

# **A FRAMEWORK FOR TOXIC TORT LITIGATION**

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*Foreword*  
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WASHINGTON LEGAL FOUNDATION  
Washington, D.C.

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## ABOUT THE AUTHORS

**Joe G. Hollingsworth** is a partner at the Washington, D.C. law firm Hollingsworth LLP. Currently in his thirty-fourth year of private practice, Mr. Hollingsworth specializes in complex trials and appeals and leads a practice of eighty attorneys. Over 100 opinions arising from his cases are published in the federal and state reporters. He has been recognized by THE NATIONAL LAW JOURNAL three times for the year's Top Ten Defense Wins—in 1998 for *Warren v. Sandoz Pharmaceuticals Corp.*, in 2001 for *Glastetter v. Novartis Pharmaceuticals Corp.*, and in 2005 for *Crowson v. C.R. Bard, Inc.* He defends cases involving pharmaceutical and medical device product liability, toxic and environmental torts, rail and other common carrier torts, and consumer product liability, and he prosecutes and defends complex federal claims involving the government. He has conducted over twenty jury trials on behalf of corporate defendants, each lasting from two weeks to over three and one-half months. He has argued in the United States Supreme Court, in most U.S. Circuit courts, before the U.S. Judicial Panel on Multidistrict Litigation, and in many state supreme courts and intermediate appellate courts.

In June 2004, Mr. Hollingsworth conducted the first jury trial in the country involving allegations that hernia repair mesh—used in approximately 700,000 hernia surgeries per year in the U.S. alone—can cause infertility. The Austin, Texas federal jury deliberated for 58 minutes, returning a unanimous verdict for the nation's largest medical device manufacturer. Mr. Hollingsworth's next most recent trial win was in September 2003, when his client was awarded a directed verdict at the close of plaintiff's case in the first Lamisil® (prescription antifungal) jury trial in the country. Representing pharmaceutical manufacturer Novartis Pharmaceuticals Corporation, he tried the case before a federal jury in Charleston, South Carolina.

In a recent post-trial victory (*General Elec. Co. v. Lowe's Home Centers, Inc.*, 608 S.E.2d 636 (Ga. 2005)), Mr. Hollingsworth's client, General Electric, eliminated collateral tort liability for property damage due to the release of a persistent contaminant. Based on 100-year-old national precedents, the Georgia Supreme Court issued a unanimous opinion on questions certified from the Eleventh Circuit, leading to the vacatur of a \$20 million verdict in a case tried by another firm.

Mr. Hollingsworth's group represents manufacturers and other

corporations in the defense of hundreds of cases nationwide involving pharmaceuticals and medical devices, *see, e.g., Rider/Siharath v. Sandoz Pharm. Corp.*, 131 F. Supp. 2d 1347 (N.D. Ga 2001), *aff'd*, 295 F.3d 1194 (11th Cir. 2002) (*Daubert* summary judgment); *Hollander v. Sandoz Pharm. Corp.*, 95 F. Supp. 2d 1230 (W.D. Okla. 2000), *aff'd*, 289 F.3d 1193 (10th Cir. 2002) (*Daubert* summary judgment); *Glastetter v. Novartis Pharm. Corp.*, 107 F. Supp. 2d 1015 (E.D. Mo. 2000), *aff'd*, 252 F.3d 986 (8th Cir. 2001) (*Daubert* summary judgment); foreign and domestic use of herbicides and pesticides, including DDT, heptachlor/chlordane, and chlorpyrifos, *see, e.g., Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993) (first state supreme court post-*Cippolone* FIFRA preemption decision) and *Conde v. Velsicol Chemical Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994) (first post-*Daubert* summary judgment opinion in 6<sup>th</sup> Cir.); manufacturing-use chemicals including polychlorinated biphenyls (“PCBs”) and solvents, *see, e.g., Schudel v. General Electric Co.*, 120 F.3d 991 (9th Cir. 1997) (overturning \$14 million jury verdict on *Daubert* grounds); asbestos-containing products; and benzene, *see, e.g., Bly v. Tri-Continental Indus.*, 663 A.3d 1232 (D.C. 1995) (affirming summary judgment in leukemia cases). Mr. Hollingsworth and his group also counsel clients with respect to due diligence and insurance coverage issues relating to toxics liabilities.

For over twenty years, Mr. Hollingsworth also has served as lead national counsel for several major manufacturers in the defense of serial toxic product claims involving thousands of claimants and various pharmaceutical and chemical products. *See, e.g., In Re Consolidated Parlodel Litig.*, 22 F. Supp. 2d 320 (D.N.J. 1998) (deconsolidating claims on *forum non conveniens* grounds). In one such case, in an 11-week jury trial involving an incident featured in a “60 Minutes” episode about national serial litigation against his chemical manufacturer client, Mr. Hollingsworth’s client won a defense verdict profiled in the THE WALL STREET JOURNAL. *See Jones v. Velsicol Chemical Corp.*, 625 N.Y.S.2d 934 (N.Y. App. Div. 1995) (affirming denial of motion for new trial). As national trial counsel in various serial litigation involving chemical and pharmaceutical products, Mr. Hollingsworth helped establish, and works closely with, the Firm’s highly-regarded network of regional and local counsel and consultants.

Mr. Hollingsworth’s practice also emphasizes the pursuit of claims

against the government on behalf of contractors and others. He represented Glendale Federal Bank, and successfully argued its breach-of-contract case before the United States Supreme Court, in the landmark “*Winstar*” litigation, *see* 518 U.S. 839 (1996), an oral argument featured in THE AMERICAN LAWYER, and a case that recently concluded with the award of \$387 million to his client Glendale. On a national basis, he has pursued indemnity claims against the government on behalf of two former asbestos-containing product manufacturers. In such federal claims litigation, Mr. Hollingsworth has appeared in numerous specialized forums, including the *en banc* Federal Circuit.

Mr. Hollingsworth frequently lectures, and is consulted by media interests, about litigation strategies in complex litigation. *See, e.g.*, NATIONAL LAW JOURNAL (March 19, 2001) (strategies for successful *Daubert* challenges). He is a member of the U.S. Chamber of Commerce National Chamber Litigation Center’s Constitutional and Administrative Law Committee, a group that helps the Chamber select appropriate cases for *amicus* participation in the highest appellate courts in the country. He has appeared frequently on behalf of the American Enterprise Institute and the Brookings Institution as a lecturer in federal and state judge educational workshops and related seminars. He is also a member of the Product Liability Advisory Council, an elite group of the most experienced and talented product liability defense attorneys in the nation, as well as the Defense Research Institute (DRI). Mr. Hollingsworth graduated from the Georgetown University Law Center in 1974, and obtained his B.A., *with distinction*, from DePauw University in 1971.

This year Spriggs & Hollingsworth will present its 20<sup>th</sup> Annual Private Seminar on Toxic Torts and Pharmaceutical Litigation, an institutional event attended by hundreds of in-house counsel from dozens of corporations.

**Katharine R. Latimer** is a partner at the Washington, D.C. law firm Hollingsworth LLP. Ms. Latimer's complex litigation practice emphasizes the defense of pharmaceutical and medical device product liability and toxic tort claims. The NATIONAL LAW JOURNAL has profiled three of her most significant victories as top defense wins of the year.

Ms. Latimer represents manufacturers, premises owners, contractors, and other corporate members of highly regulated industries in trials and appeals of matters involving such products as prescription and over-the-counter drugs (including anxiety treatments, dermatitis treatments, anti-epileptics, obstetrical drugs, antifungals, cough/cold medicines, diet aids, contraceptives, and cancer therapies), prostheses, welding rods, pesticides and herbicides, and manufacturing-use chemical compounds (including detergents, solvents and polychlorinated biphenyls ("PCBs")). She is experienced in mass tort, class action and multi-jurisdiction litigation, and she serves as national trial counsel, regional trial counsel and Multidistrict Litigation ("MDL") defense steering committee member in complex toxics matters. She also counsels clients on due diligence, product registration and labeling issues, as well as federal and state reporting requirements.

Ms. Latimer has extensive experience in *Daubert* proceedings and the presentation and cross-examination of expert witnesses in diverse medical and technical fields, and she has been the principal architect of national *Daubert* strategy for multiple major litigations. She represents clients in their most high-profile litigation, including cases involving death, encephalopathy, brain, lung and breast cancer and cancer clusters, stroke, Parkinson's disease, myocardial infarction, immunological injury, endocrine disruption, and myriad other serious injuries, as well as cases involving very substantial alleged business losses. These cases cover the gamut of liability theories, including fraud, conspiracy and other intentional torts.

Ms. Latimer regularly coordinates *amicus curiae* support for industry positions and frequently drafts *amicus curiae* briefs. She lectures at international and national seminars and private conferences on various aspects of pharmaceutical products liability and toxic tort litigation defense. She is the Consulting Editor and a member of the Advisory Board for the *Expert Evidence Reporter* published by BNA, and she was an inaugural member of the Lexis/Mealey's Toxic Tort

Defense Advisory Council, on which she served until 2007. She served as an editorial board member of Mealey's *Litigation Reports: Toxic Torts* from 1992 until 1995. She is a member of the Defense Research Institute (DRI).

Ms. Latimer graduated from the Georgetown University Law Center in 1986, *cum laude*, and obtained her B.A., *magna cum laude*, from the University of Tennessee in 1983.

The authors wish to acknowledge the contributions of **Kathryn R. Sacco, Esq.** for assisting in the preparation of this Monograph.



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## **FOREWORD**

by

Dorothy P. Watson  
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The drug and medical device industry increasingly has been the target of large and expensive tort, product liability and class action litigation. In my twenty-six years with Novartis Pharmaceuticals Corporation, I have seen plaintiffs' attorneys push the boundaries of existing tort law and dramatically increase the dollar awards sought.

The economic consequences of the present tort system on business are considerable and well-documented. In pharmaceutical litigation, the collateral consequences also can be more personal: patients who could benefit from certain drugs are discouraged from taking them by the explosive media coverage accompanying the litigation – litigation that may involve actively marketed, FDA-approved, life-saving medications. Excessive litigation also inhibits innovation, which hurts all of us.

I recall clearly the docket we inherited in 1996, when Ciba-Geigy merged with Sandoz to form Novartis. The historical response to the Parlodel<sup>®</sup> litigation was rote and settlement-directed, and the maneuvers of the plaintiffs' bar appeared to paralyze the defense, with costly consequences. We correctly recognized that we needed a more strategic approach that aimed for merits-based resolution. Once we tackled the science and swapped toward an aggressive defense strategy, we were able to resolve the litigation on terms acceptable as ordinary business risk.

My message is that the business community must encourage and support tort reform, but also must face the challenge of toxic tort litigation head on. We should work together to fight spurious litigation on the merits, in the courtroom. One step to success is keeping pace with the circumstances that create the potential for tort liability. This Washington Legal Foundation Monograph, which provides an overview of potential toxic tort liability across the country, is a valuable resource, particularly for corporate counsel, defense counsel and others wanting to stay abreast of toxic tort law and its process. It is written by trial and appellate specialists who have extensive experience defending

corporate clients in complex toxic tort and product liability litigation. Joe Hollingsworth and Kate Latimer follow developments in toxic tort litigation closely in order to help corporate clients respond – on the merits.

# A FRAMEWORK FOR TOXIC TORT LITIGATION

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## INTRODUCTION

Toxic tort litigation involves allegations that a purportedly toxic substance invaded plaintiffs' bodies or contaminated their property (real or personal), causing injury. Toxic tort liability claims arise from exposure to a variety of substances, including consumer products, pharmaceuticals, raw materials used in manufacturing, waste products, and radiation or radioactive materials. Exposures can occur in the environment, in the home, or in occupational settings. Regardless of the source of the alleged injury, however, the legal bases for toxic tort liability discussed herein generally are the same.

Entrepreneurial plaintiff attorneys are constantly seeking to expand traditional grounds of liability and continue to bring novel toxic tort claims against an ever-expanding group of defendants. As a result, the total annual tort costs in the United States exceeded \$247 billion in 2006, or almost two percent of the gross domestic product of the United States.<sup>1</sup> The growth in U.S. tort costs has far exceeded the nation's growth, even after adjusting for inflation, from a cost of \$96 per person in 1950 to \$825 per person in 2006.<sup>2</sup> Although there was a slight decrease in tort costs in 2006, those costs are expected to increase in the years to come.<sup>3</sup> In addition, the threat of excessive punitive damages awards remains one of the strongest concerns of business in the United States.<sup>4</sup> Therefore, it is imperative for defendants to prepare for all potential avenues of liability and available defenses in various jurisdictions.

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<sup>1</sup>See TILLINGHAST-TOWERS PERRIN, *2007 Update on U.S. Tort Cost Trends* (2007). Total tort costs include benefits paid to third parties, defense costs and administrative expenses.

<sup>2</sup>*Id.* at 5-6.

<sup>3</sup>*Id.* at 11.

<sup>4</sup>See U.S. Chamber Institute for Legal Reform, U.S. Chamber of Commerce State Liability Systems Ranking Study. (Mar. 17, 2006).

The legal bases for toxic tort liability vary by jurisdiction. State common law generally applies, although some states have statutes that govern products liability claims. Courts typically hold that toxic tort liability does *not* arise under federal common law as an adjunct to federal regulatory statutes such as the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6991, or the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601-9675.

The American Law Institute’s Restatement (Third) of Torts, adopted in 1997, is devoted entirely to products liability. It expands the single strict liability provision in the Restatement (Second) of Torts, § 402A, into 21 sections setting forth general rules, rules for certain specific types of products (component products, prescription drugs, food products, and used products), affirmative defenses, and issues concerning successor liability. *See* Restatement (Third) of Torts: Products Liability (“Restatement (Third)”). The new Restatement incorporates a number of changes that, as adopted by courts, have a significant impact on toxic tort theories of liability.

This Monograph provides a framework for traditional and expanding grounds of toxic tort liability across the United States and highlights some of the defenses that defendants may employ in toxic tort litigation. In a typical toxic tort case, the complaint alleges many or all of the theories discussed below. Plaintiffs use a broad pleading approach to facilitate broad discovery and allow maximum flexibility for litigation strategy.

## I.

### PRODUCTS LIABILITY THEORIES

#### A. Strict Products Liability – Defective Product (Manufacturing and Design Defects)

Generally speaking, a defendant’s fault or degree of care is not at issue under a strict products liability theory. The focus of the inquiry is on the safety of the product rather than the defendant’s conduct. *See, e.g., White v. ABCO Eng’g Corp.*, 221 F.3d 293, 301 (2d Cir. 2000). A plaintiff must prove that the product was unreasonably dangerous, the injury or damage resulted from the product defect, and the condition existed at the time the product left the control of the manufacturer or supplier. *E.g., Flock v. Scripto-Tokai Corp.*, 319 F.3d 231 (5th Cir. 2003) (Texas law); *McClaran v. Union Carbide Corp.*, 26 F. App’x 869 (10th Cir. 2002) (Oklahoma law); *Volpe v. IKO Indus., Ltd.*, 763 N.E.2d 870 (Ill. App. Ct. 2002).

In evaluating whether a product is “unreasonably dangerous,” courts and juries usually employ one or both of two standards: (1) whether the product met the reasonable consumer’s expectations as to its safety (“consumer expectations test”), *i.e.*, the product is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, *e.g.*, *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1314 (11th Cir. 2005) (Florida law); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142 (9th Cir. 2005) (Nevada law); *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 901-02 (6th Cir. 2004) (Ohio law); *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274 (10th Cir. 2003) (Utah law); *Crosswhite v. Jumpking, Inc.*, 411 F. Supp. 2d 1228, 1231 (D. Or. 2006); or (2) whether the risks of the product outweighed its utility (“risk/utility test”), *e.g.*, *Brown v. Raymond Corp.*, 432 F.3d 640, 647 (6th Cir. 2005) (Tennessee law); *Murphy v. Playtex Family Prods. Corp.*, 176 F. Supp. 2d 473 (D. Md. 2001), *aff’d*, 69 F. App’x 140 (4th Cir. 2003); *cf. Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 538-41 (3d Cir. 2007) (Pennsylvania law uniquely requires judge, instead of jury, to engage in risk-utility analysis to make pre-trial determination whether product is “unreasonably dangerous”). The two tests are not mutually exclusive. *E.g.*, *Massok v. Keller Indus., Inc.*, 147 F. App’x 651, 658 (9th Cir. 2005) (noting that California Supreme Court reserves consumer expectations test for cases involving simple products where “ordinary knowledge” provides an expectation as to product’s functioning, but risk/utility test applies to complex products); *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 264 (Ill. 2007) (“there is no *per se* rule excepting application of the risk-utility test where a product is deemed simple”). *But cf. Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999) (rejecting both consumer expectations and risk-utility tests; whether product is unreasonably dangerous is “an ultimate issue for the jury,” to be determined without “external standards”).

The factors that may be considered under either theory include usefulness of the product, availability of substitute products, and feasibility and cost of a safer design. *See, e.g., Shuras v. Integrated Project Servs. Inc.*, 190 F. Supp. 2d 194 (D. Mass. 2002); *Conde v. Velsicol Chem. Corp.*, 804 F. Supp. 972 (S.D. Ohio 1992), *aff’d*, 24 F.3d 809 (6th Cir. 1994); *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795 (Wash. 2000). A product’s warning labels may also be a factor in determining whether the product was defectively designed. *E.g., Hansen v. Sunnyside Prods., Inc.*, 65 Cal. Rptr. 2d 266 (Ct. App.) (warnings relevant to risk/utility test), *review denied* (1997). Expert testimony may not be necessary (or allowed) under the “consumer expectations test,” but is generally required under the “risk/utility test.” *See, e.g., Massok*, 147 F. App’x at 659-660.

The new Restatement eliminates the “unreasonably dangerous product” standard and instead imposes liability for “defective products.” Restatement (Third) of Torts (“Restatement Third”) § 1. In doing so, it moves away from strict liability for harm caused by products and returns some of the focus to the reasonableness of the manufacturer or seller’s conduct. Under the new Restatement formulation, a product can be defective in three ways: its

manufacture, its design, or its warnings or instructions. Only a manufacturing defect – defined as a product that departs from its intended design – would result in liability regardless of the defendant’s degree of care. The definitions of the other two types of defects take the defendant’s fault into account. *Id.* § 2.

The new Restatement defines a defectively designed product as one in which the “foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe.” *Id.* § 2(b). Accordingly, a plaintiff must establish the availability of a reasonable alternative design to prevail on a design defect theory. *See* Tex. Civ. Prac. & Rem. § 82.005(a) (“reasonable alternative design” standard); *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003) (applying reasonable alternative design standard); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002) (applying new Restatement “reasonable alternative design” standard); *Scheman-Gonzalez v. Saber Mfg. Co.*, 816 So. 2d 1133, 1139 (Fla. Dist. Ct. App. 2002) (same); *cf.*, *Morales v. E.D. Etnyre & Co.*, 382 F. Supp. 2d 1278, 1284 (D.N.M. 2005) (stating that New Mexico has not adopted new Restatement but does apply alternative design standard). However, many courts have explicitly rejected the new Restatement’s formulation, declining to impose what they see as an extra burden on plaintiffs. *See, e.g.*, *Ford v. GACS, Inc.*, 265 F.3d 670, 676-77 (8th Cir. 2001) (Missouri law) (rejecting new Restatement’s requirement that plaintiff prove availability of alternative design), *cert. denied*, 535 U.S. 954 (2002); *Kelleher v. Lumber*, 891 A.2d 477, 492 (N.H. 2005) (same); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 751-52 (Wis. App. 2000) (same); *Delaney v. Deere & Co.*, 999 P.2d 930, 945-46 (Kan. 2000) (same).

The new Restatement recognizes exceptions in certain circumstances to the reasonable alternative design requirement where: (1) the harm is of a type ordinarily caused by product defect, *i.e.*, usually the failure of the product to perform its main function (analogous to *res ipsa loquitur* in negligence cases); (2) the product violates regulatory standards (analogous to negligence *per se*); or (3) the product is of such low utility that it should not be marketed at all (though the Restatement would leave such a determination to the state’s legislature). Restatement (Third)§ 2 cmt. b. The new Restatement views the “reasonable alternative design” requirement as simply a distillation of the risk/utility test in the products context – that is, when the risks of a product are weighed against the benefits, the outcome almost always depends on whether there is a reasonable alternative design available. *Id.* § 2 rptrs. note cmt. c. Under the new Restatement’s approach, the consumer expectations test remains an important factor, but no longer may be determinative. *Id.* § 2 cmt. g.

The new Restatement holds a defendant accountable only for knowledge of risks and risk-avoidance techniques at the time of manufacture, which is akin to a negligence standard. *Id.* § 2 cmt. a. States that have adopted a no-fault design defect standard may choose not to abandon their rule in favor of the new



Restatement rule. *See, e.g., Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997) (declining to adopt new Restatement rule and citing policy reasons to maintain no-fault design defect standard).<sup>5</sup>

Regardless of the strict liability formulation or standard used, to recover, a plaintiff must prove that the product proximately caused the injury, just as in a negligence case. *See, e.g., Mohny v. U.S. Hockey, Inc.*, 300 F. Supp. 2d 556 (N.D. Ohio 2004) (Ohio law); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096 (D. Ariz. 2003), *aff'd*, 138 F. App'x 804 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1583 (2006) (Arizona law); *Soldo v. Sandoz Pharms. Corp.*, 244 F. Supp. 2d 434 (W.D. Pa. 2003) (Pennsylvania law); *Burton v. R.J. Reynolds Tobacco Co.*, 181 F. Supp. 2d 1256 (D. Kan. 2002) (Kansas law); *Needham v. Coordinated Apparel Group*, 811 A.2d 124 (Vt. 2002); *Rife v. Hitachi Constr. Mach. Co.*, 609 S.E.2d 565 (S.C. Ct. App. 2005) (South Carolina law), *cert. denied* (2006). The manufacturer or supplier is liable only for the injuries that result from normal, *foreseeable* uses of the product. *See, e.g., Berrier v. Simplicity Corp.*, 413 F. Supp. 2d 431, 441 (E.D. Pa. 2005) (“the appropriate limitation on who may recover under a strict products liability theory is whether the product caused injury during its intended use, not whether an intended user suffered injuries.”); *see also Broussard v. Procter & Gamble Co.*, 463 F. Supp. 2d 596 (W.D. La. 2006) (Louisiana law); *Adesina v. Aladan Corp.*, 438 F. Supp. 2d 329 (S.D.N.Y. 2006) (New York law); *Carlson v. Freightliner LLC*, 226 F.R.D. 343 (D. Neb. 2004). A defendant can be held liable for a misuse of its product, if the misuse was foreseeable. *Kelly v. M. Trigg Enter., Inc.*, 605 So. 2d 1185 (Ala. 1992) (manufacturer liable for foreseeable misuse of product); *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992) (duty to warn exists even when product not used for intended purpose).

Some commentators have urged the application of the strict liability theory beyond the product context, calling it “by-products liability.” However, courts have refused to extend this form of strict liability to cases where the harm-causing instrumentality is not a “product.” *See Bergman v. U.S. Silica*, No. 06-CV-356-DRH, 2006 WL 2982136, at \*4 (S.D. Ill. Oct. 17, 2006); *Snyder v. ISC Alloys, Ltd.*, 772 F. Supp. 244 (W.D. Pa. 1991). Resourceful plaintiffs may attempt to gain the benefit of strict liability in the absence of a product by arguing that the defendant was engaged in abnormally dangerous or ultra hazardous activity. *See infra*, section III.A.

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<sup>5</sup>Strict liability may be limited by statute. For example, a Louisiana statute provides that “[t]he owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.” La. Civ. Code Ann. art. 2317.1 (West 2007).

## B. Products Liability – Failure to Warn

Another type of product defect – as defined both in common law and under the new Restatement’s formulation – is inadequate warning or instruction, which exists “when the foreseeable risk of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe.” Restatement (Third) § 2(c). Failure-to-warn claims also may sound in negligence, but there is little distinction between the two. *See Blue v. Evtl. Eng’g, Inc.*, 828 N.E.2d 1128, 1141 (Ill. 2005); *McNeil Pharm. v. Hawkins*, 686 A.2d 567 (D.C. 1996), *cert. denied*, 522 U.S. 815 (1997); *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198 (N.Y.), *cert. denied*, 502 U.S. 868 (1991).

Under either a strict liability or a negligent failure-to-warn theory, a plaintiff must first show that the defendant owed him a duty to warn of a known or foreseeable risk, which is based on a reasonableness standard – whether a warning is feasible and reasonably necessary. Restatement (Third) § 2 cmt. i. The question of duty necessarily is case-specific. *Compare Macias v. California*, 897 P.2d 530 (Cal. 1995) (pesticide manufacturer had no duty to warn bystanders even if company knew user did not provide adequate warnings to the public), *with McCulloch v. H.B. Fuller Co.*, 981 F.2d 656 (2d Cir. 1992) (under Vermont law, glue manufacturer had duty to warn purchaser’s employees). Normally, the duty to warn extends only to ordinary users and consumers. *See, e.g., Carel v. Fibreboard Corp.*, 74 F.3d 1248 (10th Cir. 1996) (unpublished table decision) (Oklahoma law) (asbestos products company had no duty to warn wife of worker exposed to asbestos of potential health risks). *But see Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006) (premises owner owed duty to spouses handling workers’ unprotected work clothing based on foreseeable risk of exposure from asbestos borne home on contaminated clothing). Although the duty to warn in a prescription drug case usually runs only to the physicians who are “learned intermediaries” between pharmaceutical companies and patients-consumers, *see, e.g., Sandoz Pharms. Corp. v. Gunderson*, No. 2004-CA-001536, 2005 WL 2694816, at \*7 (Ky. Ct. App. Oct. 21, 2005), *discretionary review granted*, (Ky. Oct. 6, 2006) (unpublished); *Madsen v. Am. Home Prods. Corp.*, 477 F. Supp. 2d 1025, 1033-35 (E.D. Mo. 2007) (Iowa law), developing case law indicates that the role of direct-to-consumer advertising may enlarge the population to whom a duty is owed. *See Perez v. Wyeth Labs., Inc.*, 734 A.2d 1245 (N.J. 1999) (prescription drug manufacturers that market their products directly to consumers have corresponding duty to warn consumers). *But see Cowley v. Abbott Labs., Inc.*, 476 F. Supp. 2d 1053, 1060 n.4 (W.D. Wis. 2007) (there is no evidence that North Carolina has adopted direct-to-consumer-advertising exception to the learned intermediary doctrine); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 812 (N.D. Ohio 2004) (declining to follow *Perez*); *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 766 (Ky. 2004), *aff’d* 447 F.3d 861 (6<sup>th</sup> Cir. 2006) (adopting Restatement (Third) § 6(d) “learned intermediary” rule and finding *Perez* exception inapplicable”).

There generally is no duty to warn of a risk that is open or obvious or that is “generally known and recognized.” *See, e.g., Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003); *Sw. Pet Prods., Inc. v. Koch Indus.*, 273 F. Supp. 2d 1041 (D. Ariz. 2003); *Colegrove v. Cameron Mach. Co.*, 172 F. Supp. 2d 611 (W.D. Pa. 2001); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170 (Tex. 2004); *see also* Restatement (Third) § 2 cmt. j. The degree of specificity with which the parties and the court define the particular risk at issue, as well as the relevant time period, can materially affect the outcome of a failure-to-warn claim. For example, the Sixth Circuit affirmed the dismissal of failure-to-warn claims asserted on behalf of a decedent who smoked from 1969 to 1997, holding that the widespread public awareness of the “link between cigarette smoking and general health risks” during that period required that such “common knowledge” be imputed to the plaintiffs’ decedent. *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 351-52 (6th Cir. 2000) (emphasis added) (Ohio law). But the same court has also reversed a summary judgment ruling for cigarette manufacturers on a failure-to-warn claim because “a rational factfinder could reasonably conclude the public did not have ‘common knowledge’ of the *strong connection between cigarette smoking and lung cancer between 1950 and 1965.*” *Tompkin v. Am. Brands*, 219 F.3d 566, 575 (6th Cir. 2000) (emphasis added) (Ohio law).

In addition, the case law is split on the question of whether a duty to warn arises if a hazard becomes known only after the product has left the manufacturer’s control. *Compare, e.g., Austin v. Will-Burt Co.*, 361 F.3d 862 (5th Cir. 2004) (no duty under Mississippi law), *and Modelski v. Navistar Int’l Trans. Corp.*, 707 N.E.2d 239 (Ill. App. Ct. 1999) (no duty under Illinois law), *with Tabor v. Metal Ware Corp.*, 182 F. App’x. 774, 777-778 (10th Cir. 2006) (assuming Utah would adopt post-sale duty to warn), *and Savage v. Scripto-Tokai Corp.*, 266 F. Supp. 2d 344 (D. Conn. 2003) (finding a duty under Connecticut law); *cf. Stanger v. Smith & Nephew, Inc.*, 401 F. Supp. 2d 974, 982 (E.D. Mo. 2005) (predicting Missouri would not adopt general post-sale duty to warn but manufacturer of *medical device* owed duty to warn of risks post-sale). The new Restatement acknowledges a limited post-sale duty to warn when “a reasonable person in the seller’s position would provide such a warning.” Restatement (Third) § 10.

If a duty to warn exists, the plaintiff must show that the defendant failed to exercise due care in warning users of the potential dangers associated with the intended and reasonably foreseeable uses of its product. *See, e.g., Mazur v. Merck & Co.*, 964 F.2d 1348 (3d Cir.), *cert. denied*, 506 U.S. 974 (1992); *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990); *Santoro v. Donnelly*, 340 F. Supp. 2d 464 (S.D.N.Y. 2004). Courts may require expert testimony to establish the inadequacy of the warning, especially in prescription drug cases. *See, e.g., N. Trust Co. v. Upjohn Co.*, 572 N.E.2d 1030 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 119 (Ill. 1991), *cert. denied*, 502 U.S. 1095 (1992). The plaintiff must also show that the risk was known or reasonably knowable to the defendant at the time the product was manufactured or sold. *See* Restatement

(Third) § 2 cmt. m.; *Bailey v. Janssen Pharmaceutica, Inc.*, No. 06-80702-CIV, 2006 WL 3665417, at \*4 (S.D. Fla. Nov. 14, 2006) (pharmaceutical company must warn of prescription drug's risk known or knowable in light of generally recognized and prevailing best scientific and medical knowledge available at time of manufacture).

Finally, as with any other theory of liability, a plaintiff must show that the defendant's failure to warn or provision of an inadequate warning proximately caused his injuries. *See, e.g., Krajewski v. Enderes Tool Co.*, 469 F.3d 705, 710 (8th Cir. 2006) (Nebraska law); *Miller v. Pfizer Inc.*, 196 F. Supp. 2d 1095 (D. Kan. 2002), *aff'd*, 356 F.3d, 1326 (10th Cir.), *cert. denied*, 543 U.S. 917 (2004); *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 834 (E.D. Tex. 2002); *see also Gray v. Badger Mining Corp.*, 676 N.W.2d 268 (Minn. 2004) (failure to warn a party of danger of which it was already independently aware cannot be proximate cause of injury resulting from danger); *cf. James v. Bessemer Processing Co.*, 714 A.2d 898 (N.J. 1998) (discussing presumptions and special causation principles applicable to hazardous substance exposure cases involving multiple defendants).

## **C. Products Liability – Implied Warranty**

Most states require products to be generally fit for the ordinary purpose for which they are sold, and a defendant's fault or degree of care is not at issue. The overwhelming majority of states no longer require privity between the buyer and seller. *See, e.g., Pack v. Damon Corp.*, 434 F.3d 810, 820 (6th Cir. 2006) (Michigan law); *Sullivan v. Young Bros. & Co.*, 91 F.3d 242 (1st Cir. 1996) (Maine law). California, Kentucky and Washington are among the notable exceptions. *See James v. S. Cal. Edison Co.*, 94 F.3d 651 (9th Cir. 1996) (unpublished table decision) (privity is required for implied warranty claims under California law); *Snawder v. Cohen*, 749 F. Supp. 1473 (W.D. Ky. 1990) (same; Kentucky law); *Thongchoom v. Graco Children's Prods., Inc.*, 71 P.3d 214 (Wash. Ct. App. 2003), *review denied*, 87 P.3d 1185 (Wash. 2004) (unpublished table decision) (same; Washington). New York has adopted a middle ground where privity between the manufacturer and the consumer is not required but "the representations at issue must have been publicly disseminated and relied on by the injured party." *Silivanich v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 260 (S.D.N.Y. 2001).

The overwhelming majority of states likewise do not require a non-purchaser to comply with the notice provisions of the Uniform Commercial Code. *See, e.g., Gerrity v. R.J. Reynolds Tobacco Co.*, 399 F. Supp. 2d 87, 93 (D. Conn. 2005) (holding that a consumer of cigarettes need not give notice of an alleged breach of warranty to a manufacturer before bringing a products liability lawsuit to recover for personal injuries). Plaintiffs plead the contractual claim of implied warranty primarily in states that have not adopted strict products liability,

because the two theories generally are held to be synonymous. *See, e.g., Tompkin*, 362 F.3d at 902 (under Ohio law breach of implied warranty claim is "virtually indistinguishable" from design defect claim); *Wayslow v. Glock, Inc.*, 975 F. Supp. 370 (D. Mass. 1996) (same; Massachusetts law); *cf.* Restatement (Third) § 2 cmt. n. (manufacturing defect and implied warranty claims are identical). *But see Denny v. Ford Motor Co.*, 662 N.E.2d 730 (N.Y. 1995) (design defect and implied warranty claims are distinct because reasonableness is an element only of the former); *White v. DePuy, Inc.*, 718 N.E.2d 450 (Ohio Ct. App. 1998) (common law implied warranty claim continues to exist notwithstanding enactment of Ohio Products Liability Act).

#### **D. Products Liability – Fraud**

Plaintiffs may allege fraud where they can show detrimental reliance on an intentional, material misrepresentation by the defendant regarding the product. *Compare, e.g., In re Orthopedic Screw Prods. Liab. Litig.*, No. MDL 1014, 1997 WL 186325 (E.D. Pa. Apr. 16, 1997) (denying motion to dismiss conspiracy to commit fraud claim based on allegation that pedicle screw manufacturers misrepresented product at medical seminars attended by plaintiffs' prescribing physicians), *aff'd*, 193 F.3d 781 (3d Cir. 1999), and *Tamraz v. Lincoln Elec. Co.*, No. 03-CV-17000, 2007 WL 3399721, at \*\*7-9 (N.D. Ohio Nov. 13, 2007) (denying summary judgment under California law on allegation that manufacturers of welding rods committed common law fraud by failing to disclose information regarding negative health effects), *with, e.g., Glassner*, 223 F.3d at 353 (affirming dismissal of fraud claim based on absence of allegations sufficient to support finding that deceased smoker relied on tobacco companies' representations), and *In re Welding Fume Products Liability Litig.*, No. 03-CV-17000, 2007 WL 3226951, at \*\*23-24 (N.D. Ohio Oct. 30, 2007) (non-manufacturing defendants' attendance at trade association meetings insufficient to establish conspiracy to commit fraud on welders).

In a toxic tort scenario, plaintiffs may also assert a claim of fraud on the governmental agency that regulates or approves the manufacture or sale of a product by alleging that the defendant provided the agency with false information or improperly withheld data. The United States Supreme Court has held that claims of fraud on the FDA are impliedly preempted because they would interfere with the FDA's ability "to police fraud consistent with [its] judgment and objectives." *Buckman v. Plaintiffs Legal Comm.*, 531 U.S. 341, 350 (2001). Lower courts have applied *Buckman's* reasoning to a variety of other regulatory schemes. *See, e.g., Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004) (inadequate warnings claim regarding alleged risk of deep vein thrombosis from inadequate leg room on airplanes impliedly preempted by FAA); *Griffith v. Gen. Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002) (design defect claims regarding manual lap belts impliedly preempted by FMVSS). *But see, e.g., Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063 (9th Cir. 2000) (no implied preemption of

products liability claims involving shower door subject to Consumer Product Safety Act (“CPSA”).

## **E. Collective Liability – Liability In The Absence Of Product Identification**

As a general rule, a plaintiff in a toxic tort case must show that he was exposed to (and injured by) the defendant’s product. *See, e.g., Montgomery v. Tri-Cont’l Indus.*, No. 90-11383 (D.C. Super. Ct. Sept. 12, 1994) (granting summary judgment to certain defendants in multi-plaintiff, multi-defendant benzene leukemogenesis case where plaintiffs failed to show actual exposure to defendants’ gasoline sufficient to proximately cause claimed illnesses); *Phillips v. Velsicol Chem. Corp.*, No. 93-CV-140-J, 1995 U.S. Dist. LEXIS 22450 (D. Wyo. Oct. 13, 1995) (granting summary judgment to termiticide manufacturer where plaintiff who was exposed during pest treatment at concert hall could not establish defendant’s termiticide was product used). When the “injury-causing” product was mass marketed by a number of different defendants (*e.g.*, a generic pharmaceutical product) or was sold many years before the lawsuit is filed (*e.g.*, asbestos-containing products), this burden often is very difficult to meet. Therefore, courts have fashioned theories that allow plaintiffs to recover in certain circumstances even absent proof of product identification: market share liability, alternative liability, enterprise liability, and concert of action/civil conspiracy liability.

These four theories of collective liability usually include the following common elements: (1) all defendants sought to be held liable must have engaged in tortious activity; (2) the inability to determine product identification must result from the defendants’ conduct – in most cases, simply manufacturing a product that is fungible; and (3) generally, the plaintiff must have no other remedy against an identifiable defendant. *See, e.g., Hamilton v. Accu-Tek*, 935 F. Supp. 1307 (E.D.N.Y. 1996). Moreover, the tortious activity allegedly committed by each of the collective defendants often must be the same, which generally limits collective liability to manufacturers of fungible products creating the same alleged risk of injury. Where there are differences among products, *e.g.*, varying levels of the harmful substance, collective liability generally is unavailable. *See, e.g., Mathai v. K-Mart Corp.*, No. 01-4749, 2006 WL 166521 (E.D. Pa. Jan. 20, 2006) (electrical power strips not fungible); *Skipworth v. Lead Indus. Ass’n*, 690 A.2d 169 (Pa. 1997) (lead paint not fungible); *In re N.Y. State Silicone Breast Implant Litig.*, 631 N.Y.S.2d 491 (Sup. Ct. 1995) (breast implants not fungible), *aff’d*, 650 N.Y.S.2d 558 (App. Div. 1996); *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196 (Ohio 1995) (asbestos not fungible); *Kennedy v. Baxter Healthcare Corp.*, 50 Cal. Rptr. 2d 736 (Ct. App. 1996) (latex gloves not fungible). Likewise, collective liability generally is limited to design defects, where all defendants used the same design, not manufacturing defects, which may be specific to individual defendants. *See McLaughlin v. Acme Pallet Co.*, 658 A.2d

1314 (N.J. Super. Ct. App. Div. 1995) (“[t]he theory simply does not work when the defect is attributable to a manufacturing flaw.”).

### ***1. Market Share Liability***

The theory of market share liability was developed by the California Supreme Court in *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980), a case involving diethylstilbestrol (DES), a pharmaceutical generically produced by a number of companies. The court reasoned that, “as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.” *Id.* at 936. The theory requires a plaintiff to locate and bring before the court a “significant portion” of the potential defendants (*i.e.*, fewer than all defendants). If the plaintiff can demonstrate that the product was defectively designed, the burden of product identification will shift from plaintiff to defendant. *See id.*; *see also Ferris v. Gatke Corp.*, 132 Cal. Rptr. 2d 819, 828-29 (Ct. App.), *review denied* (2003). A defendant may exculpate itself by proving that it could not have produced the product that caused plaintiff’s injuries. *Sindell*, 607 P.2d at 936-37; *see also, e.g., Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (adopting variation of market-share theory in DES case that applies only to claims sounding in negligence and requires plaintiffs to establish that they “made a genuine attempt to locate and to identify the manufacturer responsible for [the] injury”); *Ferris*, 132 Cal. Rptr. 2d at 823 (defendant sued under market share theory of liability can avoid liability only by proving that it did not produce the specific product that harmed plaintiff). *But see, e.g., Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y.) (such “fortuities” should not inure to the benefit of equally culpable defendants), *cert. denied*, 493 U.S. 944 (1989); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991) (same). A defendant thus can avoid liability by demonstrating that it did not produce the product during the relevant time or did not sell the product in the relevant geographic region. If the defendant fails to disprove causation, it may be liable, though liability is usually limited to the percentage of its market share. Where the market share liability theory has been adopted, an absolute predicate to its application is that the product in question be fungible and generic in nature; one defendant manufacturer’s product must be indistinguishable from the next manufacturer’s product. *See, e.g., Bly v. Tri-Cont’l Indus., Inc.*, 663 A.2d 1232, 1243-45 (D.C. 1995); *Hymowitz*, 539 N.E.2d at 1075; *Sindell*, 607 P.2d at 936.

The market share liability theory has not been widely embraced. Many courts have flatly rejected the theory, particularly where the state legislature has enacted a products liability statute that does not include market share liability. *See, e.g., Barnes v. Kerr Corp.*, 418 F.3d 583, 589 (6th Cir. 2005) (“[t]he Tennessee Supreme Court, however, has not yet adopted the doctrine of market-share liability. . . . Nor have we found a case analogous to the present one in which the theory has been applied in Tennessee, and the theory is not mentioned in Tennessee’s Products Liability Act”); *Cimino v. Raymark Indus., Inc.*, 151

F.3d 297, 313-14 (5th Cir. 1998) (“[w]e know of no Texas appellate decision which . . . has even approved of in dicta, much less adopted, the theories of ‘alternative liability, concert of action, enterprise liability, or market share liability’” (internal citation omitted)); *Jefferson v. Lead Indus. Ass’n*, 106 F.3d 1245 (5th Cir. 1997) (rejecting market share liability where not included in Louisiana Products Liability Act); *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994) (rejecting market share liability under Oklahoma law in DES case); *Barasich v. Columbia Gulf Transmission Co.*, 467 F. Supp. 2d 676 (E.D. La. 2006) (rejecting plaintiffs’ attempt to impose market share liability on oil and gas companies for wetlands and coastal damage caused by hurricanes and citing with approval prior Fifth Circuit caselaw rejecting market share liability); *Mills v. Allegiance Healthcare Corp.*, 178 F. Supp. 2d 1 (D. Mass. 2001) (dismissing claim brought against distributor of latex gloves on market share theory, “[g]iven that no appellate court in . . . Massachusetts has yet upheld the theory” (citing *Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp.*, 953 F. Supp. 412 (D. Mass. 1996))); *In re Minn. Breast Implant*, 36 F. Supp. 2d 863 (rejecting market share liability theory because not recognized in Arizona (citing *White v. Celotex Corp.*, 907 F.2d 104, 106 (9th Cir. 1990))); *Santarelli v. BP Am.*, 913 F. Supp. 324 (M.D. Pa. 1996) (rejecting market share liability because Pennsylvania does not recognize theory)); *McClelland v. Goodyear Tire & Rubber Co.*, 735 F. Supp. 172 (D. Md. 1990) (rejecting plaintiff’s claims as a variant of market share theory, which is not recognized in Maryland), *aff’d*, 929 F.2d 693 (4th Cir. 1991) (unpublished table decision); *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986) (finding no support in North Carolina law for industry-wide theories that excuse plaintiffs from satisfying burden of identifying manufacturer); *City of Gary ex. rel. King v. Smith & Wesson, Corp.*, 801 N.E.2d 1222, 1245 (Ind. 2003) (“This approach to allocation of liability has not been adopted in Indiana.”); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 192-193 (Ohio 1998) (rejecting market share liability in DES case where theory not included in Ohio Products Liability Act); *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990) (finding that acceptance of market share theory would result in arbitrary, unfair, and varying judgments); *City of Chi. v. Am. Cyanamid Co.*, 823 N.E.2d 126, 134-37 (Ill. App. Ct.) (market share theory of liability would make each lead paint manufacturer an insurer for all harm attributable to universe of all lead pigments produced over a century by many manufacturers), *appeal denied*, 833 N.E.2d 1 (Ill. 2005) (unpublished table decision); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67 (Iowa 1986) (rejecting market share liability in DES case); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (*en banc*) (same); *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991) (same); *Spring Branch Indep. Sch. Dist. v. NL Indus., Inc.*, No. 01-02-01006-CV, 2004 WL 1404036 (Tex. App. June 24, 2004) (rejecting market share liability in school lead paint case); *see generally City of Phila. v. Lead Indus. Ass’n*, 994 F.2d 112, 123 n.10 (3d Cir. 1993) (noting that high courts of only six states have embraced market share liability).

Numerous other state and federal courts have declined to apply the market share liability theory based on the particular facts of a case, but have not



categorically ruled out its application in a proper case. For instance, in *Bly v. Tri-Continental Industries, Inc.*, 663 A.2d 1232 (D.C. 1995), the District of Columbia Court of Appeals rejected market share liability as applied to a benzene exposure case. The court found that gasoline was not a fungible product such as the DES at issue in *Sindell* because gasoline producers used different amounts of benzene in their respective formulations. *Id.* at 1244. In addition, although plaintiffs named numerous suppliers of benzene-containing gasoline, plaintiffs failed to join a substantial share of the market, given their alleged 20-to-30-year period of exposure. *Id.*; see also *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211, 225 & n.10 (2d Cir. 2003) (“[i]t is possible . . . that the New York Court of Appeals would permit market share liability” in case brought against gun manufacturers if insurer could demonstrate that guns at issue were “fungible products”); *Stark v. Armstrong World Indus., Inc.*, 21 F. App’x 371, 375-76 n.4 (6th Cir. 2001) (Ohio) (market-share liability inappropriate where different defendants incorporated asbestos into their products in qualitatively different ways, making it difficult to compare risk based only on relative exposure); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 321 (D. Conn. 2002) (even assuming Connecticut courts would recognize market share liability theory, “plaintiff[] alleg[ed] only one potential source for the MTBE on their property, which eliminates any problem of apportioning liability and thus any need for” application of collective liability theory); *In re Dow Corning Corp.*, 250 B.R. 298, 363 (Bankr. E.D. Mich. 2000) (“market share theory is inapplicable” in breast implant litigation because “breast implants are not fungible products” and the “various manufacturers used different designs and compositions thereby making each manufacturer’s product an identifiable product”); *210 E. 86th St. Corp. v. Combustion Eng’g, Inc.*, 821 F. Supp. 125 (S.D.N.Y. 1993) (theory inapplicable in asbestos case); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001) (liability in lawsuit brought against handgun manufacturers may not be apportioned on a market share basis due to lack of uniformity in manufacturers’ marketing techniques and lack of fungibility of handguns); *Black v. Abex Corp.*, 1999 ND 236, 603 N.W.2d 182 (declining to apply market share liability because plaintiff failed to establish that asbestos friction products “carried equivalent risks of harm and were fungible”); *Shackil v. Lederle Labs.*, 561 A.2d 511 (N.J. 1989) (declining to apply market share theory to vaccines but noting that decision “should not be read as forecasting an inhospitable response to the theory . . . in an appropriate context”); *Ferris*, 132 Cal. Rptr. 2d at 828-29 (trial court properly refused to apply theory of market share liability to asbestos manufacturer where plaintiff’s expert witness was unable to compute manufacturer’s share of the national market during the relevant time period); *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848 (App. Div. 1999) (declining to extend market share theory to lead poisoning cases due to several differences between such cases and DES lawsuits); *D.C. v. Beretta U.S.A. Corp.*, No. 0428-00, 2002 WL 31811717, at \*56 (D.C. Super. Ct. Dec. 16, 2002) (rejecting market-share theory in suit to hold various gun manufacturers liable for economic impact of gun violence due to lack of uniformity in manufacturers’ marketing techniques and lack of fungibility of handguns: “it is

virtually impossible to apply market share liability (or any similar group liability concept) to allegedly tortious use and manufacture” of “non-fungible or non-generic products”), *aff’d in part, rev’d on other grounds*, 847 A.2d 1127 (D.C. 2004); *DaSilva v. Am. Tobacco Co.*, 667 N.Y.S.2d 653 (Sup. Ct. 1997) (declining to extend market share liability theory to products liability action involving cigarettes); *In re N.Y. State Silicone Breast Implant*, 631 N.Y.S.2d at 494 (no court has permitted breast implant plaintiff to utilize market-share theory to prove her claim because breast implants are not fungible products); *cf. Netherland v. Eli Lilly & Co.*, No. A-04-00654, 2006 WL 626922, at \*\*4-9, 11 (D.D.C. Mar. 13, 2006) (applying choice-of-law analysis in DES case to reject market share liability under Louisiana law for plaintiff’s tort claim, but allowing market share liability under California law for husband’s loss of consortium claim).

Some federal courts have declined to apply the market share theory without guidance from the pertinent state’s appellate courts. *See, e.g., Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir.) (certifying question regarding viability of market share liability in handgun products liability case to New York Court of Appeals), *accepting certification*, 95 N.E.2d 360 (N.Y. 2000), *and answering certified question*, 750 N.E.2d 1055 (2001) (rejecting market share liability due to lack of uniformity in handgun manufacturers’ marketing techniques and lack of fungibility of handguns); *City of Phila.*, 994 F.2d at 123-27 (declining to apply market share liability due to lack of support for that doctrine in Pennsylvania appellate opinions); *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1 (D.D.C. 2005) (declining to apply market share liability under Pennsylvania law to DES case in absence of any state decisions post-*Skipworth* adopting the theory); *cf. Armata v. Abbott Labs.*, 747 N.Y.S.2d 863 (App. Div. 2002) (given uncertainty whether Massachusetts law recognizes non-identification theories of liability, it would be improper and presumptuous for New York courts to expand theories of products liability recognized by state appellate courts in Massachusetts).

In one notable exception a federal court presiding over multi-district litigation “predicted” that the high courts of 13 states would adopt market share liability for MTBE environmental contamination. *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005) (permitting market share liability theories to proceed under laws of Connecticut, Florida, Indiana, Kansas, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Virginia, and West Virginia). Applying an extremely expansive analysis of various states’ laws, the district court seemed intent on allowing market share liability and strained to dismiss contrary authority. For example, the court held that other federal courts rejecting the theory were not purporting to predict how the state high court would rule, *id.* at 406 (discussing *Jefferson*, 106 F.3d 1245 (Louisiana law), or that a state high court expressly declining to adopt the theory did not intend to completely foreclose market share liability in other contexts, *id.* at 394-95 (discussing *City of Gary*, 801 N.E.2d 1222 (Indiana law)). Moreover, when the court was confronted with state high

court decisions that could not be circumvented – *i.e.*, Illinois and Iowa – the court still allowed plaintiffs to proceed on concert of action/civil conspiracy theories (see below). More recently, however, despite its previously expansive analysis of various states’ laws, the same district court appeared to step back slightly in actually applying market share liability, noting that the plaintiffs could be foreclosed from using such a theory if the evidence in the case pointed to “an identifiable defendant (or defendants) and plaintiffs [could] obtain a make-whole remedy from those parties.” *In re MTBE Prods. Liab. Litig.*, 447 F. Supp. 2d 289, 304-05 (S.D.N.Y. 2006).

Jurisdictions that have not categorically ruled out application of a market share theory of liability have emphasized that a plaintiff’s inability to locate the product allegedly causing injury does not alone justify the extraordinary step of applying market share liability. *See, e.g., Healey v. Firestone Tire & Rubber Co.*, 663 N.E.2d 901 (N.Y. 1996) (loss of an allegedly defective multi-piece truck tire rim which caused plaintiff’s injuries did not obviate requirement that plaintiff identify its exact manufacturer); *In re N.Y. State Silicone Breast Implant*, 631 N.Y.S.2d at 494 (“[t]he reality of a plaintiff’s plight when product identification cannot be made is like any other plaintiff who claims injury from a product that has been lost or destroyed”).

Moreover, regardless of the product at issue, the market share liability theory is inapplicable if the plaintiff in fact possesses, or can reasonably obtain, information pertaining to manufacturer identity. *See, e.g., Gassman v. Eli Lilly & Co.*, 407 F. Supp. 2d 203, 212-13 (D.D.C. 2005) (declining to apply market share liability, which is “default causation standard” under New York law, to DES case where there is sufficient evidence of product identification to raise jury question); *In re Consol. Fen-Phen Cases, et al.*, No. 03 CV 3081, 2003 WL 22682440, at \*4 n.6 (E.D.N.Y. Nov. 12, 2003) (causes of action based on “market share” theory of liability “are not proper where the plaintiff knows the identity of the manufacturer”); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982) (because plaintiff had information concerning identity of manufacturers who caused his alleged injuries, rationale for applying market-share theory was not present); *Conley*, 570 So. 2d at 285-86 (even in a DES case, where plaintiff is able to identify manufacturer that produced injury-causing product, there is no reason to deviate from traditional tort remedies); *cf. Sharp v. Leichus*, No. 2004-CA-0643, 2006 WL 515532 (Fla. Cir. Ct. Feb. 17, 2006) (declining to apply market share liability where pharmaceutical defendants could prove plaintiffs did not ingest their product and rejecting plaintiffs’ theory that defendants nonetheless contributed to plaintiffs’ risk), *aff’d*, 952 So. 2d 555 (Fla. Dist. Ct. App. 2007).

Market share liability has been extended to a few areas beyond DES and a few jurisdictions outside California. *See, e.g., In re Factor VIII or IX Concentrate Blood Prod. Liab. Litig.*, 408 F. Supp. 2d 569, 577-81 (N.D. Ill. 2006) (predicting that United Kingdom would recognize market share or other

alternative liability for blood products cases pursuant to House of Lords opinion in *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22 (recognizing market share liability theory in asbestos fibers lawsuit); *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1239-46, 1272-76 (E.D.N.Y. 2006) (applying market share liability theory to allow “aggregate proof” and to apportion damages in class action involving light cigarettes); *Hicks v. Charles Pfizer & Co.*, 368 F. Supp. 2d 628 (E.D. Tex. 2005) (polio vaccine); *Ray v. Cutter Labs. Div. of Miles, Inc.*, 754 F. Supp. 193 (M.D. Fla. 1991) (blood products); *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987) (DPT vaccine); *Jackson v. Glidden Co.*, 647 N.E.2d 879 (Ohio Ct. App. 1995) (lead paint); *Richie v. Bridgestone/Firestone, Inc.*, 27 Cal. Rptr. 2d 418 (Ct. App. 1994) (asbestos-lined brake pads); *Conley*, 570 So. 2d 275 (prescription drug case); *Cutter Biological*, 823 P.2d 717 (blood products); *Hymowitz*, 539 N.E.2d 1069 (same); *George v. Parke-Davis*, 733 P.2d 507 (Wash. 1987) (*en banc*) (same); *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis.) (DES), *cert. denied*, 469 U.S. 826 (1984).

Courts that have adopted market share liability have developed “modified” applications. For example, to calculate the defendant’s market share, some courts look to the national market, *see, e.g., Ferris*, 132 Cal. Rptr. 2d at 828-29; *Cutter Biological*, 823 P.2d at 717; *Hymowitz*, 539 N.E.2d at 1069, while other courts examine regional markets, *see, e.g., Conley*, 570 So. 2d at 275; *George*, 733 P.2d at 507. Most courts limit recovery to the defendant’s actual market share, *see, e.g., Martin v. Abbott Labs.*, 689 P.2d 368 (Wash. 1984) (allowing imposition of liability against single defendant in DES case, limited by that defendant’s geographic market share); *Conley*, 570 So. 2d 275 (same), but the Wisconsin Supreme Court has allowed a total recovery from any defendant based on what it termed the “risk-contribution theory,” which shifts the burden of product identification to defendants based upon a manufacturer’s participation in the market of an industry-wide defective product, like DES, *see Collins*, 342 N.W.2d 37. Though the risk-contribution theory allowing 100% recovery against a single manufacturer in the absence of product identification remains limited to Wisconsin, the theory now extends to lead carbonate paint. *Thomas ex rel. Gramling v. Mallett*, 701 N.W. 2d 523 (Wis. 2005).

In the MTBE multi-district litigation, the Southern District of New York crafted a modification of market share liability that it termed “commingled product” market share liability, which applies to gaseous or liquid products manufactured by many suppliers that are completely commingled or blended in a single product where the commingled product causes a single indivisible injury. In such circumstances, under this theory, each of the commingled products will be deemed to have caused the harm, and plaintiffs need only identify the suppliers of the commingled products (*e.g.*, in a single underground storage tank) rather than a substantial percentage of all suppliers in the market place. *In re MTBE*, 379 F. Supp. 2d at 377-78.

The new Restatement does not take a position on market share liability, but states that if it is adopted, a defendant's liability should be limited to its market share because "[t]he rules of joint and several liability are incompatible with a market share approach to causation." Restatement (Third) § 15 cmt. c; *see also Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996), *cert. denied*, 520 U.S. 1115 (1997).

## 2. *Alternative Liability*

Alternative liability also shifts the burden of proving causation to the defendants, but differs from market share liability in that it requires that *all* potential defendants be located and brought before the court. *See, e.g., Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 69 (Tex. 1989). The theory of alternative liability requires the plaintiff to establish four circumstances before a court may apply the theory:

- (1) the conduct of all of the defendants was tortious;
- (2) the conduct of the defendants was substantially simultaneous, was of substantially the same character, and created substantially the same risk of harm;
- (3) one of the defendants, in fact, caused the harm to the plaintiffs (in other words, that plaintiffs have joined all defendants that might be responsible for the harm); and
- (4) through no fault of their own, the plaintiffs cannot identify which defendant is responsible for the harm.

Restatement (Second) of Torts § 433B(3) (1965);<sup>6</sup> *see also Drayton v. Pilgrim's Pride Corp.*, 472 F. Supp. 2d 638, 647-48 (E.D. Pa. 2006) (allowing plaintiffs to proceed pursuant to alternative liability against the only two manufacturers that sold, at about the same time, ready-to-eat turkey products contaminated with listeria). Some courts, however, do not require that the defendants' conduct be similar. *See N.J. Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 107 (3d Cir. 1999); *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 173 (Mich.), *cert. denied*, 469 U.S. 833 (1984).

To shift the burden to defendants, the plaintiff must initially offer "some proof" of defendants' liability. *N.J. Tpk. Auth.*, 197 F.3d at 105; *see also United*

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<sup>6</sup>Section 26 of the Restatement (Third) of Torts (Apportionment of Liability) purports to replace Section 433B of the Restatement (Second). *See* Restatement (Third) of Torts § 26 cmt. b. Section 26 and its comments, however, say nothing about alternative liability; indeed, a comment to another section states that the question "whether and how to apply alternative liability . . . is beyond the scope of this Restatement." Restatement (Third) of Torts § 4 cmt. e. The viability of alternative liability under the Restatement (Third) is thus unclear.

*States v. Davis*, 261 F.3d 1, 51 (1st Cir. 2001) (noting that requirement that plaintiff offer “some proof” of defendants’ liability may be satisfied exclusively by “adequate circumstantial proof”). As with market share liability, a defendant may exculpate itself by proving that it did not cause plaintiff’s harm, but under alternative liability, defendants who fail to do so are jointly and severally liable to the plaintiff. *City of Phila.*, 994 F.2d at 128.

The requirement that all possible defendants be joined is strictly enforced. *See, e.g., Baum v. Eco-Tec, Inc.*, 773 N.Y.S.2d 161, 163 (App. Div. 2004) (in products liability suit involving defective pipes, “plaintiff cannot rely on the theory of alternative liability to prevail due to the fact that plaintiff has not identified the alternative manufacturer/supplier of the air pipes and, thus, cannot show that all potential tortfeasors are present in the case”); *Smith v. N.Y. City Health & Hosps. Corp.*, 726 N.Y.S.2d 89 (App. Div. 2001) (plaintiffs not entitled to proceed on alternative liability theory in action against blood center, blood bank trade association, and hospital, where plaintiffs failed to satisfy critical element of alternative liability that all possible tortfeasors be present before court), *appeal denied*, 764 N.E.2d 394 (N.Y. 2001) (unpublished table decision); *Black*, 603 N.W.2d at 191-92 (holding alternative liability doctrine inapplicable because all potential tortfeasors were not defendants in asbestos exposure suit); *Gaulding*, 772 S.W.2d at 69 (same); *Erickson v. Baxter Healthcare, Inc.*, 151 F. Supp. 2d 952, 969 (N.D. Ill. 2001) (rejecting application of alternate liability theory in action by widow of hemophiliac against manufacturers of blood factor concentrates, given plaintiff’s failure to prove that all possible manufacturers were joined in action); *Doe v. Baxter Healthcare Corp.*, 178 F. Supp. 2d 1003, 1014 (S.D. Iowa 2001) (hemophiliacs who contracted HIV from blood factor concentrates manufactured by pharmaceutical corporations could not rely on alternative liability theory given failure to name all possible defendants), *aff’d*, 380 F.3d 399, 407-10 (8th Cir. 2004). *Cf. In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (applying alternative liability theory where all defendants and all plaintiffs were parties to class action), *aff’d*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

Several courts have rejected the alternative liability theory outright. *See, e.g., Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515 (11th Cir. 1988) (Georgia law); *Napier v. Osmose, Inc.*, 399 F. Supp. 2d 811, 820 (W.D. Mich. 2005) (finding Michigan tort reform statute eliminating joint and several liability effectively overruled Michigan Supreme Court case adopting alternative liability); *Hicks*, 368 F. Supp. 2d at 635 (Texas law); *Griffin*, 648 F. Supp. at 964 (North Carolina law); *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361, 368 (Ark. 2002); *Senn v. Merrell-Dow Pharms., Inc.*, 751 P.2d 215 (Or. 1988).

Many courts have declined to apply the alternative liability theory on the facts of a particular case. *See, e.g., N.J. Tpk. Auth.*, 197 F.3d at 108 (declining to decide whether alternative liability theory can be applied to CERCLA claims because, even if theory were applicable, plaintiff’s evidence was not sufficient to

survive summary judgment); *In re Consol. Fen-Phen Cases*, 2003 WL 22682440, at \*4 n.6 (plaintiffs' claims of alternate liability "are easily dismissed here, as plaintiffs do not allege that they do not know whose products they ingested"); *In re MTBE Prod. Liab. Litig.*, 175 F. Supp. 2d 593, 622 n.42 (S.D.N.Y. 2001) ("[P]laintiffs' allegations concerning the characteristics of MTBE (*i.e.*, its fungibility and ability to persist underground for extended periods of time), as well as the inherent inability to determine when a spill or leak causing the contamination occurred, demonstrate that the defendants are in no better position than the plaintiffs to identify who manufactured the offending product."); *Spencer v. Baxter Int'l, Inc.*, 163 F. Supp. 2d 74, 79-80 (D. Mass. 2001) (producers and sellers of antihemophilic factor (AHF) could not be held liable under alternative liability theory for death of hemophiliac from AIDS, where hemophiliac received other blood products from non-defendant parties and record did not establish that producers' respective methods of screening blood donors, of testing and treating their blood products, or of warning of associated risks were same or substantially same); *Sanderson v. Int'l Flavors & Fragrances, Inc.*, 950 F. Supp. 981 (C.D. Cal. 1996) (declining to apply theory where plaintiff claiming multiple chemical sensitivity from exposure to perfumes failed to join all perfume manufacturers); *Vincent v. C.R. Bard*, 944 So. 2d 1083, 1086 (Fla. Dist. Ct. App. 2006) (declining to apply theory because identity of actual product manufacturer was undisputed); *Skipworth*, 690 A.2d 169 (declining to apply theory where all potential defendants were not joined); *Bly*, 663 A.2d at 1238 (declining to apply theory – "the extraordinary measure of shifting the burden of proof on causation" – where plaintiffs were unable to prove that any of the defendants were negligent and that one or another caused decedent's death); *In re N.Y. DES Litig.*, 721 N.Y.S.2d 518 (App. Div. 2001) (rejecting plaintiffs' contention that New Jersey courts would apply theory to DES cases); *N.Y. Tel. Co. v. AAER Sprayed Insulations, Inc.*, 679 N.Y.S.2d 21 (App. Div. 1998) (declining to apply theory in asbestos-in-building claim where plaintiff was unable to demonstrate that all possible tortfeasors were before the court, that all named defendants acted tortiously toward plaintiff, and that defendants were in a better position than plaintiff to identify tortious party); *Jackson v. Glidden Co.*, No. 236835, 2001 WL 498580, at \*1 nn.1, 2 (Ohio Ct. Com. Pl. Mar. 30, 2001) (whether lead paint manufacturers should be held liable under alternative liability theory was not a "common issue of fact or law" supporting class certification petition because "the availability of [this theory] depends upon each individual plaintiff's inability to identify which defendant's product was the source of the lead poisoning" and "some plaintiffs may in fact be able to identify the particular product through chemical analysis"), *aff'd*, No. 87779, 2007 WL 184662 (Ohio Ct. App. Jan. 25, 2007).

In the products liability context, some courts have declined to apply the alternative liability theory where the allegedly defective product was marketed and sold over a long period of time, because, in such cases, the allegedly tortious behavior was neither "simultaneous" nor identical. *See, e.g., City of Phila.*, 994 F.2d at 112; *Skipworth*, 690 A.2d at 172-73.

### 3. *Enterprise Liability/Industry-wide Liability*

The much-criticized doctrine of enterprise liability permits joint and several liability to be imposed on an entire industry if the plaintiff demonstrates that:

- (a) A small number of manufacturers, virtually all of whom are defendants, produced an injury-causing product;
- (b) The defendants had joint knowledge of the risks and had joint capacity to reduce the risks; and
- (c) The defendants delegated the responsibility to set safety standards to a trade association, which failed to reduce the risks.

The only case arguably embracing the enterprise liability theory is the case in which it was first articulated: *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). In that case, an explosion of blasting caps injured plaintiffs. Although the plaintiffs could not identify which manufacturer's caps caused the injuries, the entire industry consisted of only six manufacturers. The court refused to dismiss the complaints and, in light of the number of manufacturers involved, indicated that it might be appropriate to shift the burden of causation to the defendants.

The enterprise liability theory has received a cold reception since *Hall* was decided more than 35 years ago. No subsequent court has applied the theory and several have rejected it under the facts of a particular case. *See, e.g., Kurczi v. Eli Lilly & Co.*, 113 F.3d 1426, 1433-34 (6th Cir. 1997) (holding that Ohio Products Liability Act expressly bars enterprise liability); *City of Phila.*, 994 F.2d at 112 (noting that enterprise liability has been rejected by virtually every jurisdiction); *In re Consol. Fen-Phen Cases*, 2003 WL 22682440, at \*4 n.6 (plaintiffs' claims of enterprise liability "are easily dismissed here, as plaintiffs do not allege that they do not know whose products they ingested"); *In re MTBE*, 175 F. Supp. 2d 593 (rejecting application of theory in environmental action involving MTBE because plaintiffs failed to plead sufficient facts to show that: (1) MTBE in question manufactured by one of small number of defendants; (2) defendants had joint knowledge of risks inherent in MTBE and possessed joint capacity to reduce those risks; and (3) each defendant failed to take steps to reduce risk but, rather, delegated this responsibility to trade association); *Accu-tek*, 935 F. Supp. at 1331 ("The [enterprise liability] theory requires joint control of the risk through use of a trade association or some other method of standard-setting. Plaintiffs allege joint coordination of policy positions, but that relates to lobbying activities, not to actual marketing."); *Swartzbauer v. Lead Indus. Ass'n*, 794 F. Supp. 142 (E.D. Pa. 1992) (rejecting enterprise liability argument where product identification is not at issue); *Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991) (refusing to apply enterprise liability theory in asbestos case because it applies only to industries composed of a small number of



producers); *Vigiolto v. Johns-Manville Corp.*, 643 F. Supp. 1454 (W.D. Pa. 1986) (rejecting enterprise liability theory in the absence of a small number of manufacturers and uniform safety standards), *aff'd*, 826 F.2d 1058 (3d Cir. 1987) (unpublished table decision); *Martin*, 689 P.2d at 380 (“The underlying rationale in all of the decisions rejecting enterprise liability is that the law of torts does not include a theory of liability which would allow an entire industry to be held strictly liable for an injury caused by a defective product.”); *Gaulding*, 772 S.W.2d at 69 (main reason for rejection of enterprise liability is “its limited application to cases which involve only a small number of manufacturers in a highly centralized industry”); *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 875 (Ill. App. Ct. 2003) (“[a]cceptance of such a theory [] would make the manufacturers insurers of their industry . . . and would result in an abandonment of the principle that, to be held liable, a causative link must be established between a specific defendant’s tortious acts and the plaintiff’s injuries”); *Jackson*, 647 N.E.2d at 883 (“The appellants have not alleged that the appellees [lead paint manufacturers] delegated the safety responsibility to the trade association, that the appellees were jointly aware of the risks at issue, or that in their joint capacity appellees could have reduced or affected those risks.”); *Catherwood v. Am. Sterilizer Co.*, 532 N.Y.S.2d 216 (Sup. Ct. 1988) (plaintiffs did not make required showing that defendants were part of a “tightly knit industry” that delegates safety duties to a trade association), *aff'd*, 540 N.Y.S.2d 218 (App. Div. 1989).

#### **4. Concert of Action / Civil Conspiracy**

##### **a. Concert of Action**

Entitled “Persons Acting in Concert,” Section 876 of the Restatement (Second) of Torts sets forth the essential elements of a cause of action based upon the concerted activity of two or more defendants:

For harm resulting to a third person from the conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Concert of action claims have traditionally “involve[d] conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage, or encouraged and assisted the person who directly caused the injuries by participating in a joint activity.” *Sindell v. Abbott Labs.*, 607 P.2d at 933 (Cal.), *cert. denied*, 449 U.S. 912 (1980). “The classic paradigm of concert of action is a drag race. All the participants in the race may be held liable, even though only one may have caused the injury. . . [C]ourts have also held hunters jointly liable under the concert of action theory for injury received during a negligent group hunt.” *Marshall v. Celotex Corp.*, 691 F. Supp. 1045, 1047 (E.D. Mich. 1988). *See also Juhl v. Airington*, 936 S.W.2d 640, 644-45 (Tex. 1996) (noting that concert of action liability has traditionally been reserved for “highly dangerous, deviant, or anti-social group activity which [is] likely to cause serious injury or death to a person or certain to harm a large number of people” – such as drag racing, target shooting with high-powered rifles, or drunk driving scenarios where the defendant encouraged the driver to become drunk).

The gravamen of a pure “concert of action” claim under § 876(a) is an express or tacit agreement, or at least an understanding, by one defendant to act in concert with another. *See In re MTBE* 379 F. Supp. 2d at 372 (“The term ‘conspiracy’ is often used where the wrongful acts were done pursuant to an express common plan or design to cooperate in tortious conduct. In order for liability to attach [under a concert of action theory], however, express agreement among the actors is not required. A mere tacit understanding is sufficient.”); *Hamilton v. Accu-Tek*, 935 F. Supp. at 1327 (“A theory of ‘concerted action’ establishes collective liability where the evidence shows that all defendants had an understanding, express or tacit, to participate in a common plan to commit a tortious act.”); *see also Juhl*, 936 S.W.2d at 644 (concert of action claim under § 876(a) would at least require allegations and evidence demonstrating specific intent by defendant to agree to some unlawful objective). To satisfy this essential element of the claim, plaintiffs commonly present evidence of a defendant’s participation in various trade associations, standard-setting societies, or similar organizations – participation which commonly results in the industry’s “lock-step” reaction or approach to myriad issues – as circumstantial evidence of the defendant’s actual agreement to act in concert with its counterparts or co-defendants. Courts generally find that mere evidence of such “parallel activity” cannot sustain a concert of action theory of liability. In *Hymowitz v. Eli Lilly & Co.*, for example, the court rejected application of the concert of action theory of liability in DES cases:

As we noted [elsewhere], and as the present record reflects, drug companies were engaged in extensive parallel conduct in developing and marketing DES. There is nothing in the record, however, beyond this similar conduct to show any agreement, tacit or otherwise, to market DES for pregnancy use without

taking proper steps to ensure the drug's safety. Parallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim.

539 N.E.2d at 1074-75 (internal citations omitted). “[I]nferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit.” *Id.* at 1076. *See also Brenner v. Am. Cyanamid Co.*, 732 N.Y.S.2d 799, 801 (App. Div. 2001) (“Parallel activity among companies developing and marketing the same product, without more, . . . is insufficient to establish the agreement element necessary to maintain a concerted action claim.”) (citations and internal quotation marks omitted). *But see In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 792-94 (3d Cir. 1999) (affirming denial of motion to dismiss where concert of action claims were based on defendants’ alleged active concealment of material facts at product seminars).

In many jurisdictions, it remains an open question whether lending substantial assistance or encouragement to another, *i.e.*, “aiding and abetting” another party, is sufficient to state a concert of action claim under § 876(b) in the absence of an actual agreement or knowing participation in a common plan or design. *See, e.g., Juhl*, 936 S.W.2d at 644 (holding that § 876(b) claims would “require[] that the defendant have ‘an unlawful intent, *i.e.*, knowledge that the other party is breaching a duty and the intent to assist that party’s actions’”) (citation omitted). Courts in these jurisdictions have typically avoided resolving this issue by holding that mere parallel action or knowledge of a risk does not constitute substantial assistance or encouragement. *See, e.g., Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1465-66 (2d Cir. 1995) (holding that Kodak’s knowledge of repetitive stress injury and evaluation of a keyboard maker’s product is not “substantial assistance”); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (“[W]e do not see how a rational jury could find the existence of a civil conspiracy or concerted action based solely on the alleged fact that Pfizer and the other defendants consciously engaged in parallel conduct.”).

Plaintiffs, of course, are drawn to the vicarious- or collective-liability nature of the concert of action theory of liability. Pursuant to this cause of action, defendants may be held jointly and severally liable for the plaintiff’s injuries. Therefore, a defendant may be liable for the group’s allegedly concerted and ultimately injurious activity even though that defendant’s action was *not* the cause-in-fact of the plaintiff’s injury. *See, e.g., In re MTBE*, 379 F. Supp. 2d at 372 (“The theory of concert of action is a principle of vicarious liability. One party is responsible for the acts of another.”); *Marshall*, 691 F. Supp. at 1047 (“Under the concert of action theory, a person may be held liable for concerted activity which causes injury to another, though that person was not the cause in fact of the injury.”).

Indeed, one court has said that “[u]nder the concert of action theory identification of the tort-feasor who is the cause in fact of the injury is secondary.” *Id.* at 1048. In a recent case discussing the interplay between concert of action and other alternative- and collective-liability theories of liability, another court observed that “[a]lthough the concert of action theory was not developed to ease a plaintiff’s traditional burden of proving causation, it may have that effect.” *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 373. But while precise identification of the individual tortfeasor whose actions were the cause-in-fact of the injury is not necessary, plaintiffs still must show that *one* of the defendant’s products *was* the cause-in-fact. In *Marshall*, for example, the court declined to transform the concert of action theory into one of market share liability and ultimately dismissed the plaintiff’s concert of action claim where the plaintiff was “unable to show that any defendants supplied asbestos-containing products to which [the plaintiff] may have been exposed.” 691 F. Supp. at 1048.

Because the concert of action theory does not permit the plaintiff to shed completely his burden of showing the actual manufacturer of the product that allegedly caused his injury, the concert of action theory has largely been rejected in toxic tort litigation, especially in prescription drug cases, where the plaintiff fails to carry his burden on product identification and cannot identify the defendant responsible for causing his injury. *See, e.g., City of Phila.*, 994 F.2d at 129 (Pennsylvania courts refuse to apply enterprise liability theory in toxic tort cases when the plaintiff cannot identify the specific manufacturer allegedly responsible for causing the injury); *Kraus v. Celotex Corp.*, 925 F. Supp. 646, 651-52 (E.D. Mo. 1996) (noting rejection of concert of action theory in asbestos cases because, under Missouri law, plaintiff must prove defendant’s product contributed to and was a substantial factor in causing plaintiff’s injuries); *In re DES Cases*, 789 F. Supp. 548 (E.D.N.Y. 1992) (rejecting concert of action theory); *Hurt v. Phila. Hous. Auth.*, 806 F. Supp. 515, 531-32 (E.D. Pa. 1992) (“Under Pennsylvania law, § 876 imposes liability only where the plaintiff can specifically identify both the manufacturer of the injury-producing product (the wrongdoer) and the person who acted as the wrongdoer’s co-conspirator or accomplice. . . . [T]he inability of plaintiffs to identify the specific manufacturers of specific lead-based paint underscores the reason why Pennsylvania and other courts have refused to apply the concert of action theory in toxic tort cases.” (internal citations omitted)); *Santiago v. Sherwin-Williams Co.*, 794 F. Supp. 29, 33 (D. Mass. 1992) (“[I]n the absence of an identifiable tortfeasor, plaintiff may not pursue her concert of action claim.”), *aff’d*, 3 F.3d 546 (1st Cir. 1993); *Morton v. Abbott Labs.*, 538 F. Supp. 593, 596-97 (M.D. Fla. 1982) (rejecting concert of action theory in DES case; concert of action does not eliminate the requirement of proving causation); *Hymowitz*, 539 N.E.2d at 1074 (same); *Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 205-06 (Ct. App. 2003) (rejecting concert of action theory in case against manufacturer of asbestos friction brake products where plaintiff could not establish product identification; applying the theory in such circumstances “would expand the [concert of action] doctrine far beyond its intended scope and would render virtually any manufacturer liable for

the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant” (quoting *Sindell v. Abbott Labs.*, 607 P.2d 924, 933 (Cal.), *cert. denied*, 449 U.S. 912 (1980)); *Skipworth* 690 A.2d at 175 (holding that plaintiffs “failed to establish that they had a cause of action for concert of action as they are unable to identify the manufacturer of any of the lead pigment found at [the plaintiff’s] residence that was ingested by her and allegedly caused her injuries”). *But see In re MTBE* 379 F. Supp. 2d 348 (evaluating viability of concert of action claims in various jurisdictions in light of plaintiff’s inability to specifically identify the defendant-manufacturer or distributor of the MTBE that caused contamination and property damage); *In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593, 632 (S.D.N.Y. 2001) (denying motion to dismiss concert of action claims even though plaintiff could not identify which defendant’s leak of MTBE caused property contamination).

Defendants confronted with concert of action claims should carefully evaluate some basic defenses to this cause of action. In some jurisdictions, a defendant may be able to show that concert of action claims are not recognized. This argument may be made in Texas, for instance, where the state supreme court has stated that it has never endorsed a cause of action under the Restatement (Second) of Torts § 876, but instead has “refused to apply [its provisions] . . . and expressly declined to approve this theory of liability.” *Juhl*, 936 S.W.2d at 643.

Other jurisdictions have dismissed concert of action claims in favor of a plaintiff’s conspiracy allegations, finding the concert of action claims unnecessarily duplicative. *See, e.g., Univ. Sys. of N.H.*, 756 F. Supp. at 657 (dismissing concert of action claim as duplicative of conspiracy claim).

Finally, concert of action is not an independent tort. Liability is predicated upon the commission of a tortious act by one of the defendants. *See id.* at 657 (“Implicit in the proof necessary to sustain a concert of action theory is the commission of tortious acts by defendants.”); *accord Brenner*, 732 N.Y.S.2d at 801. This requirement is not met where the defendants did not owe, or the defendants’ concerted actions did not breach, a duty to the plaintiff. *See Friedman v. F.E. Myers Co.*, 706 F. Supp. 376, 383-84 (E.D. Pa. 1989) (granting summary judgment in favor of defendant trade association because it owed no duty to plaintiff); *Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 505-06 (D. Minn. 1984) (dismissing plaintiffs’ concert of action claim where manufacturers acted in concert to obtain lawful objective, *i.e.*, formation of a trade group and lobbying about regulatory standards, noting that “[n]ot only do these actions not constitute torts, they are protected by the first amendment”); *Brenner*, 732 N.Y.S.2d at 801 (affirming dismissal of concert of action claims where underlying, independent torts were also dismissed).

b. Civil Conspiracy

The elements of civil conspiracy, which vary little from one jurisdiction to the next, are:

- (1) two or more persons;
- (2) an objective to violate a known legal duty;
- (3) a meeting of minds on the objective or activity;
- (4) one or more unlawful or overt acts; and
- (5) harm to the plaintiff as the proximate result thereof.

*See, e.g., Blackmon v. Am. Home Prods. Corp.*, 346 F. Supp. 2d 907, 921 (S.D. Tex. 2004); *Hearn*, 279 F. Supp. 2d 1096; *Loughridge v. Goodyear Tire & Rubber Co.*, 192 F. Supp. 2d 1175, 1186 (D. Colo. 2002); *Univ. Sys. of N.H.*, 756 F. Supp. at 652 (D.N.H. 1991); *In re N.D. Pers. Injury Asbestos Litig. No. 1*, 737 F. Supp. 1087, 1096 (D.N.D. 1990); *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983); *see also Thomas ex rel Gramling v. Mallett*, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523, 566 (“To state a cause of action for civil conspiracy, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts.”).

Like concert of action claims, conspiracy theories abound due in large part to the vicarious-liability aspect of this tort. *See, e.g., Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 816 (W.D. Tenn. 2005) (denying defendant’s Rule 12 motion to dismiss, noting that defendant’s “argument fails to recognize . . . that because each conspirator is responsible for everything done by his confederates which the execution of the common design makes probable as a consequence, . . . each is liable for all damages naturally flowing from any wrongful act of a co-conspirator in carrying out such common design” (quotation marks and citation omitted)); *Lewis v. Lead Indus. Ass’n*, 793 N.E.2d 869, 879 (Ill. App. Ct. 2003) (“If the plaintiffs can prove, as they allege, that the sale and distribution of lead pigment for use in paint was tortious in nature, that the defendants . . . were the sole suppliers and promoters of lead pigment, and that each was a party to the conspiratorial agreement, then it is of little consequence that the plaintiffs cannot establish which of the defendants actually supplied the lead pigment used in the paint to which any given child might have been exposed”); *Adcock v. Brakegate, Ltd.*, 645 N.E.2d 888, 895 (Ill. 1994) (holding that a plaintiff need not prove or allege that the defendant co-conspirator against whom damages are sought actually performed some tortious act in furtherance of the conspiracy; to impose such a burden “would deprive the plaintiff of one of the fundamental benefits of a conspiracy claim, that is, that once the conspiracy

is formed, all of its members are liable for injuries caused by any unlawful acts performed pursuant to and in furtherance of the conspiracy.”).

Conspiracy liability flows from the traditional notion that a group’s collective agreement to commit a wrongful act makes the perpetration of that wrongful act more likely. Therefore, as with concert of action, the heart of a conspiracy cause of action is a knowing or intentional *agreement* among the co-conspirators to commit some act. *See, e.g., McClure v. Owens Corning Fiberglas Corp.*, 720 N.E.2d 242, 258 (Ill. 1999) (“In order to state a claim for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement. The agreement is ‘a necessary and important’ element of this cause of action. . . . [because] ‘[a] defendant who understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further those objectives . . . is liable as a conspirator.’” (internal citations omitted)).

Courts in nearly every jurisdiction have remarked that, “by their very nature[,] conspiracies are often provable only by circumstantial evidence.” *United States v. Fox*, 902 F.2d 1508, 1515 (10th Cir.), *cert. denied*, 498 U.S. 874 (1990). Consequently, most courts do *not* require direct evidence of the most necessary element of a plaintiff’s conspiracy claim – *i.e.*, an express agreement among the defendants. *See, e.g., Beard*, 354 F. Supp. 2d at 816 (“Because the agreement does not need to be a formal one, plaintiffs can prove the existence of a conspiracy through circumstantial evidence, including inferences from the relationships among the parties.” (quotation marks and citation omitted)). Even so, a plaintiff’s circumstantial evidence must reveal some indicia of an agreement among the alleged co-conspirators sufficient to prove that the defendants knowingly, intentionally, and deliberately conspired to pursue a common plan or design that resulted in a tortious act. *See, e.g., Pressman v. Franklin Nat’l Bank*, 384 F.3d 182, 188-89 (6th Cir. 2004) (affirming trial court’s judgment in favor of defendant on plaintiff’s conspiracy claims where evidence failed to show that defendant knew about or intended to participate in co-defendant’s scheme to defraud plaintiff); *Beard*, 354 F. Supp. 2d at 816 (“Under Tennessee law, to prove a conspiracy to defraud, the plaintiff must establish: a common purpose, supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has the purpose.”); *see also Loughridge*, 192 F. Supp. 2d at 1186 (notwithstanding absence of express agreement, genuine issue of material fact existed as to whether hose manufacturer and heating systems company jointly marketed heating system’s hose despite knowledge of problems with the product’s oxygen barrier and longevity, precluding summary judgment for manufacturer in civil conspiracy action brought by purchasers of the heating systems); *Hearn*, 279 F. Supp. 2d at 1117 (under Arizona law, allegations by estate of deceased cigarette smoker that manufacturers “engaged in numerous agreements with other parties to do wrongful acts, and that they in fact carried out those wrongful acts,” were sufficient to state civil conspiracy claim).

Though it is often stated that the essence of a conspiracy cause of action is the agreement to commit an act, a claim of “conspiracy” itself does not provide an independent cause of action. To the contrary, conspiracy claims generally must be based upon damages flowing from an actionable, underlying tort committed by one of the co-conspirators. In this regard, courts often proclaim that “[t]he conspiracy alone is not actionable” and dismiss conspiracy allegations where the underlying tort cannot be proved. *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 410 (8th Cir. 2004) (affirming summary judgment on conspiracy allegations where underlying tort claims fail for lack of causation evidence); *see also Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 926 (8th Cir. 2004) (“Because [plaintiff’s] common law fraud claim is legally insufficient for want of proof that [plaintiff] relied on the [defendant’s] representations, we agree with the district court’s ruling that the civil conspiracy claim, which depends on a viable underlying tort, must fail as well.”); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1201 (11th Cir. 2004) (affirming dismissal of conspiracy claims predicated upon plaintiff’s allegations that defendant fraudulently misrepresented that cigarettes were safe; plaintiff could not establish justifiable reliance to prove fraud claims because “at least since the 1990s the dangers of cigarette smoking [have been] well known to the ordinary cigarette consumer with access to knowledge common to the community”); *Waterhouse v. R.J. Reynolds Tobacco Co.*, 270 F. Supp. 2d 678, 685-86 (D. Md. 2003) (agreeing that “conspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury,” but rejecting dismissal of conspiracy claims since plaintiff still had a viable claim for false representations); *Flanders v. Garlock, Inc.*, No. CV202-178, 2003 WL 22697241, at \*3 (S.D. Ga. Aug. 11, 2003) (dismissing civil conspiracy claims where underlying fraud claims fail for lack of duty and reliance by plaintiff); *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 540 (Pa. Super. Ct. 2003) (failure to show that cigarette manufacturer’s failure to warn, or its defectively designed cigarette, caused smoker’s lung cancer and death precluded claim for civil conspiracy to commit fraud), *aff’d* 881 A.2d 1262 (Pa. 2005); *Brenner*, 732 N.Y.S.2d at 800 (“[T]here is no independent tort in New York for civil conspiracy. Rather, [a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.” (internal quotation marks and citations omitted)). *But see In re MTBE*, 379 F. Supp. 2d at 390 (noting that Florida law “recognizes an independent tort of civil conspiracy” in “certain circumstances” where the plaintiff can show that “force of numbers acting in unison” created “some peculiar power of coercion”).

At least one state – California – has expanded upon this requirement of an underlying, tortious act and allowed defendants to escape conspiracy claims where the defendant owed no *individual* duty of care to the plaintiff. In essence, these California courts hold that conspiracy allegations can only flow from an underlying duty on the part of each named defendant to each plaintiff. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994) (“By its nature, tort liability arising from conspiracy presupposes that the



coconspirator is legally capable of committing the tort, *i.e.*, that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty.”); *accord Chavers v. Gatke Corp.*, 132 Cal. Rptr. 2d 198, 201 (Ct. App.), *modified* (2003) (civil conspiracy instruction was not warranted at asbestos trial against manufacturer of friction brake products based on manufacturer’s alleged involvement with others to suppress safety studies; injured mechanic admitted he could not prove that manufacturer’s product caused his injury such that manufacturer had no duty to mechanic under which it could be held liable for conspiracy); *Ferris*, 132 Cal. Rptr. 2d at 830 (given there was no evidence that plaintiff used any of asbestos manufacturer’s products, manufacturer could not be held liable for civil conspiracy despite its alleged role in pioneering use of asbestos; tort liability cannot arise vicariously out of participation in the conspiracy itself), *review denied* (2003). These holdings express a unique, minority position.

A majority of jurisdictions limits the reach of civil conspiracy claims by requiring that such claims be based on allegations of an underlying, intentional tort – as opposed to claims of strict products liability or simple negligence. *See, e.g., Flanders*, 2003 WL 22697241, at \*3; *Gonzalez v. Am. Home Prods. Corp.*, 223 F. Supp. 2d 803, 805 (S.D. Tex. 2002); *Altman v. Fortune Brands, Inc.*, 701 N.Y.S.2d 615, 615 (App. Div. 2000); *N. Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 116 (Tex. App. 2001). These cases suggest that, because a plaintiff must demonstrate a knowing and intentional agreement on the part of the conspirators, a claim for conspiracy is essentially an intentional tort, and it is illogical to conclude that persons can conspire to commit negligence or some other unintentional tort. *See, e.g., Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996) (“Logic and case law dictate that a conspiracy to commit negligence is a non sequitur.”); *Triplex Commc’ns., Inc. v. Riley*, 900 S.W.2d 716, 720 n.2 (Tex. 1995) (“Given the requirement of specific intent, parties cannot engage in a civil conspiracy to be negligent.”). As one court succinctly stated:

The real problem with the plaintiffs’ theory . . . is that it is incomprehensible. Precisely how the defendants, or anyone else, can conspire to cause negligent harm or conspire to cause damages under a strict products liability claim is inexplicable. The same must be said for the warranty claims. None of these claims are amenable to a conspiracy theory. There must be some manifestation of intent to conspire toward an unlawful end (or an unlawful means to a lawful end).

*Campbell v. A.H. Robins Co.*, 615 F. Supp. 496, 500 (W.D. Wis. 1985).

In some jurisdictions, the intent-based nature of conspiracy takes on additional meaning. Under Texas law, for example, because “civil conspiracy requires specific intent[, f]or a civil conspiracy to arise, the parties must be aware

of the harm or wrongful conduct *at the inception* of the combination or agreement.” *Triplex*, 900 S.W.2d at 719 (emphasis added). In other jurisdictions, such as Pennsylvania, conspiracy allegations may be sustained only where the plaintiff shows that the defendants acted with malice or a specific intent to injure the plaintiff. *See, e.g., Jeter ex rel. Smith v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 688 (W.D. Pa. 2003) (granting summary judgment on civil conspiracy claims because plaintiff failed to establish underlying intentional tort and requisite showing that defendant exhibited malice or acted solely to harm plaintiff), *aff’d on other grounds*, 113 F. App’x 465 (3d Cir. 2004); *Skipworth*, 690 A.2d at 174 (“In order to state a cause of action for civil conspiracy, a plaintiff must show ‘that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure, is essential in proof of a conspiracy.’” (citation omitted)).

Contrary to the decisions cited and discussed above, some courts explicitly disagree with this view of conspiracy as an intent-based tort and therefore allow plaintiffs to base their conspiracy allegations on underlying claims of negligence. *See, e.g., Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 174 (Iowa 2002) (“[T]he plaintiff may base a claim of civil conspiracy on wrongful conduct that does not constitute an intentional tort.”); *Adcock*, 645 N.E.2d at 894-95 (“Once a defendant knowingly agrees with another to commit an unlawful act or a lawful act in an unlawful manner, that defendant may be held liable for any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature.”).

Because civil conspiracy is a derivative cause of action, such a claim cannot be predicated upon an underlying tort that, *ab initio*, would not be actionable against a single defendant. *See, e.g., Tillman v. R.J. Reynolds Tobacco Co.*, 871 So. 2d 28, 35 (Ala. 2003) (holding that cigarettes are not unreasonably dangerous as a matter of law under Alabama Extended Manufacturer’s Liability Doctrine, and noting that “there may exist a potential claim for conspiracy only to the extent that there exist (or preexist) independent claims against the retailers of cigarettes.”). Therefore, a civil conspiracy claim cannot rest solely upon an alleged violation of a federal statute for which there is no private right of action. As the Third Circuit explained in affirming the dismissal of conspiracy claims premised upon alleged violations of the Food, Drug, and Cosmetic Act:

Because plaintiffs here could not sue an individual defendant for an alleged violation of the FDCA, it follows that they cannot invoke the mantle of conspiracy to pursue the same cause of action against a group of defendants. A claim of civil conspiracy cannot rest solely upon the violation of a federal statute for which there is no corresponding private right of action.

*In re Bone Screw Prods. Liab. Litig.*, 193 F.3d at 789-90. Arguably, a civil conspiracy claim cannot be predicated upon constitutionally-protected conduct or activity. The Third Circuit held that a district court's decision denying summary judgment in favor of a former asbestos manufacturer was clearly erroneous where the plaintiff's conspiracy allegations were "based solely on [the defendant's] limited and . . . innocent association with" a trade organization. *In re Asbestos Sch.*, 46 F.3d at 1294. Following the rationale of the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Third Circuit held that "[t]he implications of [the district court's] holding [denying summary judgment on the plaintiff's conspiracy claims] are far-reaching. Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. But the district court's holding, if generally accepted, would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them." 46 F.3d at 1294 (internal citations omitted).

Some courts expressly state that civil conspiracy claims face a heightened burden of proof. Illinois apparently requires that a conspiracy be proved by clear and convincing evidence. *See McClure*, 720 N.E.2d at 258 ("A conspiracy is almost never susceptible to direct proof. Usually, it must be established 'from circumstantial evidence and inferences drawn from evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances.' If a civil conspiracy is shown by circumstantial evidence, however, that evidence must be clear and convincing." (citation omitted)). The same is true in Texas. *See Guynn v. Corpus Christi Bank & Trust*, 589 S.W.2d 764, 771 (Tex. App. 1979) ("The acts of a conspiracy must be established by full, clear, satisfactory, and convincing testimony."); *Universal Commodities, Inc. v. Weed*, 449 S.W.2d 106, 114 (Tex. App. 1969) ("The existence of a conspiracy may be proved by circumstantial evidence, but the evidence must be full, clear, satisfactory and convincing. Disconnected circumstances will not do.").

Perhaps as a result of this heightened evidentiary standard, evolving case law in many jurisdictions suggests that evidence of a product manufacturer's "parallel conduct" with other alleged conspirators, without more, is insufficient to establish the defendant's requisite knowing and intentional agreement to participate in the alleged conspiracy. *See, e.g., Blackmon v. Am. Home Prods. Corp.*, 346 F. Supp. 2d at 921 (granting summary judgment on conspiracy claims in Thimerosal/autism case where plaintiff offered, "[a]t most, . . . alleg[ations] that Defendants acted in concert"). Most often, plaintiff's conspiracy allegations focus on the defendant's participation in various trade organizations and the industry's "parallel conduct" on myriad issues. In the seminal case on this issue, the Illinois Supreme Court noted that "[i]n other cases involving allegations of a civil conspiracy among manufacturers, courts have been unwilling to infer an agreement based on membership in industry trade organizations." *McClure*, 720 N.E.2d at 266. The court ultimately reversed the trial court's judgment against

the manufacturers of asbestos-containing products and held “that parallel conduct alone is insufficient to establish civil conspiracy” under the clear and convincing standard of proof under Illinois law. *Id.* at 261.

Accordingly, “a company’s mere membership in an industry group [or trade association] would not make that company liable for the tortious acts of other members of the group.” *Wright*, 652 N.W.2d at 174. *See also Payton v. Abbott Labs.*, 512 F. Supp. 1031, 1038 (D. Mass. 1981) (rejecting conspiracy and concert of action allegations against manufacturers of DES and noting that “[t]here is nothing inherently wrong with membership in an industry-wide trade association, [or] with participating in scientific conferences. . . . Indeed, these practices are probably common to most industries”); *see generally Lynn v. Amoco Oil Co.*, 459 F. Supp. 2d 1175 (M.D. Ala. 2006) (granting summary judgment for the defendant on conspiracy allegations focused upon defendants’ parallel conduct, participation in trade organizations, and lobbying efforts).

Along similar lines, the Wisconsin Supreme Court affirmed summary judgment for defendant on conspiracy claims brought against manufacturers of white lead pigment and its longtime trade association, the Lead Industries Association. *See Thomas*, 701 N.W.2d at 566. After citing a litany of conspiracy allegations – all viewed in the light most favorable to the plaintiff – the court reiterated that evidence of mere “parallel behavior” among product manufacturers is insufficient to demonstrate conspiracy. *Id.* The court went on to note:

[E]ach Pigment Manufacturer had a unique story regarding its participation in the [Lead Industries Association (“LIA”)]. [The plaintiff] does not explain when any agreement was reached to commit tortious acts, who was involved in this agreement, and when the other parties entered into this agreement. At best, his evidence establishes that a trade organization, the LIA, aggressively promoted lead products and took, what seems to be, any measures possible to ensure that the market for lead products remained free and unencumbered. Further, the Pigment Manufacturers, either individually or as successors-in-interest, all were members of the LIA at varying times. However, “every action by a trade association is not concerted action by the association’s members.” We conclude that [the plaintiff] has not presented sufficient material facts to sustain his civil conspiracy claim.

*Id.* (citations omitted).<sup>7</sup>

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<sup>7</sup>Although the *Thomas* court rejected the plaintiff’s conspiracy claims, it thoroughly discussed and then extended its “risk-contribution” theory of liability (a version of market-share liability previously applied only to DES cases) to allow the plaintiff a cause of action for injuries allegedly sustained as a result of exposure to lead-based paint. *See* 701 N.W.2d at 527. Had the court not

Several defenses to conspiracy claims are available to a defendant separate and apart from those that relate to or otherwise flow from the various points raised above. Depending upon the context, some courts will reject a plaintiff's conspiracy claim as a matter of law. For example, some courts have held that the relevant jurisdiction does not recognize claims for civil conspiracy. *See, e.g., In re Minn. Breast Implant*, 36 F. Supp. 2d at 875 (D. Minn. 1998) (holding that Arizona law does not recognize civil conspiracy claim).

Moreover, some jurisdictions find little distinction between common law conspiracy and concert of action claims, which allows defendants to employ arguments focusing on the similarities between the two claims to their advantage. For instance, at least one court has held that the elements of a conspiracy claim and a concert of action claim are identical and therefore redundant when asserted in the same cause of action. *See Univ. Sys. of N.H.*, 756 F. Supp. at 657 (dismissing concert of action claim as duplicative of conspiracy claim). *But see, e.g., In re MTBE* 379 F. Supp. 2d at 392-93 (holding that Illinois law permits plaintiffs to prosecute simultaneously both conspiracy and concert of action claims); *Friedman*, 706 F. Supp. at 383-84 (granting summary judgment on plaintiff's concert of action claim where defendant owed no duty to plaintiff and allowing conspiracy claim to go forward).

Likewise, courts have held that conspiracy claims are simply duplicative of other types of claims asserted in the plaintiff's pleadings and dismissed them for this reason alone. *See Belkow v. Celotex Corp.*, 722 F. Supp. 1547, 1551 (N.D. Ill. 1989) (dismissing what the court characterized as an allegation of "conspiracy to commit a tort," finding that "plaintiffs' conspiracy claim merely [and impermissibly] duplicates earlier allegations and 'gives plaintiffs' lawyers one more charge to fling at the jury in the hope that if enough charges are made the jury may accept at least one'" (citation omitted)).

In some cases, courts have found the plaintiff's conspiracy allegations internally inconsistent, and dismissed them for that reason. *See, e.g., In re MTBE*, 379 F. Supp. 2d at 398 (dismissing without prejudice conspiracy claims against "downstream handlers" of MTBE on the grounds that plaintiff's allegations were "inherently contradictory" because they portrayed these downstream defendants "as both the perpetrators and victims of the same tortious conduct"); *see also MTBE Prods. Liab. Litig.*, 415 F. Supp. 2d 261, 277 (S.D.N.Y. 2005) (dismissing very same conspiracy claims with prejudice after plaintiff's failure to amend).

In other cases, courts have found that various products liability statutes provide specific remedies and thereby preclude a cause of action for conspiracy. *See, e.g., Jefferson* 106 F.3d at 1251 (*per curiam*) (declining to certify questions to Louisiana Supreme Court and affirming district court's dismissal of plaintiff's conspiracy allegations against manufacturers of lead paint because Louisiana

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reached this result, the plaintiff's inability to identify the manufacturer of the lead-based paint(s) to which he was allegedly exposed would have precluded his claims.

Products Liability Act provides exclusive remedy for plaintiff's products-based claims); *In re MTBE*, 379 F. Supp. 2d at 384-85 (dismissing plaintiff's civil conspiracy claims as "preempted" by the Connecticut Products Liability Act) (citing *Edwards v. Novartis Consumer Health*, No. X06CV010167425S, 2002 WL 1843057, at \*3 (Conn. Super. Ct. July 15, 2002) (dismissing civil conspiracy claim in suit against pharmaceutical companies because Connecticut Products Liability Act "provide[s] an adequate and exclusive remedy" for plaintiffs in products liability actions and, thus, "[c]ivil conspiracy claims are redundant and barred by the CLPA's exclusivity provision")); *Lee v. Bayer Corp.*, No. 02-0753, 2002 WL 1058893, at \*1 (E.D. La. May 24, 2002) (granting motion to dismiss civil conspiracy claims in pharmaceutical products liability case because such claims are not recognized under the Louisiana Products Liability Act, which "establishes the exclusive theories of recovery against a manufacturer"). *But see R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268 (Miss. 2005) (holding that the "inherent characteristic" defense within the Mississippi Products Liability Act bars claims based upon products liability theories of recovery and, conversely, does not bar claims such as conspiracy), *modified* (2006).

Many plaintiffs plead fraud-based conspiracies, alleging that the defendants collectively withheld or misconstrued vital safety information. When a plaintiff asserts conspiracy claims based upon underlying allegations of fraud, those claims fall prey to the pleading-with-particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure and its state analogs. *See, e.g., Hill v. Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 823 (D. Md. 2005) ("Claims of conspiracy to commit fraud must abide by Rule 9(b)'s particularity requirements."). As the *Hill* court stated, "the more specific requirements of an allegation of conspiracy are that the pleader provide, whenever possible, some details of the time, place and alleged effect of the conspiracy." *Id.* (citing numerous cases).

## II.

### OTHER TRADITIONAL GROUNDS OF LIABILITY

#### A. "Abnormally Dangerous" and "Ultrahazardous" Activities

Strict liability is sometimes imposed even in the absence of a product under the theory that the defendant was engaged in "abnormally dangerous" or "ultrahazardous" activity. Many jurisdictions have adopted the Restatement formulation described below, which is set out in the Restatement (Second) of Torts ("Restatement (Second)") §§ 519, 520. *See, e.g., Splendorio v. Bilray Demolition Co.*, 682 A.2d 461 (R.I. 1996) (reversing 60-year-old precedent that rejected "abnormally dangerous activity" liability). However, some jurisdictions

have not adopted this strict liability theory.<sup>8</sup>

Section 519 of the Restatement (Second) allows an actor engaged in abnormally dangerous activity to be held strictly liable for harm caused to persons, land, or chattels of another if the activity causes the harm, even if the actor exercised the utmost care. Strict liability is imposed only if the harm results from the particular type of occurrence that makes the activity “abnormally dangerous” or “ultrahazardous.” Although this theory of liability stems from *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868), which held that such liability may arise out of “non-natural use of land,” the use of land normally is no longer required. *But see Heinrich v. Sweet*, 49 F. Supp. 2d 27 (D. Mass. 1999) (holding liability limited to land cases under Massachusetts law); *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539 (D. Md. 1997) (same under Maryland law).

The crucial question is whether the activity is “abnormally dangerous.” Section 520 of the Restatement (Second) sets forth six factors to be evaluated:

- (a) high degree of risk of harm to person or property;
- (b) likelihood the resulting harm will be great;
- (c) inability to eliminate risk by exercise of reasonable care (without this factor, negligence would suffice to establish liability);
- (d) the activity is not a matter of common usage;
- (e) the activity is inappropriate to the place where it is carried out;
- (f) value of the activity to the community is outweighed by the potential danger.

Satisfying any one factor usually is not sufficient to impose strict liability; generally, a combination of these factors must exist. The issue is whether the dangers of the activity are so great that they cannot be eliminated through reasonable care and are sufficiently uncommon and inappropriate to warrant strict liability, despite the usefulness of the activity. Due to the flexible nature of this inquiry, results are often diverse. For example, although courts are divided over whether hazardous waste disposal constitutes an “ultrahazardous” activity, the trend is toward imposing liability. *See Isabel v. Velsicol Chem. Co.*, 327 F. Supp. 2d 915 (W.D. Tenn. 2004) (allegations that defendant discharged Aldrin/Dieldrin into a creek sufficient to state claim for ultrahazardous liability);

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<sup>8</sup>See *In re Derailment Cases*, 416 F.3d 787, 796 (8th Cir. 2005) (Nebraska law); *Hynes v. Energy W., Inc.*, 211 F.3d 1193, 1197-99 (10th Cir. 2000) (Wyoming law); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448 (5th Cir. 1996) (Texas law); *Mehl v. Canadian Pac. Ry.*, 417 F. Supp. 2d 1104, 1118 (D.N.D. 2006).

*Fletcher v. Tenneco Inc.*, No. 91-118, 1993 U.S. Dist. LEXIS 3054 (E.D. Ky. Feb. 22, 1993) (unpublished op.) (hazardous waste disposal); *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991) (processing and disposing of radium in urban area); *Kenney v. Scientific, Inc.*, 497 A.2d 1310 (N.J. Super. Ct. Law. Div. 1985) (generators and transporters of hazardous waste); *see also Indiana Harbor Belt R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990). *But see Collins v. Olin Corp.*, 418 F. Supp. 2d 34, 49 (D. Conn.2006) (operating landfill not an ultrahazardous activity); *E. Greyrock, LLC v. OBC Assocs., Inc.*, X08CV04400 2173S, 2006 WL 416302, at \*7 (Conn. Super. Ct. Feb. 7, 2006) (hazardous waste storage and disposal not an ultrahazardous activity). Transporting and handling chemicals is often found not to constitute an ultrahazardous activity because it can be done safely if reasonable care is exercised. *See, e.g., Hawkins v. Evans Cooperage Co.*, 766 F.2d 904 (5th Cir. 1985); *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476 (N.D. Ala. 1995); *Baltodano v. CTL Distrib., Inc.*, 820 So. 2d 421 (Fla. Dist. Ct. App. 2002). Likewise, a federal court recently held that a gasoline station's underground storage tanks were not ultrahazardous where the tanks were not near a public drinking water supply, were located in an area populated with commercial enterprises, and were of great utility to the community. *Nnadill v. Chevron U.S.A., Inc.*, 435 F. Supp. 2d 93, 102-103 (D.D.C. 2006). On the other hand, remediation of mold has been held in certain circumstances to constitute an ultrahazardous activity. *Slasson v. Bd. of Educ.*, No. UWYCV055001311S(XO2), 2006 WL 3908532, at \*3 (Conn. Super. Ct. Dec. 27, 2006) (satisfying 4 of 6 prongs: (a) high degree of risk, (b) likelihood of long term disease; (d) not a matter of common usage, and (e) totally inappropriate for area where young children are attending school).

A company's manufacture of products that themselves may be hazardous, such as handguns, explosives, or chemicals, does not constitute abnormally dangerous activity within the meaning of the Restatement (Second), at least where there are other non-hazardous uses of the product. The harm in such cases is from the use of the product, not its manufacture. *See, e.g., Outlet City, Inc. v. W. Chem. Prods., Inc.*, 60 F. App'x 922, 2003 WL 1511759 (3d Cir. 2003) (manufacture of household products and chemicals not ultrahazardous, absent evidence of increased risk, where plant is located in an industrial area); *Copier v. Smith & Wesson Corp.*, 138 F.3d 833 (10th Cir. 1998) (manufacture of firearms is not ultrahazardous activity); *United States v. Union Corp.*, 277 F. Supp. 2d 478 (E.D. Pa. 2003) (abnormal dangerousness is a property of activities not substances); *Akee v. Dow Chem. Co.*, 293 F. Supp. 2d 1140, 1144 (D. Haw. 2002) ("the fact that a defendant is engaged in the manufacture of an extremely harmful substance or product does not compel the conclusion that the manufacture of that substance or product is itself an ultrahazardous activity"); *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1324 (E.D.N.Y. 1996) ("Abnormally dangerous activities are distinguished from dangerous instrumentalities."). Similarly, marketing a consumer product, even one that is dangerous, is not an ultrahazardous activity. Strict liability is imposed under this theory only where



the activity in question is hazardous *in the vicinity in which the activity takes place*. See, e.g., *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611 (7th Cir. 1989); *Richmond, Fredericksburg & Potomac R.R. Co. v. Davis Indus.*, 787 F. Supp. 572 (E.D. Va. 1992); *Erbrich Prods. Co. v. Wills*, 509 N.E.2d 850 (Ind. Ct. App. 1987).

Pharmaceutical manufacturers have not been found liable under theories of abnormally dangerous activities as described in Sections 519 and 520. See *Ehlis v. Shire Richwood, Inc.*, 233 F. Supp. 2d 1189, 1191-93 (D.N.D. 2002) (“the application of absolute liability to the realm of pharmaceutical products is glaringly absent, and has specifically been refused in its application to the production of new drugs”), *aff’d*, 367 F.3d 1013 (8th Cir. 2004); see also *Gaston v. Hunter*, 588 P.2d 326, 341 (Ariz. Ct. App. 1978) (“rules relating to ‘ultrahazardous’ or ‘abnormally dangerous’ activities are inapplicable to the ‘production of new drugs’”); *Reeder v. Hammond*, 336 N.W.2d 3, 6 (Mich. Ct. App. 1983) (theory that ultrahazardous liability applies to manufacture of Biphedamine and birth control pills is “without merit”).

A property owner generally is not liable to subsequent owners of the property for a pre-existing ultrahazardous activity. The Restatement (Second) requires injury to the person, land, or chattels “of another.” § 519; *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 623 (M.D. Pa. 1997). Moreover, a successive owner can protect himself by thoroughly inspecting the property before purchase. See generally, *Rosenblatt v. Exxon Co., USA*, 642 A.2d 180, 188 (Md. 1994) (“unreasonable to hold prior user liable to remote purchasers or lessees of commercial property who fail to adequately inspect before taking possession of the property”); *Amland Props. Corp. v. ALCOA*, 711 F. Supp. 784, 803 (D.N.J. 1989) (subsequent purchaser can protect itself by, *inter alia*, inspection of the property). Assumption of risk is a defense to liability for ultrahazardous activities just as with negligence-based liability. Restatement (Second) § 523.

The first two factors of Section 520 require a high probability and magnitude of harm. See *Smith v. Carbide & Chems. Corp.*, 298 F. Supp. 2d 561, 573 (W.D. Ky. 2004) (disposal of radiological waste not abnormally dangerous where plaintiffs offered no evidence of a health hazard due to the contamination). However, the Restatement (Second) also provides that strict liability may be imposed where the magnitude of the harm is great even if the probability is low.

Courts applying the third factor of Section 520 consider whether the activity is one in which the risk could be eliminated by the exercise of reasonable care. If so, the activity may not qualify as abnormally dangerous. See *Beck v. Koppers, Inc.*, Nos. Civ. A. 303CV60PD, Civ. A. 304CV160PD, 2006 WL 288350 (N.D. Miss. Feb. 3, 2006) (wood treatment facility); *Marmo v. IBP, Inc.*, 362 F. Supp. 2d 1129 (D. Neb. 2005) (wastewater treatment); *Santa Maria Enters., Inc. v. Texaco Exploration & Prod., Inc.*, No. B161737, 2005 WL 675501 (Cal. Ct.

App. Mar. 24, 2005) (oil field waste). *But see In re Hanford Nuclear Reservation Litig.*, 350 F. Supp. 2d 871 (E.D. Wash. 2004) (addressing chemical separation in course of World War II era plutonium production).

The fourth factor of Section 520 addresses whether the activity is one of “common usage,” *i.e.*, whether many people or businesses in the community customarily engage in such activity. Restatement (Second) § 520 cmt. d. One court held that using PCBs in transformers is ultrahazardous because it is not a commonplace activity carried on by a great many people. *See Ahrens v. Superior Court*, 243 Cal. Rptr. 420 (Ct. App. 1988). Another court held that the transmission of natural gas and petroleum products by pipeline, train, or motor vehicle is a common activity in a highly industrialized society and that therefore strict liability is inappropriate. *See Melso v. Sun Pipe Line Co.*, 576 A.2d 999 (Pa. Super. Ct. 1990), *appeal denied*, 593 A.2d 842 (Pa. 1991) (unpublished table decision). Likewise, the Supreme Court of Arkansas held that aerial spraying of the chemical Roundup Ultra on crop land is within common usage and therefore not ultrahazardous. *Mangrum v. Pigue*, 198 S.W.3d 496, 499-500 (Ark. 2004).

The last two factors of Section 520 – the inappropriateness of the activity to the place where it is carried out and the extent to which its value to the community is outweighed by its dangerous attributes – address the relationship between the parties, which is often crucial in determining whether an activity is abnormally dangerous. For example, in *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476 (N.D. Ala. 1995), the court held that transporting and delivering chemicals was not an ultrahazardous activity where the plaintiff, the purchaser of the chemicals, had used them to manufacture consumer products for over 15 years and directed where the chemicals were to be delivered and stored. Similarly, in *Villari v. Terminix International, Inc.*, 663 F. Supp. 727, 732 (E.D. Pa. 1987), the court refused to hold that the application of pesticide constituted abnormally dangerous activity, because the plaintiffs paid the defendant to apply the pesticide to protect their economic investment in their home. *See also Heinrich*, 49 F. Supp. 2d at 41 (experimental medical treatments not abnormally dangerous, in the absence of misconduct). By contrast, in *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969), the court held that maintenance of a gasoline tank located next to drinking water was an ultrahazardous activity. *See also In re Hanford*, 350 F. Supp. 2d at 88 (abnormal danger exists even where no other site in the continental United States was appropriate for the activity and even where plaintiffs benefited from activity but suffered disproportionately to all other Americans who also benefited). *Cf. Collins*, 418 F. Supp. 2d at 49 (where residential development occurred after landfill was closed, requirement that activity be conducted in heavily populated or inappropriate area was not satisfied); *Cont'l Bldg. Corp. v. Union Oil Co.*, 504 N.E.2d 787 (Ill. App. Ct.) (storage of petroleum products without allegation that such storage occurred in urban area was insufficient to constitute ultrahazardous activity), *appeal denied*, 515 N.E.2d 104 (Ill. 1987) (unpublished table decision).

## B. Negligence

Negligence is the broadest theory of toxic tort liability. Unlike a strict liability claim, a negligence claim focuses on the defendant's behavior: the plaintiff must prove that the defendant acted improperly. The issues in a negligence case are whether the defendant owed the plaintiff a duty of care, and, if so, whether the defendant breached that duty by failing to exercise due care, and if so, whether that breach proximately caused harm to the plaintiff. *See, e.g., Finestone v. Fla. Power & Light Co.*, No. 03-14040-CIV, 2006 WL 267330, at \*7 (S.D. Fla. Jan. 6, 2006); *Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, 995 P.2d 657, 666 (Alaska 2000).

To determine whether a defendant violated its duty of care, courts apply a "reasonable defendant" test by weighing the probability and severity of *foreseeable* injuries against the cost to the defendant of preventing those injuries. The defendant may argue that the injuries were not foreseeable and that reasonable alternatives were not available. Because of the long latency period of many diseases allegedly caused by exposure to toxic substances, substantial evidence might be necessary regarding the standard of care and the state-of-the-art (knowledge of the product's potential health hazards) that existed at some remote point in the past. *See, e.g., Bourke v. Ford Motor Co.*, 2:03-CV-136, 2007 WL 704127, at \*1 (N.D. Ind. Mar. 5, 2007) (instructing jury to consider "evidence of the existing level of technology, industry standards, the lack of other advanced technology and the product's safety record at the time the product was designed, manufactured, packaged and labeled" when deciding if a product was manufactured in conformity with the generally recognized state of the art); *Cavanaugh v. Skil Corp.*, 751 A.2d 518, 519-20 (N.J. 2000) ("State-of-the-art 'refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed.'" (internal citations omitted)).

In most jurisdictions, the violation of a statute constitutes negligence *per se*. In other words, the statute creates a duty of care and the violation establishes a breach of that duty. *Fagan v. Amerisource Bergen Corp.*, 356 F. Supp. 2d 198, 214 (E.D.N.Y. 2004) (under New York law, violations of Food, Drug, and Cosmetics Act can constitute negligence *per se* if proximate cause is shown).

Some states follow the analysis set forth in Section 286 of the Restatement (Second) for determining when a violation of a statute constitutes negligence *per se*. A court may adopt a statute as the standard of reasonable care when the purpose of the statute is to:

- (a) protect a class of persons that includes the plaintiff;
- (b) protect the particular interest invaded;

- (c) protect the particular interest against the kind of harm which has resulted; and
- (d) protect that interest against the particular hazard from which the harm results.

*Id.* § 286. In jurisdictions following this formulation, only a violation of a health or safety statute will establish duty and breach. *See, e.g., Scarborough v. Brown Group, Inc.*, 935 F. Supp. 954, 964-65 (W.D. Tenn. 1995). Moreover, the violation of a statute does not establish negligence *per se* where it was designed to secure individuals' rights to the enjoyment of privileges to which they are entitled only as members of the public. *See, e.g., Short v. Ultramar Diamond Shamrock*, 46 F. Supp. 2d 1201 (D. Kan. 1999) (holding that a violation of an ordinance constituted negligence *per se* only if the legislature intended to establish right of action for injury by creating a duty to individuals, as opposed to the public at large).

In other states, the violation of a statute creates either: (a) a rebuttable presumption of duty and breach; or (b) has no effect. *See, e.g., In re Derailment Cases*, 416 F.3d 787, 795 (8th Cir. 2005) (“We agree with the district court’s conclusion that the violation of a regulation or statute is generally not recognized as negligence *per se* under Nebraska law.”).

The new Restatement of Torts incorporates *per se* negligence standards into strict liability for products. It provides that “noncompliance with an applicable safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation.” Restatement (Third) § 4.

Negligent-marketing cases seek to impose liability for the marketing of a dangerous product. Plaintiffs have attempted to use this theory in handgun litigation in an attempt to circumvent the limitations on bringing such suits under a products liability theory. *See Iletto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003) (reversing dismissal of negligence claims pursuant to Rule 12(b)(6) where plaintiffs’ allegations regarding defendants’ distribution and marketing practices deemed sufficient to impose duty of care on defendants), *cert. denied*, 543 U.S. 1050 (2005); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1247 (Ind. 2003) (negligent marketing through misleading and deceptive advertising is viable cause of action); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002) (reversing dismissal of suit alleging damages from firearms violence and holding that plaintiffs alleged facts sufficient to show that defendants engaged in an affirmative act by failing to exercise adequate control over the distribution of its product and thereby harmed foreseeable plaintiffs); *McClain v. Metabolife Int’l, Inc.*, 193 F. Supp. 2d 1252 (N.D. Ala. 2002) (diet product Metabolife® 356). *But see Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001) (reversing jury verdict on negligent marketing theory after New

York Court of Appeals answered certified question by holding that gun manufacturers did not owe plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture); *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (rejecting claim of negligent marketing of hollow point bullets because duty element lacking); *Bikowicz v. Sterling Drug, Inc.*, 557 N.Y.S.2d 551 (App. Div. 1990) (claim of negligent marketing of prescription drug Talwin rejected by jury).

A negligence claim opens the door to certain defenses that might not otherwise apply, such as contributory negligence or comparative negligence. Contributory negligence is an absolute bar to liability even if the defendant's conduct is 90% of the cause of the injury, and plaintiff's conduct constitutes only 10% of the cause. To alleviate this harsh result, most states have adopted the doctrine of comparative negligence, which reduces the plaintiff's damages in an amount commensurate with his degree of fault. Some of these states use a "pure" or "true" form of comparative negligence, allowing the plaintiff to recover whatever portion of his damages the defendant caused, even if that is as low as one percent. *See, e.g., Church v. Massey*, 697 So. 2d 407 (Miss. 1997). However, most states use a modified form of comparative negligence, barring the plaintiff from recovering any damages if the degree of his own fault exceeds that of the defendant. *See, e.g., Kaplan v. Exxon Corp.*, 126 F.3d 221 (3d Cir. 1997) (applying Pennsylvania law). In many states, comparative negligence has been adopted by statute. *See, e.g., id.* (discussing 42 Pa. Cons. Stat. Ann § 7102(a) (West 2006)).

### **C. Assault and Battery**

The common law torts of assault and battery have been asserted in the toxic tort context by plaintiffs alleging that exposure to a toxic substance constituted an unwanted "touching." Asserting these and other intentional torts allows plaintiffs to seek punitive damages. *See infra*, IV.C. – Punitive Damages.

Assault is defined as intentional conduct creating the *apprehension of harmful or unwanted contact*. The plaintiff must establish that the defendant's conduct created a reasonable and actual apprehension of immediate harmful or offensive contact to the plaintiff's person. *See, e.g., Wilson v. Meeks*, 98 F.3d 1247 (10th Cir. 1996) (applying Kansas law); *Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994), *cert. denied*, 525 U.S. 1140 (1999) (applying Illinois law). Most states allow punitive damages where the defendant has acted maliciously. *See, e.g., Larkin v. Brown*, 41 F.3d 387, 389 (8th Cir. 1994) (under Missouri law, proof that an "evil hand was guided by an evil mind" is necessary to recover punitive damages for assault).

Battery is defined as intentional conduct resulting in *unwanted or harmful contact*. The plaintiff must establish that the defendant committed an intentional

act that resulted in unwanted or harmful contact. *See, e.g., Wilson*, 98 F.3d at 1253. The plaintiff must also prove that he did not consent to the tortious conduct. *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 147 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999). However, the plaintiff need not be aware of the battery as it is occurring. Restatement (Second) § 13.

Some courts have determined that mere exposure to toxic substances does not constitute “harmful or offensive contact.” *See, e.g., McClenathan v. Rhone-Poulenc, Inc.*, 926 F. Supp. 1272 (S.D. W. Va. 1996) (exposure to airborne toluene did not constitute battery under West Virginia law). *But see, e.g., Tolen v. Honeywell Int’l, Inc.*, No. 05-4220, 2006 WL 3333754, at \*4 (S.D. Ill. Nov. 16, 2006) (denying motion to dismiss battery claim alleging intentional release of gas into atmosphere with knowledge it would contact nearby residents); *Corcoran v. N.Y. Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996) (under New York law, exposure to radiation without plaintiff’s consent states a claim for battery).

A battery claim requires proof of the defendant’s intent to bring about harmful or offensive contact. *See, e.g., Wilson*, 98 F.3d 1247; *see also, e.g., Baker v. Monsanto Co.*, 962 F. Supp. 1143 (S.D. Ind. 1997) (granting summary judgment on plaintiff’s claim of battery against a manufacturer of dielectric fluids containing PCBs, because plaintiff presented no proof of the manufacturer’s intent). Proof of intent to cause unwanted contact may be sufficient. *See, e.g., Field v. Phila. Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989) (deliberate venting of radioactive steam); *Messina v. Matarasso*, 729 N.Y.S.2d 4, 7 (N.Y. App. Div. 2001) (intent to harm not essential element of battery). Where the offensive contact arises from the defendant’s lawful activity, however, some courts require that the plaintiff establish an intent to cause harm. *See, e.g., Bulot v. Intracoastal Tubular Servs., Inc.*, No. 98-C-2015 (La. App. 4 Cir. 2/24/99); 730 So. 2d 1012, *abrogated on other grounds*, No. 2002-CA-1237 (La. App. 4 Cir. 11/3/04), 888 So. 2d 1017 (intentional exposure to radiation insufficient absent intent to harm); *Glowacki v. Moldtronics, Inc.*, 636 N.E.2d 1138 (Ill. App. Ct. 1994) (dismissal appropriate where no allegation that defendant was aware of hazards of chemicals that came in contact with plaintiff). Most states allow punitive damages where the defendant has acted maliciously. *See, e.g., Larkin*, 41 F.3d 387.

Some plaintiffs have also attempted to use a battery claim to circumvent the workers’ compensation bar on tort suits against employers. *See, e.g., Clark v. Fox Entm’t Group*, No. B168002, 2004 WL 1045705 (Cal. Ct. App. May 10, 2004) (movie extra sprayed with potentially harmful pyrolite-containing dust did not sufficiently plead toxic battery to avoid workers’ compensation bar); *Gunnell v. Metrocolor Labs., Inc.*, 92 Cal. App. 4th 710 (Ct. App. 2001) (solvent sprayed on walls and ceilings by workers which then “rained” down on them was not criminal battery and not sufficient to avoid workers’ compensation bar).

## D. Intentional Infliction of Emotional Distress

Plaintiffs in toxic tort cases often rely on the common law tort of intentional infliction of emotional distress to seek damages for fear of increased risk of disease. *See, e.g., Plourde v. Gladstone*, 69 F. App'x 485 (2d Cir. 2003); *In re MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d 348, 431-32 (S.D.N.Y. 2005); *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992). The Restatement (Second) § 46(1) provides for liability where an actor, by *extreme* or *outrageous* conduct, intentionally or recklessly causes the plaintiff *severe* emotional distress.

### 1. *Extreme or Outrageous Conduct*

Courts relying on the Restatement (Second) have taken a narrow view of what constitutes outrageous behavior. Generally, to be sufficiently outrageous to support a cause of action, the behavior must be:

- (a) beyond the bounds of common decency
- (b) atrocious; and
- (c) utterly intolerable in a civilized community.

*Compare Caputo v. Boston Edison Co.*, 924 F.2d 11 (1st Cir. 1991) (nuclear power plant owner's alleged delay in resolving worker's contradictory dosimeter readings and failure to report aberrational readings to Nuclear Regulatory Commission until worker filed claim was not extreme and outrageous), *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81 (3d Cir. 1987) (failure to warn workers indirectly exposed to asbestos about the hazards of asbestos is not outrageous where defendant was unaware of particular risk), *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55 (D. Mass. 1999) (failure to test plaintiff's property for PCBs not sufficiently outrageous), *and Minn. ex rel. Woyke v. Tonka Corp.*, 420 N.W.2d 624 (Minn. Ct. App. 1988) (employer's conduct in allowing employee to take home items contaminated with trichloroethylene and benzene was not sufficiently extreme and outrageous conduct), *with Eruteya v. City of Chicago*, No. 04 C 1482, 2005 WL 563213 (N.D. Ill. Mar. 9, 2005) (pouring harmful chemicals and/or biological agents in employee's work area sufficiently extreme and outrageous); *Philadelphia Elec. Co.*, 565 A.2d 1170 (intentionally exposing individual to radiation and attempting to conceal conduct is outrageous), *and Birklid v. Boeing Co.*, 904 P.2d 278 (Wash. 1995) (alleged human experimentation by employees, refusal to permit workers to transfer pursuant to medical restrictions, and cleaning and ventilating work area before government testing to skew test results were found to be outrageous).

Some jurisdictions also require that the defendant's conduct be directed specifically at the plaintiff. *See Avila v. Willits Env't Remediation Trust*, No. C99-3941 SI, 2007 WL 108347, at \*5 (N.D. Cal. Jan. 10, 2007) (no valid claim for intentional infliction of emotional distress where defendant did not act with knowledge of particular plaintiffs). *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 463 (D.D.C. 1997) (“[T]he tort of intentional infliction of emotional distress requires a high standard of intent, that is, the intent must be to actually cause emotional harm and it must be specifically directed toward the person complaining of emotional harm.”); *see also Lewis*, 37 F. Supp. 2d 55; *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993). One federal court recently held that “if an entity dumped a toxin in a location from which it is not evident that it would impact anyone’s water supply and burned the toxin where it is not evident that the smoke would harm anyone,” necessary intent and recklessness are lacking absent an “explicit expression of intent.” *Major v. AstraZeneca, Inc.*, Nos. 501CV618, 500CV1736, 2006 WL 2640622, at \*21 (N.D.N.Y. Sept. 13, 2006).

## 2. *Severe Emotional Distress*

Most jurisdictions require the plaintiff to establish that he has suffered severe or serious emotional distress. *See Molden v. Ga. Gulf Corp.*, 465 F. Supp. 2d 606, 614-18 (M.D. La. 2006) (no damages where no showing of genuine and serious mental distress); *Carbide and Chems. Corp.*, 298 F. Supp. 2d at 574 (no evidence of severe emotional distress where radiological waste from uranium enrichment facility deposited in soil and groundwater of surrounding properties); *see also In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551 (E.D. Wash. 1991); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Ball*, 755 F. Supp. 1344; *Angle v. Alexander*, 945 S.W.2d 933 (Ark. 1997); *Tonka*, 420 N.W.2d at 624. Distress is sufficiently severe if it is medically significant, *i.e.*, requires medical attention. *See Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994). Moreover, plaintiffs usually must provide competent medical or psychological evidence regarding the severity of their distress. *See id.* at 1406 (condition must be medically diagnosable); *Kazatsky v. King David Mem'l Park, Inc.*, 527 A.2d 988 (Pa. 1987); *see also McClenathan*, 926 F. Supp. at 1279 n.10 (putting plaintiffs “on notice [that] the Court will expect expert testimony on the issue of severe emotional distress”).

Some courts have held that damages for emotional distress cannot be recovered unless the plaintiff has also suffered a physical injury as a result of the defendant's conduct. *See, e.g., Rjanda v. Olin Corp.*, No. C-04-02668 RMW, 2006 WL 1525694, at \*5 (N.D. Cal. May 30, 2006) (emotional distress claim cannot be derivative of property damage only); *In re MTBE*, 379 F. Supp. 2d at 431-32 (physical manifestation of bodily contamination required under New York law); *Heinrich v. Sweet*, 49 F. Supp. 2d 27 (D. Mass. 1999) (granting motion to dismiss claims arising from experimental medical treatments to third parties where plaintiffs failed to show physical harm); *see also Hart v. O'Malley*,



647 A.2d 542 (Pa. Super. Ct. 1994), *aff'd on other grounds*, 676 A.2d 222 (Pa. 1996). *But see Honaker v. Smith*, 256 F.3d 477 (7th Cir. 2001) (contemporaneous physical impact or injury not required under Illinois tort law).

### 3. *Causation*

A plaintiff must demonstrate that the defendant's outrageous conduct proximately caused his emotional distress. *See, e.g., Caputo*, 924 F.2d 11 (affirming summary judgment where plaintiff's depression predated defendant's conduct); *Heinrich*, 49 F. Supp. 2d at 27 (granting motion to dismiss where event and distress were not sufficiently contemporaneous); *Thomas*, 846 F. Supp. at 1406-07 (granting summary judgment on mental anguish claims where psychological diagnoses "come very late in the game" and were possibly related to stresses other than TCE exposure).

## E. **Negligent Infliction of Emotional Distress**

Plaintiffs in toxic tort cases also often seek damages under the common law theory of negligent infliction of emotional distress. This claim is easier to prove than intentional infliction of emotional distress because the plaintiff need not show extreme or outrageous conduct. Instead, to prove a negligent infliction of emotional distress claim, the plaintiff must demonstrate that defendant's conduct was negligent and created an unreasonable risk of emotional harm. Although most courts apply the standard negligence measure of foreseeability, some courts require that a claim for negligent infliction of emotional distress be based on a pre-existing contractual or fiduciary relationship between plaintiff and defendant. *See, e.g., Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995).

Because this cause of action is easier to prove than a claim for intentional infliction of emotional distress, there is potential for abuse. Accordingly, courts have limited recoveries for negligent infliction of emotional distress in three ways:

### 1. *Actual injury*

Most courts require some physical injury.<sup>9</sup> *See, e.g., Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424 (1997) (construing the Federal Employers' Liability Act); *Nesom v. Tri Hawk Int'l, Inc.*, 985 F.2d 208, 211 (5th Cir. 1993) (Louisiana law); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (Pennsylvania law); *Woodman v. United States*, 1995 U.S. Dist. LEXIS

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<sup>9</sup>Such jurisdictions include: Arizona, Arkansas, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

2787, at \*116 (M.D. Fla. Jan. 24, 1995); *In re Rezulin Prods. Liab. Litig.*, 361 F. Supp. 2d 268 (S.D.N.Y. 2005) (Texas law); *Lewis*, 37 F. Supp. 2d 55; *Mateer v. U.S. Aluminum Co.*, No. 88-2147, 1989 U.S. Dist. LEXIS 6323 (E.D. Pa. June 2, 1989); *Stites v. Sundstrand Heat Transfer, Inc.*, 660 F. Supp. 1516 (W.D. Mich. 1987); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996).

Thus, the majority view is that mere *exposure* to a toxic substance is insufficient to create liability. See, e.g., *Buckley*, 521 U.S. 424 (finding inhalation of asbestos dust does not constitute a physical injury); *Ball*, 958 F.2d 36 (mere exposure to toxic chemicals does not constitute a physical injury); *Green v. McAllister Bros.*, Nos. 02CV7588 (FM), 03 CV1482, 2005 WL 742624, at \*\*22-23 (S.D.N.Y. Mar. 25, 2005) (no physical injury where workers exposed to asbestos and other carcinogens at World Trade Center site); *Dombrowski v. Gould Elecs., Inc.*, No. 3:CV-93-0120, 1996 U.S. Dist. LEXIS 20775 (M.D. Pa. Mar. 22, 1996) (elevated lead levels are not proof of necessary physical injury from lead exposure); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 704 (Mich. 2005) (Michigan does not recognize emotional distress as part of negligence actions absent physical manifestations of distress); *DeStories v. City of Phoenix*, 744 P.2d 705 (Ariz. Ct. App. 1987); *Doner v. Ed Adams Contracting, Inc.*, 617 N.Y.S.2d 565 (App. Div. 1994). As explained in *Woodman*, “physical impact” secondary to the ingestion of toxic chemicals is insufficient to support recovery for negligent emotional distress in the absence of “objectively discernible physical impairment.” 1995 U.S. Dist. LEXIS 2787, at \*116.

The minority (but growing) rule is that exposure to a harmful substance alone may suffice to create liability.<sup>10</sup> See, e.g., *Isabel*, 327 F. Supp. 2d 915 (Tennessee law); *McCafferty v. Centerior Serv. Co.*, 983 F. Supp. 715 (N.D. Ohio 1997); *Bernbach v. Timex Corp.*, 989 F. Supp. 403 (D. Conn. 1996). One court stated in *dictum* that even proof of exposure is unnecessary if there are sufficient indicia that plaintiff’s claim is genuine. *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986) (federal common law). Cf. *Madrid v. Lincoln County Med. Ctr.*, 923 P.2d 1154 (N.M. 1996) (plaintiff may recover for negligent infliction of emotional distress based on fear of AIDS without proving actual exposure to HIV).

## **2. Reasonable and Severe Distress**

The majority of courts require that the emotional distress or fear be objectively reasonable. See, e.g., *Mateer*, 1989 U.S. Dist. LEXIS 6323; *Kosmacek v. Farm Serv. Co-op*, 485 N.W.2d 99 (Iowa Ct. App. 1992); *Broussard v. Olin Corp.*, 546 So. 2d 1301 (La. Ct. App. 1989). Some courts may consider the likelihood of future illness in determining the “reasonableness” of

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<sup>10</sup>Jurisdictions following the minority rule include: Alabama, Alaska, California, Connecticut, Hawaii, Maine, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Tennessee, and Washington.

the fear. *See Kosmacek*, 485 N.W.2d 99; *Potter*, 863 P.2d 795. *But see Hagerty*, 788 F.2d 315 (permitting recovery for mental anguish due to fear of future illness not based on probability of actually contracting disease). In addition, the fear must be severe or serious. *See Conde v. Velsicol Chem. Corp.*, 816 F. Supp. 453 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994); *Smith v. AC&S, Inc.*, 843 F.2d 854 (5th Cir. 1988); *Howard v. Union Carbide Corp.*, No. 04-1035 (La. App. 5 Cir. 2/15/05); 897 So. 2d 768, *writ denied*, No. 2005 C-0726 (La. 5/6/05); 901 So. 2d 1100; *Ironbound Health Rights Advisory Comm'n v. Diamond Shamrock Chems. Co.*, 578 A.2d 1248 (N.J. Super. Ct. App. Div. 1990).

### **3. Zone of Danger**

Some jurisdictions have allowed witnesses to injuries to recover for emotional distress provided they were sufficiently close to the accident to fear for their own safety. *See, e.g., Bahura v. S.E.W. Investors*, 754 A.2d 928 (D.C. 1995) (to prevail on a claim for “somatic injury,” plaintiff must show that his or her presence in the zone of danger was contemporaneous with a fear for his or her safety) (j.n.o.v. granted after six weeks of trial and verdicts totaling \$948,000). Other courts have abandoned the requirement that the plaintiff be within “the zone of danger” if the plaintiff (1) is located near the scene of the accident; (2) witnesses the accident; and (3) is closely related to the victim. *See, e.g., Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979); *see also Woodman*, 1995 U.S. Dist. LEXIS 2787 (plaintiff must show physical injury, direct involvement in the event causing the original injury, and an “especially close emotional attachment” to the party injured).

These cases recognize that the shock of seeing a loved one suffer a grievous injury may result in extreme emotional distress that is reasonably foreseeable. However, merely witnessing an injury allegedly caused by a toxic exposure does not state a claim because it lacks the “traumatic impact” of witnessing an accident. *See Cathcart v. Keene Indus. Insulation*, 471 A.2d 493 (Pa. Super. Ct. 1984); *see also Leonard v. BASF Corp.*, No. 2:06CV00033, 2006 WL 3702700, at \*8 (E.D. Mo. Dec. 13, 2006) (negligent infliction of emotional distress claim dismissed because exposure to chemicals causing injury was not a sudden event). In a pharmaceutical products liability case where plaintiffs had no contemporary awareness of any causal connection between the drug and their son’s death, the court held that the zone of danger would not extend to support a negligent infliction of emotional distress claim. *Coutu v. Tracy*, No. PC/00-3720, 2006 WL 1314261, at \*\*4–8 (R.I. Super. Ct. May 11, 2006).

## **F. Trespass**

A claim of trespass to land addresses an interference with the plaintiff’s right to exclusive possession of real property. *See, e.g., New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1231-32 (D.N.M. 2004). Therefore, to state a claim

for trespass, a plaintiff must prove that he has “possession” of the property at issue. *See* Restatement (Second) of Torts § 158 (1979); *see also New Mexico*, 335 F. Supp. 2d at 1231 (“Trespass is defined as a direct infringement of another’s right of possession.” (internal quotation marks omitted)). Because a “trespass may be committed on or beneath the surface of the earth,” *New Mexico*, 335 F. Supp. 2d at 1231 (quoting Restatement (Second) § 159), a plaintiff is entitled to assert a trespass claim for intrusion by hazardous substances into groundwater located directly beneath his land, *see id.* at 1233-34.

The Restatement distinguishes between intentional trespass and negligent trespass. *Compare* Restatement (Second) § 158 (liability for intentional trespass imposed regardless of whether any legally protected interest of plaintiff has been harmed) *with* § 165 (liability for negligent trespass imposed if plaintiff or his land has been harmed). Courts also have recognized that trespass liability may be based on intentional or negligent conduct, *see, e.g., Parks Hiway Enters.*, 995 P.2d at 664; *Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604, 619-20 (Ky. Ct. App. 2003), although some jurisdictions define trespass as an intentional tort, *see, e.g., Williamson v. City of Hays*, 64 P.3d 364, 370 (Kan. 2003); *Union Corp.*, 277 F. Supp. 2d at 495. Under the traditional rule applicable to intentional trespass, “proof that the trespassory invasion caused actual damages is not required to establish liability, and [the] plaintiff is always entitled to recover at least nominal damages.” *Cook v. Rockwell Int’l Corp.*, 273 F. Supp. 2d 1175, 1200 (D. Colo. 2003).

### ***1. Intentional Conduct***

To prevail on a claim for intentional trespass, a plaintiff must prove that the defendant has intentionally: (a) entered the plaintiff’s land or caused a thing or third person to enter the land; (b) remained on the land; or (c) failed to remove from the land something which the defendant is under a duty to remove. *See* Restatement (Second) § 158; *see also, e.g., Union Corp.*, 277 F. Supp. 2d at 495 (quoting § 158).

The intent requirement does not mean that a plaintiff must show that the defendant actually intended to invade the property. Restatement (Second) §164 & cmt. a. Under New York law, for example, a plaintiff need show only that the defendant: (1) “intend[ed] the *act* which amounts to or produces the unlawful invasion,” and (2) “had good reason to *know or expect*” that the invasion would occur. *See Scribner v. Summers*, 84 F.3d 554, 558 (2d Cir. 1996) (quoting *Phillips v. Sun Oil Co.*, 121 N.E.2d 249 (N.Y. 1954)). In *Scribner*, the defendant had washed and demolished furnaces on its property, causing barium chloride to migrate onto the plaintiffs’ property. Holding the defendant liable in trespass, the Second Circuit noted that (1) the defendant continued this conduct for four years after the state had listed barium as a hazardous waste, and (2) the plaintiffs’ property was located at a lower elevation than the defendant’s property. *See also Plourde v. Gladstone*, 69 F. App’x 485, 488 (2d Cir. 2003) (court properly

dismissed plaintiff's intentional trespass claim absent evidence to suggest that defendants were substantially certain that herbicide spraying would result in injury); *Martin v. Shell Oil Co.*, 180 F. Supp. 2d 313, 326 (D. Conn. 2002) (holding that defendant is liable in trespass if invasion of plaintiff's property was substantially certain to result from defendant's conduct); *Bradley v. Am. Smelting and Refining Co.*, 709 P.2d 782, 786 (Wash. 1985) (defendant that emitted particulates of heavy metals from tall smokestack had "the requisite intent to commit intentional trespass as a matter of law," even though plaintiffs' property was four miles away from defendant's smelting plant, because defendant "acted on its own volition and had to appreciate with substantial certainty that the law of gravity would visit the effluence on someone, somewhere").

## **2. Location of Property Affected by Trespass**

Although the traditional rule is that trespass involves an "invasion of the real estate of another," *Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001), in some cases a property owner has attempted to hold the prior owner (or occupier) of the *same* property liable in trespass for polluting the property before the prior owner (or occupier) relinquished his interest in the property. In most jurisdictions, this kind of claim fails as a matter of law because a trespass claim does not extend to cover pollution of property that occurred when the property was owned (or occupied) by the defendant accused of trespass. *See id.* (Okla. law); *City of N.Y. v. N.Y. Cross Harbor R.R. Terminal Corp.*, No. 98CV7227ARRRML, 2006 WL 140555, at \*19 (E.D.N.Y. Jan. 17, 2006) (trespass claims brought by lessor of property against lessee arising out of lessee's contamination of property were dismissed because there was no "wrongful intrusion upon the land of another," explaining that "a release of hazardous substances by a lessee during a lessee's tenancy does not involve a wrongful intrusion upon the land of another, and therefore does not support a trespass claim by the lessor"); *see also Patton v. TPI Petroleum, Inc.*, 356 F. Supp. 2d 921, 930-31 (E.D. Ark. 2005); *Lilly Indus., Inc. v. Health-Chem Corp.*, 974 F. Supp. 702, 708-09 (S.D. Ind. 1997); *Cross Oil Co. v. Phillips Petroleum Co.*, 944 F. Supp. 787, 793 (E.D. Mo. 1996); *Busch Oil Co. v. Amoco Oil Co.*, No. 5:94CV175, 1996 WL 33143114, at \*10 (W.D. Mich. Feb. 20, 1996); *Dartron Corp. v. Uniroyal Chem. Co.*, 893 F. Supp. 730, 741-42 (N.D. Ohio 1995); *Rosenblatt v. Exxon Co., USA*, 642 A.2d 180, 189-90 (Md. 1994).

However, some courts have permitted trespass claims in these circumstances. *See Capogeannis v. Superior Court*, 15 Cal. Rptr. 2d 796, 798 (Ct. App. 1993) (owners of property stated cognizable trespass claim against former tenant for allegedly contaminating property before plaintiffs acquired it, but did not state cognizable trespass claim against former owners); *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 837 (Ct. App. 1991) (owners of property stated cognizable trespass claim against former tenants for allegedly contaminating property before plaintiffs acquired it); *Degussa Constr. Chem. Operations, Inc. v. Berwind Corp.*, 280 F. Supp. 2d 393, 408-09 (E.D. Pa. 2003)

(denying summary judgment motion and allowing property owner to proceed with permanent trespass claim against prior owner of property for contamination caused by prior owner).

### 3. *Continuing vs. Permanent Trespasses*

Some jurisdictions distinguish between a continuing trespass and a permanent trespass. *See, e.g., Cook v. Rockwell Int'l Corp.*, 358 F. Supp. 2d 1003 (D. Colo. 2004). As the Restatement notes, “[a] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.” Restatement (Second) § 161(1). Facts supporting an action for continuing trespass typically arise in the context of seepage or migration of water, oil, or other contaminants onto a plaintiff’s property.

How a trespass is characterized – as permanent or continuing – can have a significant impact on two issues: (a) what type of damages the plaintiff may recover; and (b) how the trespass claim is affected by the statute of limitations. Each of these issues is discussed below.

When the trespass is considered permanent, the plaintiff is required to bring a single lawsuit for both past and future damages. *See, e.g., Cook*, 358 F. Supp. 2d at 1011. But when the plaintiff’s property is affected by a continuing trespass, he traditionally has been required (or permitted) to bring successive actions for recurring or continuing damages until the contaminant or condition at issue has been removed from his property. *See Cook*, 273 F. Supp. 2d at 1210-11 (discussing the “traditional rule” that if a continuing trespass “is not abated, the plaintiff is required to bring successive actions for these temporary damages until abatement occurs”); *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1136 (Utah 2002) (“in the case of a continuing trespass . . . the person injured may bring successive actions for damages until the [trespass] is abated” (quoting *Walker Drug Co. v. La Sal Oil Co.*, 902 P.2d 1229, 1232 (Utah 1995))). Some courts, however, have held that when all damages, both past and future, can be estimated in one action, plaintiffs are permitted to seek all such damages in one lawsuit. *See Cook*, 358 F. Supp. 2d at 1012 (“[a] number of courts . . . have allow[ed] plaintiffs injured by continuing [property] invasions to elect to recover prospective damages” and past damages in one lawsuit); *id.* at 1013 (allowing plaintiffs to recover prospective damages, as well as past damages, in one lawsuit, if they “prove not only liability in trespass or nuisance, but also that the tortious invasion ‘will probably continue indefinitely’ because ‘there is no reason to expect its termination at any definite time in the future’” (quoting Restatement (Second) § 930, cmt. b)).

Plaintiffs often rely on the continuing trespass doctrine in an attempt to minimize the impact of a statute of limitations that would completely bar an untimely permanent trespass claim. *See, e.g., Skokomish Indian Tribe v. United*

*States*, 410 F.3d 506, 518 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1025 (2006); *Sycamore Family, L.L.C v. Vintage On The River Homeowners Ass'n., Inc.*, 2006 UT App 387, 145 P.3d 1177, 1178-80 (Utah 2006) (rejecting plaintiffs' argument that statute of limitations did not apply because underground pipes carrying water and sewage constitute a continuing trespass; holding that pipes and contents constitute a permanent trespass and that, therefore, statute of limitations barred plaintiffs' claim).

States have taken various approaches to analyzing this issue. *See Cook*, 358 F. Supp. 2d at 1004-10 (comparing Colorado law and other states' approaches). For example, to establish that a trespass is continuing, plaintiffs in some jurisdictions have the burden of demonstrating "that the damage is reasonably abatable," which means that "the condition . . . can be removed without unreasonable hardship and expense." *Skokomish Indian Tribe*, 410 F.3d at 518 (internal quotation marks omitted) (applying Washington law); *see Mangini v. Aerojet-Gen. Corp.*, 912 P.2d 1220, 1230 (Cal. 1996) (trespass claim was time-barred because plaintiffs' continuing trespass argument was not supported by "substantial evidence that the contamination on [their] property is reasonably abatable").

In Colorado, however, reasonable abatability is not an issue because a continuing trespass exists when the "defendant fails to stop or remove continuing, harmful physical conditions that are wrongfully placed on a plaintiff's land." *Hoery v. United States*, 64 P.3d 214, 220 (Colo. 2003). Thus, for statute of limitations purposes, the claim does not begin to accrue until the offending substance has been removed from the plaintiff's land. *See id.* at 218-20; *see also Cook*, 358 F. Supp. 2d at 1008 (rejecting defendants' argument that a property invasion "that is abatable but only through unreasonable measures or at unreasonable cost must be deemed a permanent tort under Colorado law"). Because Utah courts "look solely to the act constituting the trespass, and not to the harm resulting from the act," the "reasonable abatability" test has not been adopted in that state. *Breiggar*, 52 P.3d at 1135-36 ("that the pile of debris continued to remain on [plaintiff's] property, or the possibility that it could be reasonably abated is irrelevant to [the] conclusion" that plaintiff's trespass claim is time-barred). Along similar lines, to establish a continuing trespass claim under Michigan law, a plaintiff must show additional tortious conduct by the defendant within the limitations period (beyond the original, completed tortious act) because a "continuing wrong is established by continuing tortious acts, not by continual harmful effects from an original, completed act." *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004) (internal quotation marks omitted) (continuing trespass doctrine did not apply because, "[a]lthough [plaintiff] presented some evidence that pollutants released before the statutory [limitations] period may have continued to move from [defendant's] property to [plaintiff's] wells [during the limitations period], no evidence substantiates that this resulted from further acts by [defendant]").

Some states, such as New York, do not extend the statute of limitations period, even when the trespass is considered continuing. “[T]he fact that the defendant’s conduct may be characterized as a continuing trespass or nuisance does not delay the commencement of the limitations period” for damages sought “for latent injury to property resulting from the seepage or infiltration of a toxic foreign substance over time.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 709 (2d Cir. 2004). Similarly, Arkansas does not recognize a continuing trespass claim. *See Highland Indus. Park, Inc. v. BEI Def. Sys. Co.*, 357 F.3d 794, 797 (8th Cir. 2004). Other states, such as Ohio, restrict the amount of time that the statute of limitations will be extended. *See Reith v. McGill Smith Punshon, Inc.*, 163 Ohio App. 3d, 2005-Ohio-4852, 840 N.E.2d 226 (although there is a four year statute of limitations for all trespass actions upon real property, “a claim for continuing trespass [to real property] may be brought at any time until the claim has ripened into a presumptive right by adverse possession, which takes 21 years.”)

#### **4. “Intangible” or “Invisible” Trespass**

Although trespass claims traditionally were based on physical invasion by tangible matter, “litigants have pushed the envelope of what constitutes a trespassory invasion of property by asserting trespass claims based on intangible phenomena such as light, noise, electromagnetic fields, and airborne gases.” *Cook*, 273 F. Supp. 2d at 1200. The modern trend is for courts to recognize such claims and allow plaintiffs to recover for invasions of property by intangible or invisible substances, but only when physical damage results. *See Cantrell v. Ashland Inc.*, No. 2003-CA-001784-MR, 2003-CA-001865, 2006 WL 2632567, at \*5 (Ky. Ct. App. Sept. 15, 2006) (“the mere presence of [naturally occurring radioactive material deposited by defendants] on plaintiffs’ properties in above background levels does not, by itself, constitute an injury;” requiring plaintiffs to show actual harm to property); *Mercer v. Rockwell Int’l Corp.*, 24 F. Supp. 2d 735, 741-42 (W.D. Ky. 1998) (“Many . . . courts have allowed trespass claims for invisible particles, but . . . they circumscribe the reach of this rule by requiring actual damage to the property.”); *Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001) (“an intangible intrusion may give rise to [a] claim for trespass, but only if an aggrieved party is able to prove physical damage to the property caused by such intangible intrusion;” holding that plaintiffs failed to state claim against public utility based on alleged intrusion by noise, electromagnetic fields, and radiation waves); *see also, e.g., Bradley*, 709 P.2d at 790 (quoting *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979)); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1540 (D. Kan. 1990) (“the court will adopt the modern view recognized in *Borland* and *Bradley*”); *but see Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222-23 (Mich. Ct. App. 1999) (holding that plaintiff must show “an unauthorized direct or immediate intrusion of a physical, tangible object onto land” to recover in trespass and that, because the intrusions in the case “were intangible things, the trial court erred in allowing the jury to award damages in trespass”).



The modern trend of permitting plaintiffs to bring claims for intangible trespass leads to cases that present the issue of whether an alleged invasion of the plaintiff's property should be characterized as tangible or intangible. This distinction can be important in jurisdictions where a plaintiff asserting an intentional trespass claim for tangible invasion of his property is not required to prove actual harm. *See, e.g., Cook*, 273 F. Supp. 2d at 1175. The *Cook* opinion, which involved trespass claims by landowners for releases of plutonium and other hazardous substances from a nuclear weapons plant, illustrates the fine lines that can be drawn to distinguish between tangible and intangible intrusions. Based on its analysis of two Colorado Supreme Court opinions, the *Cook* court held that "the disposition of pollution (which is after all a tangible matter) onto another's property" is not an intangible intrusion under Colorado law, "even though the pollution is present on the property in a form or at a concentration that is not perceptible to human senses." *Id.* at 1201 (discussing *Pub. Serv. Co.*, 27 P.3d 377, and *Hoery*, 64 P.3d 214). Consequently, the court held that the plaintiffs "need not demonstrate that plutonium and other plant-derived contaminants are present on their properties at levels of toxicological concern or are otherwise causing damage to their properties in order to prevail on their trespass claim." *Id.*; *see also Stevenson v. E.I. Du Pont De Nemours & Co.*, 327 F.3d 400, 405-06 (5th Cir. 2003) (rejecting defendant's argument that Texas trespass law requires direct invasion by tangible matter; holding that plaintiffs were not required to show substantial damage to their property and that their claim for trespass by airborne particulates satisfied requisite showing of "some physical entry upon the land by some 'thing'" (quoting *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 567 (Tex. 1962)). *But see Smith v. Carbide & Chems. Corp.*, 298 F. Supp. 2d 561, 569 (W.D. Ky. 2004) ("trespass by an imperceptible particle or substance, whether intentional or not, is actionable only if actual harm to the property results;" granting summary judgment to defendants on intentional trespass claim involving radioactive contaminants); *Bradley*, 709 P.2d at 791 (requiring plaintiffs to show "actual and substantial damages" for intentional trespass claim based on microscopic, airborne heavy metal particles released from defendant's smelting plant).

### 5. Showing of "Harm"

When a plaintiff is required to show "harm" to prevail on a trespass claim (because he asserts a negligent trespass claim or an invisible trespass claim), courts and litigants have wrestled with the issue of what kind of showing suffices to satisfy the "harm" requirement and whether an intrusion can be too minimal to constitute the requisite harm. For example, the Fourth Circuit has held that the mere presence of TCE in drinking water in concentrations only four times EPA's maximum contaminant level was sufficient to satisfy plaintiffs' burden of proving actual damage for trespass and nuisance purposes. *Carroll v. Litton Sys., Inc.*, 47 F.3d 1164, 1995 WL 56862, at \*6 (4th Cir.) (unpublished table decision) (applying North Carolina law and reversing summary judgment ruling that there can be no cause of action for trespass or nuisance where there is a *de minimus*

intrusion), *cert. denied*, 516 U.S. 816 (1995).

In other trespass lawsuits, defendants have prevailed because plaintiffs have been unable to prove actual harm. For instance, the court granted judgment as a matter of law for defendant in a PCB case after concluding: (a) that “since the substance at issue in this case is completely imperceptible to human senses,” the plaintiffs are required to show harm by “demonstrat[ing] that the amount of PCB’s on their property now are a health hazard”; and (b) that the levels of PCB’s were so low that the plaintiffs failed to make this health hazard showing. *Mercer*, 24 F. Supp. 2d at 745 (negligent trespass claim); *see also Wilhite*, 143 S.W.3d at 621 (holding that “evidence of a minimal presence of PCB’s [on plaintiffs’ properties], in an amount insufficient to present a health hazard” does not satisfy “actual injury” requirement for negligent trespass claim; explaining that plaintiffs’ mere-presence-of-PCB’s argument “would open the proverbial floodgates of litigation, allowing a suit to proceed any time a landowner can show the presence, however minute, of a substance known to be harmful in greater concentrations”); *Smith*, 298 F. Supp. 2d at 573 (granting summary judgment on intentional trespass claim because plaintiffs “concede that they cannot prove contamination at levels that pose a ‘significant health risk’”); *Abundiz v. Explorer Pipeline Co.*, No. Civ.A. 300CV2029H, 2003 WL 23096018, at \*9 (N.D. Tex. Nov. 25, 2003) (granting summary judgment on trespass claim because plaintiffs “provide[d] no evidence that current levels of contaminants on their properties exceed state action levels”);

In an effort to show actual harm, plaintiffs sometimes argue that the presence of contaminants diminishes the value of their property. In some states, that argument would fail because “[d]eferred market value is not harm to the property,” but “is only a means of measuring the harm.” *Mercer*, 24 F. Supp. 2d at 743; *see Wilhite*, 143 S.W.3d at 621 (quoting *Mercer*, 24 F. Supp. 2d at 743); *see also Maddy*, 737 F. Supp. at 1541 (holding that plaintiffs’ “mere allegation of] a general diminution in the value of the property” fails to “demonstrate an injury implicating their right to exclusive possession”); *see generally* Section IV.B., *infra*, “Decreases in Property Value (‘Stigma’ Damages).”

## **6. *Manufacturer’s Post-Sale Liability***

Manufacturers of products generally will not be found liable in trespass where the alleged invasion occurred after the product left the manufacturer’s control. *See City of Bloomington*, 891 F.2d at 615 (affirming dismissal of Indiana law trespass claim against PCB manufacturer; “courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers”); *Union Corp.*, 277 F. Supp. 2d at 496 (quoting *City of Bloomington*, 891 F.2d at 615); *County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 333 (Ct. App. 2006) (affirming denial of leave to amend because land owner’s proposed allegations did not state cause of action for trespass; “where the owner of property voluntarily places a product on

the property . . . the owner cannot prosecute a trespass cause of action against the manufacturer of that product because the owner has consented to the entry of the product onto the land”); *see also Parks*, 995 P.2d at 664; *Ward v. Ne. Tex. Farmers Co-op Elevator*, 909 S.W.2d 143, 151 (Tex. App. 1995), *writ denied* (1996); *Abelman v. Velsicol Chem. Corp.*, No. 12611, slip op. at 11 (Montgomery County, Md. May 17, 1991), *aff’d on other grounds*, No. 1612 (Md. Ct. Spec. App. 1992), *cert. denied*, 619 A.2d 546 (Md. 1993). *But cf. State v. Fermenta ASC Corp.*, 616 N.Y.S.2d 702, 705 (Sup. Ct. 1994) (distinguishing *City of Bloomington* and stating that trespass action can be sustained against product manufacturer if manufacturer “*advised* or directed the act [upon which the trespass claim is based] to be committed [by the user of the product]” (internal quotation marks omitted)); *State v. Fermenta ASC Corp.*, 656 N.Y.S.2d 342, 346 (App. Div.) (affirming finding of trespass liability because manufacturers’ “actions in directing consumers to apply [herbicide] to the soil was substantially certain to result in the entry of [a chemical byproduct of the herbicide] into [plaintiff’s] wells”), *appeal dismissed*, 656 N.Y.S.2d 342 (1997).

## G. Private Nuisance

To state a claim for private nuisance, a plaintiff must demonstrate that:

- (1) He possessed the property;
- (2) His use and enjoyment of that property was invaded by defendant’s conduct; and
- (3) This invasion was either: (a) intentional and unreasonable; or (b) unintentional but otherwise actionable under the rules of negligence, recklessness, or abnormally dangerous activity.

*See* Restatement (Second) of Torts § 822; *see also City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975 (E.D. Wis. 2002) (same). Or, as the Colorado Supreme Court has explained: “Liability for nuisance may rest upon any one of three types of conduct: an intentional invasion of a person’s interest; a negligent invasion of a person’s interest; or, conduct so dangerous to life or property and so abnormal or out-of-place in its surroundings as to fall within the principles of strict liability.” *Hoery*, 64 P.3d at 218; *see also OXY USA, Inc. v. Cook*, 127 S.W.3d 16, 19 (Tex. App. 2003); *Carter v. Monsanto Co.*, 575 S.E.2d 342, 346 (W. Va. 2002). To bring a cognizable claim for private nuisance, a plaintiff is required to have an interest in the real property allegedly affected by the nuisance. *See, e.g., Anderson v. Minn. Dep’t of Natural Res.*, 693 N.W.2d 181, 192 (Minn. 2005) (migratory commercial beekeepers who did not own property near location of pesticide spraying “lacked the requisite property interest to maintain a private nuisance action” for deaths of bees and damages to hives).

Unlike traditional trespass, no physical invasion of the plaintiff's property is required for a private nuisance claim. *See, e.g., Walker Drug. Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1243-45 (Utah 1998). However, the interference with the plaintiff's use and enjoyment of his property usually must be both unreasonable and substantial. *Compare, e.g., Carter*, 575 S.E.2d at 347 (fear of property contamination insufficient), *Walker*, 972 P.2d 1238 (fears regarding contamination of adjacent property insufficient), *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 721, 725-26 (Mich. 1992) (diminution of property values due to negative publicity and unfounded fears insufficient), *Adams v. Star Enters.*, 51 F.3d 417, 422 (4th Cir. 1995) (under Virginia law, fear of contamination coupled with diminution of property value insufficient), and *Carbide & Chems. Corp.*, 298 F. Supp. 2d at 569-73 (fear of imperceptible contaminants insufficient; requiring proof of "contamination at levels that pose a significant health risk" (internal quotation marks omitted)) *with Scheg v. Agway, Inc.*, 645 N.Y.S.2d 687, 688 (App. Div. 1996) (diminution in property value sufficient), *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d at 1205 (recognizing that "courts continue to approve nuisance claims based on actual property contamination and landowners' concerns regarding this contamination, without regard to whether the contamination poses an actual health risk"), *Holland v. United States*, 94 F. Supp. 2d 787, 791-92 (S.D. Tex. 2000) ("fear, apprehension, offense, or loss of peace of mind" can support nuisance claim where alleged nuisance does not result from lawful operation of industry), *aff'd*, 251 F.3d 157 (5th Cir. 2001) (unpublished table decision), and *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 61 (D. Mass. 1999) (diminution in property value and fear for health sufficient); *see also Baker v. Westinghouse Elec. Corp.*, 70 F.3d 951 (1995) (affirming dismissal of Indiana law nuisance claim based on annoyance where plaintiff failed to show "concrete harm").

Moreover, the harm at issue is evaluated based on how a normal person in the community – not a fastidious person or somebody with scientific knowledge – would react. *See Johnson v. Knox County P'ship*, 728 N.W.2d 101, 103 (Neb. 2007). ("To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities." (citations omitted)); *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004) ("A 'nuisance' is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."); *Martin v. Moore*, 561 S.E.2d 672, 677 (Va. 2002) ("not every trifling or imaginary annoyance that may offend the sensibilities of a fastidious person" constitutes actionable nuisance); *Cook*, 273 F. Supp. 2d at 1207-08 (rejecting defense argument that plaintiffs should be required to "prove an actual or verifiable health risk" to satisfy substantial interference with use and enjoyment of their properties because this approach would rely on "the experience and knowledge of the scientific community to determine whether substantial interference has occurred, rather than on the reaction of a member of the community affected by the contamination"). In other words, as one court stated in reversing a nuisance claim brought by plaintiffs

whose properties had low levels of contaminants: “Any annoyance or interference sustained by the landowners here is the result of irrational fear of PCBs. The law does not allow relief on the basis of an unsubstantiated phobia.” *Wilhite*, 143 S.W.3d at 627; *see also* Section III.B., *infra*, “Decreases in Property Value (‘Stigma’ Damages).”

If proved, a nuisance theory will support injunctive relief. *See, e.g.*, Minn. Stat. Ann. § 561.01 (West 2007) (permitting injunctive relief in nuisance action); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472 (6th Cir. 2004) (applying Kentucky law and affirming permanent injunction); *Emerald Dev. Co. v McNeil*, 120 S.W.3d 605, 609 (Ark. Ct. App. 2003) (“Equity will enjoin conduct that culminates in a private or public nuisance where the resulting injury to the nearby property and residents, or to the public, is certain, substantial, and beyond speculation and conjecture.”).

### **1. Intentional Invasion**

An invasion is intentional if the actor “knows that [the invasion] is resulting.” *See* Restatement (Second) Torts § 825(b); *see Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 93 (2d Cir. 2000) (under New York law, “an invasion of another’s interest in the use or enjoyment of land is ‘intentional in origin’ when the actor: (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct”); *see also United Proteins, Inc. v. Farmland Indus. Inc.*, 915 P.2d 80, 85-86 (Kan. 1996). “It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional.” Restatement (Second) of Torts § 825 cmt. c. *Compare Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 552 (Minn. Ct. App. 2003) (evidence that operators of confined-animal feeding facility were aware of operation’s alleged impact on the use and enjoyment of nearby land was sufficient to demonstrate intentional conduct, for purposes of nuisance action) *with Gussack*, 224 F.3d at 94 (small-scale, accidental solvent spills, coupled with “non-obvious theory of causation” with respect to contaminant flow, would not support finding of intentional conduct).

### **2. Unreasonable Invasion**

Section 826 of the Restatement (Second) provides that an invasion is unreasonable if the gravity of the harm outweighs the utility of the conduct. This is essentially a fact-bound inquiry that is very similar to the analysis used to determine whether conduct is abnormally dangerous. Moreover, certain legislative enactments may reflect a crystallization of legal opinion regarding the competing utility and gravity of harm of certain invasions. As a result, some invasions are now deemed unreasonable as a matter of law. *See* Restatement (Second) of Torts § 826 cmt. e.

### **3. Negligence**

A defendant can be held liable on a private nuisance theory, even without having intentionally invaded the plaintiff's property interest, if the nuisance resulted from the defendant's negligence. *See* Restatement (Second) of Torts § 822; *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 691 N.W.2d 658, 674 (Wis. 2005) (*quoting* Restatement (Second) § 822). Thus, "when a nuisance claim is predicated upon negligence, the usual defenses in a negligence action are applicable." *Milwaukee Metro*, 691 N.W.2d at 674.

### **4. Groundwater Contamination Cases**

Section 832 of the Restatement (Second) creates liability for nuisances resulting from the contamination of groundwater. Significantly, comment f to Section 832 indicates that the type of water polluted is important in determining whether the invasion is intentional. The comment notes that pollution of streams, lakes, or surface water is ordinarily considered intentional because the actor "usually knows to a substantial certainty" that the pollution will burden the use and enjoyment of land. However, pollution of subterranean water is generally not considered an intentional invasion because the course of such water is unknown and the actor cannot foresee more than a potential risk of harm. Once the actor determines the flow of the subterranean waters and is thus aware of the risk, any invasion will be deemed intentional. *See* Restatement (Second) § 825 cmt. c.

### **5. Location of Property Affected By Nuisance**

Historically, private nuisance law has been used to "efficiently resolv[e] conflicts between neighboring, contemporaneous land uses." *Patton*, 356 F. Supp. 2d at 932; *see also Cross Oil Co.*, 944 F. Supp. at 792. Thus, in most jurisdictions, an owner of real property cannot hold a prior owner (or occupier) of the same property liable in nuisance for a condition created on the property by the prior owner (or occupier). *See Moore*, 244 F.3d at 1232 (under Oklahoma law, "an action for private nuisance is designed to protect neighboring landowners from conflicting uses of property, not successor landowners from conditions on the land they purchased"); *Phila. Elec. Co. v. Hercules*, 762 F.2d 303, 312-15 (3d Cir.) (applying *caveat emptor* principle and Pennsylvania law to conclude that property owner cannot hold prior owner liable in private nuisance for pollution that was present on property before it was acquired by plaintiff), *cert. denied*, 474 U.S. 980 (1985); *Metro. Water Reclamation Dist. v. Lake River Corp.*, 365 F. Supp. 2d 913, 918-19 (N.D. Ill. 2005) (current owner of property cannot hold former tenant liable in nuisance for activities conducted on property during tenant's occupancy) *aff'd*, 473 F.3d 824 (7th Cir. 2007); *Patton*, 356 F. Supp. 2d at 932 (same); *Degussa*, 280 F. Supp. 2d at 409-10 (nuisance claim by current owner of property does not lie against prior owner); *Lilly Indus.*, 974 F. Supp. at 705-08 (same); *Cross Oil Co.*, 944 F. Supp. at 792-93 (same); *Busch Oil*

Co., 1996 WL 33143114, at \*\*9-10 (same); *Dartron Corp.*, 893 F. Supp. at 741 (same). See also *Rosenblatt*, 642 A.2d at 190-91 (current tenant on property cannot hold prior tenant liable in nuisance for activities conducted on property during prior tenant's occupancy).

A different issue was addressed in *Carroll v. Absolute Tank Removal, LLC*, 834 A.2d 823, 825 (Conn. 2003) (because plaintiff who sued defendant for defectively installing leaking oil tank on plaintiff's property "fail[ed] to allege that the injury to the plaintiff's property originated outside the land affected, [plaintiff did] not state a cause of action for common law nuisance"). However, in California, where "nuisance law is a creature of statute," the statutes "have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by a nuisance created on the owner's property." *Mangini*, 281 Cal. Rptr. at 832. Thus, under California law, "it is not necessary that a nuisance have its origin in neighboring property." *Id.* (holding that owners of property stated cognizable nuisance claim against former tenants for allegedly contaminating property before plaintiffs acquired it); see also *Shamsian v. Atl. Richfield Co.*, 132 Cal. Rptr. 2d 635, 644 (Ct. App. 2003) ("a current possessor of property has a cause of action against a prior possessor who created a nuisance on the property"); *Capogeannis*, 15 Cal. Rptr. 2d at 798 (property owners pleaded cognizable nuisance claims against former owners and tenants for allegedly contaminating property before plaintiffs acquired it); cf. *Galen v. Mobil Oil Corp.*, 922 F. Supp. 318, 323 (C.D. Cal. 1996) (implying that nuisance claim would lie against seller of property in the absence of "as is" language in sales agreement).

## 6. Continuing vs. Permanent Nuisances

Many jurisdictions distinguish between continuing and permanent nuisances, which can be an important issue for statute of limitations purposes. See *Schneider*, 147 S.W.3d at 270-71 & n.14 (citing cases). In 2004, the Texas Supreme Court explained the distinction by focusing on "whether a nuisance is constant, regular, and likely to continue or whether it is sporadic, uncertain, and likely to end." *Id.* at 272. However, the Court acknowledged that "the test used to make the distinction in Texas is fairly unique" and that "[m]ost states define nuisances by looking at the structure of the source [of the nuisance] or the possibility of stopping it." *Id.* at 271. In Missouri, for example, "[i]f the source of the injury can be reasonably and practically abated, it is a temporary nuisance." *Shade v. Mo. Highway & Transp. Comm'n*, 69 S.W.3d 503, 513 (Mo. Ct. App. 2001) (internal quotation marks omitted), modified (2002); see also *Wilhite*, 143 S.W.3d at 625 ("A permanent nuisance is any private nuisance that cannot be corrected or abated at reasonable expense to the owner and is relatively enduring and not likely to be abated voluntarily or by court order."). But see *Schneider*, 147 S.W.3d at 284 ("the characterization of a nuisance as temporary or permanent should not depend on whether it can be abated"); *id.* at 289 ("virtually any nuisance can be said to be abatable").

An action for permanent nuisance accrues when a substantial, actionable injury becomes reasonably ascertainable. *See Shade*, 69 S.W.3d at 513 (cause of action for permanent nuisance accrues “when the effect of the injury becomes manifest”). By contrast, under a continuing nuisance theory, a new cause of action accrues each day the property invasion continues, whether by migration of additional pollutants onto the plaintiff’s property or the continued presence of pollutants on his property. *See Hoery*, 64 P.3d at 223 (“Under Colorado law, a tortfeasor’s liability for continuing trespass and nuisance creates a new cause of action each day the property invasion continues.”); *Shamsian*, 132 Cal. Rptr. 2d at 645 (“if a nuisance is continuing, the persons harmed by it may bring successive actions for damages until the nuisance is abated” (internal quotation marks omitted)); *see also Jacques v. Pioneer Plastics Inc.*, 676 A.2d 504, 508 (Me. 1996); *Williams v. Amoco Prod. Co.*, 734 P.2d 1113 (Kan. 1987); *Silvester v. Spring Valley Country Club*, 543 S.E.2d 563, 567 (S.C. Ct. App.), *cert. denied* (2001). However, under New York law, “the fact that the defendant’s conduct may be characterized as a continuing trespass or nuisance does not delay the commencement of the limitations period” for damages sought “for latent injury to property resulting from the seepage or infiltration of a toxic foreign substance over time.” *Bano*, 361 F.3d at 709.

Plaintiffs may usually elect whether to pursue a permanent or continuing nuisance cause of action. *See Bartleson v. United States*, 96 F.3d 1270, 1274 (9th Cir. 1996) (“California law allows the plaintiff to choose whether to treat a particular nuisance as permanent or continuing”); *see also, e.g., Arcade Water Dist. v. United States*, 940 F.2d 1265 (9th Cir. 1991); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Sunnyside Feed Co. v. City of Portage*, 588 N.W.2d 278 (Wis.), *review denied*, 589 N.W.2d 630 (1998) (unpublished table decision). *But see Schneider*, 147 S.W.3d at 281. However, if a continuing nuisance cause of action is pursued, plaintiffs may only recover for damages incurred during the period within the statute of limitations. *See Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 107 (Mo. Ct. App. 2005) (“similar to a continuing trespass theory, the plaintiffs’ recovery for a temporary nuisance is limited to those damages that accrued within the relevant limitations period immediately preceding the lawsuit.”); *see also Bolin*, 759 F. Supp. at 698-99; *Taylor v. Culloden Pub. Serv. Dist.*, 591 S.E.2d 197, 205 n.21 (W. Va. 2003). For example, if property damage is claimed, plaintiffs may receive depreciation of rental or other usable value during the period within the statute of limitations. *Bolin*, 759 F. Supp. at 699. Yet a continuing nuisance claim permits the plaintiff to pursue successive actions without the threat of claim preclusion. *Arcade Water Dist.*, 940 F.2d at 1269; *see also DeSoto Fuels*, 169 S.W.3d at 107 (“for a temporary nuisance, much like a continuing trespass, the continuance of the nuisance each day is considered a repetition of the original wrong, and successive actions accrue as to each injury.”)

Although the continuing cause of action theory allows plaintiffs to avoid statute of limitations and preclusion problems, it imposes a substantial additional



burden of proof upon plaintiffs in jurisdictions that require plaintiffs to establish that the injury is “reasonably abatable.” See *Mangini*, 912 P.2d at 1227-30; *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1072 (C.D. Cal. 2003) (quoting *Mangini*, 912 P.2d at 1227); *Jacques*, 676 A.2d at 507-08. An abatable nuisance is one which is “actually and practically abatable by reasonable measures and without unreasonable expense.” *Mangini*, 912 P.2d at 1226; see also Restatement (Second) § 839 cmt. f (defining an “abatable physical condition” as “one that reasonable persons would regard as being susceptible of abatement by reasonable means”). Under this standard, it is not enough to show that there is technology available which is capable of remedying the contamination. Plaintiffs may be required to establish the extent of the contamination and the costs of decontamination. *Mangini*, 912 P.2d at 1220; *Castaic*, 272 F. Supp. 2d at 1072. In *Mangini*, for example, the California Supreme Court found fatal the admission by plaintiffs’ expert and counsel that “nobody really knows” the extent of the contamination or the cost to remedy it. 912 P.2d at 1220. Plaintiffs may also be required to demonstrate that defendant has sufficient control over the source of the nuisance to be able to abate it. See, e.g., *Dine v. W. Exterminating Co.*, No. 86 1857 OG, 1988 WL 25511, at \*9 (D.D.C. Mar. 9, 1988) (“the circumstances of this case lack an essential element of the nuisance theory – the power to abate the nuisance”); *Clark v. Greenville County*, 437 S.E.2d 117, 119 (S.C. 1993) (“the trial judge correctly ruled the corporate respondents could not be liable for nuisance because they had no control over the property allegedly used as a nuisance”); *Abelman v. Velsicol Chem. Corp.*, No. 12611, slip op. at 12 (Montgomery County, Md. May 17, 1991) (“defendant in this case lacks an essential element of the nuisance theory – the power to abate the nuisance”), *aff’d on other grounds*, No. 1612 (Md. Ct. Spec. App. 1992), *cert. denied*, 619 A.2d 546 (Md. 1993).

## **7. Manufacturer’s Post-Sale Liability**

As with trespass, a manufacturer usually is not liable for a nuisance created by a product once it has left the manufacturer’s control. See *City of Bloomington*, 891 F.2d at 614 (affirming dismissal of nuisance claim under Indiana law because pleadings did not show that PCB manufacturer “retained the right to control the PCBs beyond the point of sale” or “participated in carrying on the nuisance”); see also, e.g., *E.S. Robbins Corp. v. Eastman Chem. Corp.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995) (under Alabama law, supplier of chemical product was not liable for common carrier’s spills at manufacturing plant under nuisance theory where supplier had no control over off-loading of product); *Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1582 (S.D. Ga. 1992) (manufacturer and seller of chemicals not liable in nuisance after buyer accidentally released chemicals); *Parks*, 995 P.2d at 666-67 (holding that defendant should “bear no liability” in nuisance because defendant “did not ‘erect a nuisance’ by delivering gasoline to [the service station’s] leaking tanks” and because defendant “did not control either [the] tanks or the fuel when the contamination of [plaintiff’s] groundwater occurred”); *Ward*, 909 S.W.2d at 151

(declining to impose nuisance liability on manufacturer of nondefective product based on purchaser's later improper use). *But see In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 844-48 (N.D. Ill. 2002) (plaintiff corn farmers properly stated nuisance claim against manufacturer of genetically modified corn); *Northridge Co. v. W. R. Grace & Co.*, 556 N.W.2d 345, 351-52 (Wis. Ct. App.), *review denied*, 560 N.W.2d 274 (Wis. 1996) (unpublished table decision) (affirming nuisance verdict against asbestos manufacturer despite its lack of control over plaintiffs' property where asbestos was located based on principle that "manufacturers can be liable for a nuisance long after they relinquish ownership or control over their polluting products"); *Suffolk County Water Auth. v. Union Carbide Corp.*, No. 90-14163 (N.Y. Sup. Ct. June 13, 1991) (holding that anyone who participates in creation of nuisance can be sued and that control over product at issue is not necessary); *Jones v. Stegman*, No. 18111/84, slip op. (N.Y. Sup. Ct. Nov. 2, 1990) (sending nuisance claim against manufacturer to jury; defense verdict obtained), *aff'd*, 625 N.Y.S.2d 934 (App. Div. 1995). A manufacturer can be held liable for a private nuisance caused by its product if the manufacturer was aware of the injurious use and participated to some extent in that use. *In re StarLink Corn*, 212 F. Supp. 2d at 845 ("one can be liable for nuisance 'not only when he carries on the activity but also when he participates to a substantial extent in carrying it on'" (quoting Restatement (Second) of Torts § 834)).

## H. Public Nuisance

Section 821B(1) of the Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Public nuisance claims generally "are brought to abate an activity which adversely affects the public health, safety, or welfare or an unreasonable interference with a right common to the general public." *New Mexico*, 335 F. Supp. 2d at 1236 (internal quotation marks omitted). Unlike a private nuisance claim, a claim "for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property rights." *Phila. Elec. Co.*, 762 F.2d at 315 (applying Pennsylvania law); *see also StarLink Corn*, 212 F. Supp. 2d at 844 n.12 (unlike private nuisance, "a public nuisance does not necessarily involve interference with use or enjoyment of land" (quoting Restatement (Second) of Torts § 821B, cmt. h)); *Milwaukee Metropolitan Sewerage Dist.*, 691 N.W.2d at 670 ("the interest involved in a public nuisance is broader than that in a private nuisance because 'a public nuisance does not necessarily involve interference with use and enjoyment of land'" (quoting Restatement (Second) of Torts § 821B, cmt. h)).

Factors to be considered in determining whether an interference with a public right is unreasonable include whether the conduct:

- involves a significant interference with the public health, safety, peace, comfort, or convenience;
- is proscribed by statute, ordinance, or administrative regulation; and
- is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) § 821B(2). Unlike a private nuisance claim, a public nuisance claim does not necessarily require a showing of negligence or intentional conduct by the defendant. *See, e.g., Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 793 (Wis. 2002) (“although either negligent or intentional conduct can result in maintenance of a public nuisance, liability for maintaining a public nuisance is predicated on the existence of the public nuisance itself”). Although public nuisance is a common law claim, some states also have enacted statutes that address certain kinds of public nuisance claims. *See, e.g., New Mexico*, 335 F. Supp. 2d at 1241-42 (discussing state’s public nuisance statutes).

To prevail on a public nuisance claim, an individual plaintiff must establish not only the existence of a public nuisance, but also the type of harm sufficient to give him standing to sue. *See Frey v. EPA*, 270 F.3d 1129, 1137 (7th Cir. 2001) (Indiana law); *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 53 (N.C. Ct. App. 2002), *review denied*, 577 S.E.2d 628 (N.C. 2003). This means the plaintiff must demonstrate that the harm to him is different from the harm suffered by the general public. *See Frey*, 270 F.3d at 1137; *Phila. Elec. Co.*, 762 F.2d at 315; *Mercury Skyline Yacht Charters v. Dave Mathews Band, Inc.*, No. 05-C-1698, 2005 U.S. Dist. LEXIS 29663, at \*44 (N.D. Ill. Nov. 22, 2005); *New Mexico*, 335 F. Supp. 2d at 1239-40; *Johnson v. Bryco Arms*, 304 F. Supp. 2d 383, 392 (E.D.N.Y. 2004); *Russell Corp. v. Sullivan*, 790 So. 2d 940, 951-52 (Ala. 2001); *Concerned Citizens of Cedar Heights-Woodchuck Hill Rd. v. DeWitt Fish & Game Club, Inc.*, 755 N.Y.S.2d 192 (App. Div.), *appeal denied*, 791 N.E.2d 961 (N.Y. 2003).

A public nuisance that causes physical harm to the plaintiff or physical harm to his land or chattels is usually sufficient to confer standing. *See* Restatement (Second) § 821C cmt. c. Thus, a plaintiff claiming personal injury in the form of disease or emotional distress likely will have standing. It is not as clear, however, whether damages such as diminution in property value or loss of water supply will be found sufficiently distinct to confer standing. Indeed, the Restatement notes that standing will not be conferred where pecuniary loss is common to the entire community and the plaintiff merely suffers it to a greater degree. *See* § 821C cmt. h; *see also Allen v. Gen. Elec. Co.*, No. 2001/03711, 2003 WL 22433809 (N.Y. Sup. Ct. Sept. 17, 2003), *aff’d*, 790 N.Y.S.2d 897 (App. Div.), *appeal dismissed*, 835 N.E.2d 662 (N.Y. 2005 (unpublished table decision)). *But*

*cf. Lewis*, 37 F. Supp. 2d at 61 (denying motion to dismiss public nuisance claim because plaintiff alleged that contamination of the neighborhood “constitutes an interference with public health and environment and that plaintiff’s inability to sell her property represents special injury”); *Booth v. Hanson Aggregates N.Y., Inc.*, 791 N.Y.S.2d 766, 767-68 (App. Div. 2005) (plaintiffs stated cognizable public nuisance claim because they “own wells on their properties and have alleged an injury that is different in kind from property owners in the community who have a public supply of water”); *Nalley v. Gen. Elec. Co.*, 630 N.Y.S.2d 452, 458 (Sup. Ct. 1995) (loss of sale of property due to existence of polluted site nearby created issue of fact regarding special damages sufficient to withstand summary judgment on public nuisance claim).

Although causation may be relatively easy for plaintiffs to establish in most public nuisance cases, causation can become an insurmountable hurdle when plaintiffs bring wide-ranging claims that attempt to hold defendants liable for pervasive industry-wide conduct extending over many years. For example, a dismissal of Chicago’s public nuisance lawsuit against manufacturers and sellers of lead-based paint was affirmed because, *inter alia*, the appellate court held that the city had failed to establish causation in fact and proximate cause. *See City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 135-36 (Ill. App. Ct.), *appeal denied*, 833 N.E.2d 1 (Ill. 2005) (unpublished table decision) (“plaintiff has not identified any specific manufacturer’s product at any specific location” and plaintiff is impermissibly attempting to “mak[e] each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many”); *id.* at 139 (“We therefore hold that the conduct of defendants in promoting and lawfully selling lead-containing pigments decades ago, which was subsequently lawfully used by others, cannot be a legal cause of plaintiff’s complained-of injury, where the hazard only exists because Chicago landowners continue to violate laws that require them to remove *deteriorated* paint.”). *But cf. City of Milwaukee v. NL Indus., Inc.*, 2005 WI App 7, 278 Wis. 2d 313, 691 N.W.2d 888, 894-95 (reversing summary judgment entered in favor of companies who marketed and sold lead-based paint because “there are disputed material facts concerning the extent of both defendants’ sales in Milwaukee and whether those sales were a substantial cause of the alleged nuisance”; deferring analysis of defendants’ “public policy concerns” because they “are more appropriately addressed after trial, based on a complete factual record”).

## **I. Premises Liability**

A plaintiff’s principal theory of liability against a premises defendant is often ordinary negligence – that the property owner breached a duty of reasonable care to keep its premises in a safe condition or failed to warn about latent or concealed dangers that the owner knew or should have known existed on the premises.

Premises liability originated in the leading English case of *Indermaur v. Danes*, 1866 WL 8190 (CCP), (1865-66) LR 1 C.P. 274. *Indermaur* established the common law rule under which a property owner has an affirmative duty to protect an “invitee” from dangers known to exist or that were discoverable through the exercise of reasonable care. Section 343, and related sections 343A and 341A, of the Restatement (Second) of Torts set forth a premises owner’s common law duty of care regarding conditions on the premises that cause harm to persons. Restatement (Second) of Torts §§ 341, 343. The law of premises owner liability applies in cases ranging from the peculiar, *Jacob v. Caesars Entm’t, Inc.*, No. 05-0805, 2007 WL 594714 (E.D. La. Feb. 21, 2007) (wrongful death claim arising from alleged exposure to bacterial virus contracted from fallen ceiling tile while playing poker), to mass tort actions arising from terrorist attacks and subsequently alleged toxic injuries. *In re World Trade Ctr. Disaster Site Litig.*, 456 F. Supp. 2d 520, 571 (S.D.N.Y. 2006) (rescue and recovery workers alleging injury from toxic fumes against leasehold defendants); *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 298-301 (S.D.N.Y. 2003) (holding that “plaintiffs should not be foreclosed from being able to prove that defendants [Port Authority] failed to exercise reasonable care to provide a safe environment for occupants and invitees with respect to reasonably foreseeable risks”).

Plaintiffs continue to target premises owners in lawsuits alleging injury from exposure to toxic substances. *See, e.g., Talevski v. Carter*, No. 2:05-CV-184, 2006 WL 276927 (N.D. Ind. Feb. 1, 2006) (deputy prosecutor alleging respiratory illness from toxic exposure to mold detected in prosecutor’s offices); *Rehm v. Navistar Int’l*, No. 2002-CA-001399, 2005 WL 458713 (Ky. Ct. App. Feb. 25, 2005) (finding multiple premises owners immune to liability pursuant to Kentucky’s “up-the-ladder” statute where plaintiff contractor employee’s work, which included maintenance of plant production equipment and machinery, was a regular or recurrent part of the owners’ businesses); *Dyall v. Simpson Pasadena Paper Co.*, 152 S.W.3d 688 (Tex. App. 2004) (requiring plaintiff to prove owner had control over work performed and actual knowledge of danger resulting in injury from inhaling chlorine dioxide); Complaint, *Brengle v. A.O. Smith*, No. BC347342 (Cal. Super. Ct. Feb. 10, 2006) (alleging defendants controlled premises on which hazardous manganese welding fumes were released during work of various independent contractors and owners’ employees). Recently, the Supreme Court of California “modified” the “usual rules about [premises owner] liability,” ruling that even if an owner does not retain control over the work of an independent contractor, tort liability may be imposed if the owner knows or reasonably should know of a concealed hazard which the contractor does not know of or could not reasonably ascertain, provided the owner fails to warn the contractor. *Kinsman v. Unocal Corp.*, 123 P.3d 931, 940-41 (2005); *see also Plock v. Crossroads Joint Venture*, 475 N.W.2d 105, 118-20 (Neb. 1991) (holding premises owner required to warn independent contractor or his employees of latent defects); *Glenn v. U.S. Steel Corp.*, 423 So. 2d 152, 154 (Ala. 1982) (holding premises owner has duty to warn independent contractor of hidden dangers).

Some states base the duty of care owed by a premises owner upon the status of the injured plaintiff (*i.e.*, invitee, licensee, or trespasser). *See, e.g., Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 858 N.E. 2d 699, 707-08 (Mass. 2006) (holding that county owed common-law duty of reasonable care to all lawful visitors to and occupants of the courthouse in a case alleging asbestos exposure during uncontrolled abatements); *Huxoll v. McAlister's Body & Frame, Inc.*, 129 S.W.3d 33 (Mo. Ct. App. 2004); *O'Donnell v. Garasic*, 676 N.W.2d 213 (Mich. Ct. App. 2003), *appeal denied*, 682 N.W.2d 90 (Mich. 2004) (unpublished table decision). Several jurisdictions have adopted a single standard of liability that requires a landowner "to maintain reasonably safe conditions in view of all of the circumstances, 'including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.'" *Paulison v. Suffolk County*, 775 F. Supp. 50, 53 (E.D.N.Y. 1991) (citations omitted); *see also Richards v. Meeske*, 675 N.W.2d 707, 718 (Neb. Ct. App. 2004) ("owners and occupiers of land must exercise reasonable care toward all lawful visitors"), *aff'd in part, rev'd in part*, 689 N.W.3d 337 (Neb. 2004) (citing *Heins v. Webster County*, 552 N.W.2d 51 (Neb. 1996)). Recently, New York's highest court agreed with defendants concerned about the "specter of limitless [tort] liability" and ruled that the New York Port Authority had no duty to protect an employee's wife from known asbestos health hazards. *In re N.Y. City Asbestos Litig.*, 840 N.E.2d 115, 119-120 (N.Y. 2005). In contrast, a Louisiana Court of Appeals recognized "the novelty of the duty" it imposed and the "lack of Louisiana cases on point," when it ruled that a premises owner owed "a general duty to act reasonably in view of the foreseeable risks of danger" to a plaintiff exposed during childhood to household asbestos from his father's work clothes. *Zimko v. Am. Cyanamid*, 03-0658 (La. App. 4 Cir. 6/8/05); 905 So. 2d 465, 482-83. The same Court of Appeals expanded the liability of premises owners yet again, finding "an ease of association" between the circumstances of the plaintiff's asbestos disease and her husband's work as a pipefitter, and concluding that "public policy" and "moral, social and economical factors" all "weigh[ed] in favor of imposing a duty." *Chaisson v. Avondale Indus., Inc.*, 05-1511 (La. App. 4 Cir. 12/20/06); 947 So. 2d 171, 183-89.

The pivotal issue of foreseeability often determines whether courts will impose liability on a premises owner for injury-causing conditions. *See generally Houston County Health Care Auth. v. Williams*, 961 So.2d 795 (Ala. 2007) (holding that premises owner's knowledge as it varied over time was relevant to foreseeability of harm and thus liability for injury from contamination during implant surgery); *Olivo v. Exxon Mobil Corp.*, 895 A.2d 1143 (N.J. 2006) (holding that defendant owed a duty to independent contractor's wife injured off of the premises by "take-home" asbestos); *Exxon Mobil Corp. v. Altimore*, -- S.W.3d. -- , 2007 WL 1174447, at \*9-10 (Tex. App. April 19, 2007) (distinguishing *Olivo* and rejecting plaintiff's foreseeability argument that knowledge of a risk of harm to someone creates a duty of care to everyone); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005) (finding no liability based on foreseeability for exposure to persons outside the premises workplace); *Beck*

v. *J.J.A. Holding Corp.*, 785 N.Y.S.2d 424, 426 (App. Div. 2004) (“incumbent upon plaintiff to show that defendant either created, or had actual or constructive notice of, the mold hazard”), *appeal denied*, 2005 WL 377223 (N.Y. 2005) (unpublished table decision); *Stelly v. Barlow Woods, Inc.*, 830 F. Supp. 936 (S.D. Miss. 1993), *aff’d*, 47 F.3d 427 (5th Cir. 1995) (unpublished table decision); *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844, 846-47 (10th Cir. 1992) (applying Oklahoma law); *Herrera v. Flemming Cos.*, 655 N.W.2d 378 (Neb. 2003) (foreseeability is a factor in determining landowner’s exercise of reasonable care).<sup>11</sup>

The general rule is that premises owners do not have a duty to provide a safe work environment to employees of an independent contractor. *See, e.g., Rudy v. A-Best Prods. Co.*, 870 A.2d 330 (Pa. Super. Ct.) (holding peculiar risk and superior knowledge exceptions to general rule of no liability were not satisfied where hazard was common risk of work and plaintiff had substantial knowledge of risk of hazard), *appeal denied*, 885 A.2d 533 (Pa. 2005) (unpublished table decision); *Dyall*, 152 S.W.3d at 697 (applying Texas Civil Practice & Remedy Code § 95.003 (Vernon 2004) to find owner “not generally subject to liability . . . because the owner had no duty to see that an independent contractor performed his work in a safe manner”); *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 961 (Ind. 2005) (“no liability to an independent or contractor’s employee for injuries sustained while addressing a condition as to which the landowner has no superior knowledge”); *Kamla v. Space Needle Corp.*, 52 P.3d 472, 477 (Wash. 2002) (*en banc*) (prime responsibility for ensuring safety of workers is on the general contractor, not the job site owner). *But see Messer v. Cerestar USA, Inc.*, 803 N.E.2d 1240, 1244 (Ind. Ct. App. 2004) (“owner has a duty to maintain the property in a reasonably safe condition for business invitees, including employees of independent contractors”).

However, a premises owner may be liable if evidence shows the owner retained sufficient control of the work conducted on the premises. *See, e.g., In re Benzene Litig.*, Nos. 05C-09-020-JRS(BEN), 06C-05-295-JRS(BEN), 2007 WL 625054 (Del. Super. Ct. Feb. 26, 2007) (holding that circumstances related to latency dictate the particularity with which plaintiff must identify the premises upon which alleged toxic exposure occurred as a prerequisite to imposing liability based on retained control); *Palermo v. Port of New Orleans*, Nos. 2004-CA-1804, 2004-CA-1805, 2004-1804 (La. App. 4 Cir. 1/19/07); 951 So. 2d 425 (holding premises owner owed no duty where lessee assumed complete responsibility for property and there was no evidence that the owner knew or should have known of the dangerous condition); *Thomas v. A.P. Green Indus.*,

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<sup>11</sup>The Supreme Court of Texas “weighed . . . foreseeability” and other factors in declining to impose a duty on silica product suppliers to directly warn contractor employees of abrasive blasting health hazards. *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 182-83 (Tex. 2004). The Court found that “shifting responsibility away from operators [to suppliers] might lessen even further their incentives to provide a safe working environment” and “it would be a perverse result if the responsibility for injury fell solely on those doing the least harm – suppliers who sold flint in bags.” *Id.* at 194.

*Inc.*, 2005-1064 (La. App. 4 Cir. 5/31/06); 933 So. 2d 843 (holding premises owner liable because independent contractor was owner's agent with complete control over entire construction project); *Stovall v. Universal Constr. Co.*, 893 So. 2d 1090, 1096-98 (Ala. 2004) (general contractor not in possession or control of premises owes no duty to subcontractor employees); *Wajer v. Baltimore Gas & Elec. Co.*, 850 A.2d 394, 404 (Md. Ct. Spec. App.) (finding owner's right to require conformity with contract specifications and construction plans did not constitute sufficient control over contractor employees to trigger liability), *cert. denied*, 857 A.2d 1131 (Md. 2004) (unpublished table decision); *Laico v. Chevron U.S.A., Inc.*, 20 Cal. Rptr. 3d 307, 320 (Ct. App. 2004) ("illogical and unfair" to impose liability absent evidence of owner's control over work as distinguished from knowledge of working conditions involving benzene exposure); *Marchevka v. DeBartola Capital P'ship*, 771 N.Y.S.2d 524, 525 (App. Div. 2004) ("Under New Jersey law, a landowner has no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work, provided that the landowner does not retain control over the means and methods of the execution of the project.") (citing *Muhammad v. N.J. Transit*, 821 A.2d 1148 (N.J. 2003)); *Rogstad v. Dakota Gasification Co.*, 623 N.W.2d 382 (N.D. 2001); *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999) (*per curiam*) (holding that premises owner can be liable if owner either contractually retains or actually exercises control over the independent contractor's work); *Winningham v. N. Am. Res.*, 812 F. Supp. 1460 (S.D. Ohio 1992), *modified on other grounds*, 42 F.3d 981 (6th Cir. 1994).

Work-related injuries are often covered by state worker's compensation systems that preempt a right to sue employers for damages. *See, e.g., Wedeck v. Unocal Corp.*, 69 Cal. Rptr. 2d 501 (Ct. App. 1997) (temporary worker was a special employee of premises owner under worker's compensation scheme and therefore barred from bringing tort action). However, a premises owner may be liable for damages if the injury is not covered by an applicable worker's compensation statute. *Marlin v. Bill Rich Constr., Inc.*, 482 S.E.2d 620, 629 (W. Va. 1996) (finding state worker's compensation statute does not cover fear of contracting pneumoconiosis after exposure to asbestos and allowing the case to proceed against premises owner).<sup>12</sup>

In some states, tort reform measures have clarified the nature and scope of liability of a premises owner to employers of independent contractors. *See Tex. Civ. Prac. & Rem. Code Ann. § 95.003* (Vernon 2006); *CHI Energy v. Urias*, 156 S.W.3d 873, 878-80 (Tex. App. 2005) ("the legislature, following years of Texas jurisprudence, intended to limit the liability of owner or operator for

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<sup>12</sup>Despite worker's compensation statutes that generally bar employee personal injury lawsuits against employers, cases alleging toxic exposure to mold and chemical sensitivity in the workplace represent attempts to expand the concept of premises owner liability. *See, e.g., Burnley v. City of San Antonio*, No. A.SA-02-CA0489NN, 2004 WL 298709 (W.D. Tex. Jan. 6, 2004) (alleging respiratory condition from exposure to building-borne molds); *Meyer v. Chapel Hill Acad.*, No. CV-03-366, 2003 WL 23864633 (D. Minn. June 10, 2003) (alleging negligence based on exposure to mold and toxins).



injuries to” independent contractor employees); *see also Phillips v. Dow Chem. Co.*, 186 S.W.3d 121 (Tex. App. 2005). Similarly, Ohio law now provides that a premises owner is not liable for injury resulting from asbestos exposure where the contractor was hired prior to January 1, 1972, unless the owner directed the activity that caused injury or gave or denied permission for the critical acts that resulted in injury. Ohio Rev. Code Ann. § 2307.941(A)(3)(b) (Baldwin 2007). In cases where the owner hired the contractor after January 1, 1972, there is no liability absent a showing that the owner intentionally violated an established safety standard in effect at the time of exposure and that such violation proximately caused the plaintiff’s injury. *Id.* at § 2307.941(A)(3)(c). Under a Mississippi tort reform statute, no premises owner shall be “liable for death or injury of an independent contractor or an independent contractor’s employees resulting from dangers of which the contractor knew or reasonably should have known.” Miss. Code Ann. § 11-1-66 (West 2006).

### III.

## SPECIAL DAMAGES

### A. Medical Monitoring

Some states allow plaintiffs to sue for “medical monitoring” – generally consisting of the alleged cost of future periodic medical examinations necessary to detect the onset of physical harm – even in the absence of manifested physical injury. *See Redland Soccer Club, Inc. v. Dep’t of the Army*, 696 A.2d 137, 144 (Pa. 1997); *see also In re Welding Fume Products Liability Litig.* 245 F.R.D. 279, 285 (N.D. Ohio 2007) (declining to certify class of welders from multiple states with no present injury seeking medical monitoring, but noting that all eight states at issue did not require that plaintiff suffer an existing injury to obtain medical monitoring); *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 73 (W. Va. 2003) (certifying state-wide class of prescription drug users seeking court-supervised medical monitoring program); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977 (Utah 1993) (“Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself and the concomitant need for medical testing constitute the injury.”); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 821 (Cal. 1993) (“In the context of a toxic exposure action, a claim for medical monitoring seeks to recover the cost of further periodic medical examinations intended to facilitate early detection and treatment of disease caused by plaintiff’s exposure to toxic substances.”); *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984) (“It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury.”).

Although the U.S. Supreme Court rejected medical monitoring claims under the Federal Employers' Liability Act, *see Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 443-44 (1997), a number of states continue to recognize such a cause of action under state law. *See, e.g., Petito v. A. H. Robins Co.*, 750 So. 2d 103, 106 (Fla. Dist. Ct. App. 1999) (distinguishing *Buckley* holding as based on FELA and on the grounds that a court's imposition of limitations on the remedy would assuage the *Buckley* Court's concern regarding the depletion of funds needed for persons who actually suffer physical injuries), *review denied*, 780 So. 2d 912 (Fla. 2000) (unpublished table decision).

Courts applying the law of at least fourteen jurisdictions – Arizona, California, Colorado, the District of Columbia, Florida, Maryland, Missouri, New Jersey, New York, Ohio, Pennsylvania, Utah, Vermont, and West Virginia – have permitted plaintiffs to seek medical monitoring relief, despite the absence of any manifest, physical injury.<sup>13</sup> However, courts applying Alabama, Kansas,

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<sup>13</sup>*In re Aredia and Zometa Products Liability Litigation*, No. 06-1760, 2007 WL 3012972, at \*1 (M.D. Tenn. October 10, 2007) (declining to certify a multi-state class of prescription drug users seeking medical monitoring but noting 13 jurisdictions that have allowed medical monitoring); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33-34 (Ariz. Ct. App. 1987) (residents of trailer park near asbestos mill were entitled to recover future medical monitoring costs despite lack of any present, manifest, physical injury); *Potter*, 863 P.2d at 823 (recognizing claim for “medical monitoring” as a recoverable form of damages in a negligence claim, despite absence of present, physical injury); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1476-77 (D. Colo. 1991) (predicting that “Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring,” but that plaintiffs were required to allege exposure to toxic substance); *Friends for All Children*, 746 F.2d at 824-25 (predicting that District of Columbia would recognize medical monitoring claim despite absence of physical injury); *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 466-67 (D.D.C. 1997) (same); *Petito*, 750 So. 2d at 105-06 (recognizing medical monitoring claim as independent cause of action, despite absence of present, physical injury); *In re MTBE Prods. Liab. Litig.*, 457 F. Supp. 2d 298 (S.D.N.Y.), *aff'd on reh'g*, No. Master File 1:00-189, MDL 1358 (SAS), M 21-88, 2006 WL 1816308, at \*2-\*3 (S.D.N.Y. Apr. 7, 2006) (predicting Maryland courts would recognize cause of action for medical monitoring notwithstanding *Angeletti* court's refusal to decide issue); *Meyer ex rel. Coplin v. Fluor Corp.*, No. SC 87771, 2007 WL 827762, at \*4 (Mo. Mar. 20, 2007) (medical monitoring available as a remedy under Missouri law); *Ayers v. Twp. of Jackson*, 525 A.2d 287 (N.J. 1987) (holding that the “cost of medical surveillance 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.”); *Sinclair v. Merck & Co.*, 913 A.2d 832 (N.J. Super. Ct. App. Div. 2007) (reversing trial court's rejection of medical monitoring at pleadings stage in pharmaceutical products case and permitting plaintiffs to develop case); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (App. Div. 1984) (acknowledging that “medical monitoring” damages could be recoverable in tort action where only “physical injury” was “the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body setting in motion the forces which eventually result in disease”); *Day v. NLO*, 851 F. Supp. 869, 881 (S.D. Ohio 1994) (applying Ohio law and holding that it is “sufficient for the Plaintiffs in the case at bar to show by expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring”); *Redland*, 696 A.2d at 137 (recognizing medical monitoring as an independent cause of action, despite absence of manifest, physical injury); *Hansen*, 858 P.2d at 978-80 (permitting claim for medical monitoring in absence of present, physical injury); *Stead v.*

Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Oregon, South Carolina, Texas, Virginia, Virgin Islands, and Washington law have reached a different conclusion, holding that plaintiffs without present, physical injuries cannot obtain medical monitoring relief.<sup>14</sup>

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*F.E. Meyers Co.*, 785 F. Supp. 56 (D. Vt. 1990) (permitting plaintiffs' expert to testify concerning future risk of cancer because testimony was relevant to claim for medical monitoring costs); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) (permitting medical monitoring claim, despite absence of any present, manifest, physical injury).

<sup>14</sup>*See Hinton v. Monsanto Co.*, 813 So. 2d 827, 831-32 (Ala. 2001) (Alabama law does not recognize cause of action for medical monitoring based on alleged exposure to hazardous substance absent present, physical injury); *Houston County Health Care Auth. v. Williams*, No. 1021253, 2007 WL 80797, at \*\*11-12 (Ala. Jan. 12, 2007) (same); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522-23 (D. Kan. 1995) (dismissing separate medical monitoring count for failure to state a claim under Kansas law but allowing plaintiff to pursue medical monitoring relief for his other claims, which alleged existing physical injuries); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 856 (Ky. 2002) (declining to recognize cause of action for medical monitoring based on alleged exposure to hazardous substance absent present, physical injury); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686 (Mich. 2005) (reversing circuit court order and remanding for entry of summary disposition for defendant; plaintiffs' medical monitoring claim was not premised on present injury and thus was not a viable negligence claim under Michigan law); *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396 JRTFLN, 2004 WL 45504, at \*8 (D. Minn. Jan. 5, 2004) (stating that Minnesota "recognize[s] a claim for medical monitoring, but impose[s] an 'injury' requirement"), *rev'd and remanded on other grounds*, 425 F.3d 116 (8th Cir. 2005); *Paz v. Brush Engineered Materials, Inc.*, 2006-FC-00771-SCT (Miss. 2007) (refusing to recognize action for medical monitoring without present injury); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) ("Entitlement to the costs of future medical monitoring requires plaintiff to prove an actual present injury and an increased risk of future harm.") (citation omitted); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (holding that plaintiffs, who sought medical monitoring relief without asserting any present physical injury, "have not asserted a cognizable medical monitoring claim under Nebraska law"); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001) (holding that Nevada common law does not recognize independent cause of action for medical monitoring, but that medical monitoring might be available as a remedy in an otherwise viable cause of action); *Galaz v. United States*, 175 F. App'x 831, 832 (9th Cir. 2006) (same); *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at \*\*51-52 (W.D.N.C. Oct. 29, 1990) (predicting North Carolina law and holding that medical monitoring claims are not cognizable under North Carolina law absent present physical injuries); *Lowe v. Phillip Morris USA, Inc.*, 142 P.3d 1079, 1091 (Or. Ct. App. 2006) (allegations of increased risk do not establish physical harm or fall within recognized exception to physical harm rule); *Rosmer v. Pfizer, Inc.*, No. 9:99-2280-18RB, 2001 WL 34010613, at \*5 (D.S.C. Mar. 30, 2001) ("South Carolina has not recognized a cause of action for medical monitoring"); *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659 (W.D. Tex. 2006) (Texas does not recognize action for medical monitoring); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (predicting Virginia law and holding that "claim for medical surveillance costs is simply a claim for future damages," which is available only if plaintiff has sustained a present, physical injury that was proximately caused by defendant), *cert. denied*, 502 U.S. 1033 (1992); *Purjet v. Hess Oil V.I. Corp.*, No. 1985/284, 1986 WL 1200, at \*4 (D.V.I. Jan. 8, 1986) (refusing to recognize medical monitoring claim under Restatement (Second) and law of Virgin Islands in absence of demonstrable, physical injury); *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 609 (W.D. Wash. 2001) (predicting Washington law and holding that flight attendant had no independent cause of action for medical monitoring due to exposure to second-hand smoke, but permitting her to seek medical monitoring as remedy for negligence claim, which alleged existing physical injury); *see also In re Berg Litig.*, 293 F.3d 1127, 1133 (9th Cir. 2002) ("a cause of action for medical monitoring because of a future risk of disease, and absent a present physical injury, . . . fails to meet the jurisdictional requirements of the Price Anderson Act").

Unfortunately, some courts have blurred this distinction by using overly broad definitions of “physical injury” to enable plaintiffs to seek medical monitoring relief.<sup>15</sup> Nevertheless, as one federal court has recognized, there appears to be a “recent trend of rejecting medical monitoring as a cause of action.” *Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006).<sup>16</sup>

Other jurisdictions remain in flux, with muddled case law regarding whether a claim for medical monitoring exists. In Indiana, for example, a mid-level state appellate court ruled in 2004 that the state “does not recognize medical monitoring as a cause of action.” *Johnson v. Abbott Labs*, No. 06C01-0203-PL-89, 06C01-0206-CT-243, 2004 WL 3245947, at \*6 (Ind. Cir. Ct. Dec. 31, 2004). Subsequently, the United States District Court for the Southern District of Indiana predicted, without citing *Johnson*, that the state would adopt a cause of action for medical monitoring similar to that described below. *See Allgood v. Gen. Motors Corp.*, No. 102CV 1077 DFHTAB, 2006 WL 2669337, at \*\*26-27 (S.D. Ind. Sept. 18, 2006). Similarly, in *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984), the Delaware Supreme Court held that claims for medical monitoring in the absence of physical injuries were not recognized. Recently, however, a Pennsylvania federal court, apparently applying Delaware law, held that a cause of action for medical monitoring was available. *Conway v. A.I. DuPont Hosp.*, Civ. A. No. 04-4862, 2007 WL 560502, at \*\*11-12 (E. D. Pa. Feb. 14, 2007). Courts interpreting Illinois law have demonstrated similar confusion regarding the availability of a cause of action. *Compare Guillory*, 2001 WL 290603, at \*7 (noting that it was “far from clear whether Illinois recognizes medical monitoring as an independent cause of action”) with *Jensen v. Bayer AG*, 862 N.E.2d 1091, (Ill. App. Ct. 2007) (assumed without deciding that Illinois

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<sup>15</sup>*See, e.g., Askey*, 477 N.Y.S.2d at 247 (holding that predicate “injury” was “the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body setting in motion the forces which eventually result in disease.”); *Werlein v. United States*, 746 F. Supp. 887, 901-05 (D. Minn. 1990) (allegation that TCE caused “subcellular injuries,” including “chromosomal breakage, and damage to the cardiovascular immunal systems” was sufficient to support medical monitoring claim, despite lack of any manifest injury), *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992); *see also Lowe*, 142 P.3d at 1092-93 (leaving “for another day” whether a differently phrased complaint might sufficiently allege an injury).

<sup>16</sup>In some jurisdictions, courts have considered the issue but not decided whether a medical monitoring claim is a viable cause of action. *See Baker*, 992 S.W.2d at 799 n.2 (plaintiffs voluntarily dismissed independent medical monitoring claim but were permitted to seek medical monitoring costs as damages); *Martin*, 180 F. Supp. 2d at 323 (assuming without deciding that Connecticut would recognize medical monitoring as a remedy if other actionable injuries exist); *Angeletti*, 752 A.2d at 251 (holding that the question of whether medical monitoring is a cognizable cause of action under Maryland law was not ripe for review); *Mehl*, 227 F.R.D. 505 (declining to address whether North Dakota would recognize a medical monitoring claim, but noting North Dakota would require “a legally cognizable injury to recover any type of damages in a newly recognized tort, including a medical monitoring claim”); *Brown*, 2002 WL 32151777, at \*4 (stating that Oklahoma would at least recognize a medical monitoring award based on existing injuries, but not deciding whether injury was a requirement). In *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 575-76 and n.7 (6th Cir. 2005), the Sixth Circuit refused to decide whether Tennessee recognizes a cause of action for medical monitoring but suggested, in a footnote, that it would.

Supreme Court would adopt medical monitoring claim but found plaintiff's evidence insufficient to recover), and *Muniz v. Rexnord Corp.*, No. 04 C 2405, 2006 WL 1519571 (N.D. Ill. May 26, 2006) (Illinois recognizes action for medical monitoring where there is an increased risk of physical harm).

In Louisiana, judicial recognition of medical monitoring claims has provoked a legislative response. In 1998, the Louisiana Supreme Court recognized a medical monitoring claim brought by shipyard workers who alleged that they had been exposed to asbestos during the course of their employment, despite the fact that none of the plaintiffs had any manifest injury at the time the suit was filed. *Bourgeois v. A.P. Green Indus., Inc.*, 1997-3188 (La. 7/8/98); 716 So. 2d 355, 360-61. The legislature responded to the *Bourgeois* decision by amending the Louisiana damages statute explicitly to preclude claims for medical monitoring damages in the absence of "manifest physical or mental injury or disease." See LA. CIV. CODE ANN. art. 2315 (West 2006).<sup>17</sup>

The full impact of such legislative solutions remains unclear. For example, a Louisiana appellate court affirmed a lower court's decision to certify a medical monitoring class despite the fact that the complaint did not seek recovery for present, physical injury.<sup>18</sup> Although this decision appears on its face to conflict with the Louisiana statute, the court held that the existence of a predicate physical injury could not be determined without a full trial on the merits, and that the class had therefore stated a viable claim for medical monitoring despite the fact that they were not seeking to recover for any personal injuries.

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<sup>17</sup>In an attempt to change the specific result in the *Bourgeois* case, the amendment also provided that – because the amendment was interpretative rather than substantive – it would be given retroactive effect. *Id.* Undeterred, the *Bourgeois* plaintiffs continued to press their medical monitoring claim after the statute was amended, arguing that retroactive application of the anti-medical monitoring amendment violated their due process rights. The Louisiana Supreme Court agreed, holding that the statute could not be applied retroactively. *Bourgeois v. A.P. Green Indus., Inc.*, 2000-1528 (La. 4/3/01); 783 So. 2d 1251, 1260-61; see also *Edwards v. State*, 2000-2420 (La. App. 1 Cir. 12/28/01); 804 So. 2d 886, 888 (relying on *Bourgeois II* to hold that retroactive application of 1999 amendment was unconstitutional in asbestos medical monitoring case), *writ denied* (La. 4/26/02), 814 So. 2d 557. Recently, the Court of Appeal of Louisiana rejected certification of a medical monitoring class in *Bourgeois* on the ground that factual differences among the plaintiffs predominated. *Bourgeois v. A.P. Green*, 06-87 (La. App. 5 Cir. 7/28/06); 939 So. 2d 478, 493.

<sup>18</sup>In *Johnson v. Orleans Parish School Board*, 2000-0825 (La. App. 4 Cir. 6/27/01); 790 So. 2d 734, *writ denied*, 2001-2216 (La. 11/9/01); 801 So. 2d 378, the trial court granted plaintiffs' motion to certify a class composed of all residents and former residents of a New Orleans neighborhood located near a landfill that allegedly contained toxic substances. The complaint sought damages for fear of future injuries, diminution in property value, and medical monitoring. *Id.* at \*1. The defendants argued that a medical monitoring class was inappropriate because there was no indication that any individual plaintiffs were likely to develop any particular disease as a result of their alleged exposure to the toxic substances. The appellate court affirmed the certification of the class, holding that whether plaintiffs had demonstrated a manifest, physical injury could not be determined without a full trial on the merits – despite the fact that the complaint did not seek recovery for physical injury.

The typical medical monitoring claim has the following elements, each of which must be proved by expert testimony:

- significant exposure through defendant's negligence to a proven hazardous substance;
- a significantly increased risk of contracting a serious latent disease as a proximate result;
- a reasonable necessity for periodical medical examinations due to the increased risk;
- the existence of monitoring and testing procedures that make early detection possible and beneficial; and
- the existence of a medical monitoring regime that a reasonable physician would prescribe for plaintiff that differs from the monitoring that would have been prescribed in the absence of that particular exposure.

*See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) (“*Paoli I*”); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 787 (3d Cir. 1994) (“*Paoli II*”), *cert. denied*, 513 U.S. 1190 (1995); *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 458-59 (3d Cir. 1997) (“*Paoli III*”); *see also Dodge v. Cotter Corp.*, 203 F.3d 1190, 1195 (10th Cir. 2000) (above elements set forth in jury instructions), *cert. denied*, 531 U.S. 825 (2000); *Conway*, 2007 WL 560502, at \*12 (recognizing action adopting *Paoli* elements, apparently under Delaware law); *Wall v. Sunoco, Inc.*, 211 F.R.D. 272, 276 (M.D. Pa. 2002) (similar description of elements); *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, at \*37 (Fla. Cir. Ct. Nov. 6, 2002) (same).

### ***I. “Significant exposure”***

A plaintiff may not recover for *de minimis* exposures to harmful substances. *Miranda v. Shell Oil Co.*, 26 Cal. Rptr. 2d 655, 657 (Ct. App. 1993); *see also Buckley*, 521 U.S. at 442 (noting that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring” if exposure level is not considered); *Lockheed Martin Corp. v. Superior Court*, 63 P.3d 913, 921 (2003) (“[E]vidence of exposure alone cannot support a finding that medical monitoring is a reasonably necessary response.”). Thus, many courts explicitly require exposure to a substance at levels above the normal background presence of the substance. *See Redland*, 696 A.2d at 145; *see also, e.g., Paoli III*, 113 F.3d at 462 (affirming jury instruction that plaintiffs were required to “demonstrate that they were exposed to a greater level of PCB exposure than they would ordinarily encounter

in their daily life”); *Perez v. Metabolife Int’l, Inc.*, 218 F.R.D. 262, 265 (S.D. Fla. 2003) (Florida law requires plaintiffs to demonstrate, *inter alia*, “exposure greater than normal background levels” (citing *Petito*, 750 So. 2d at 106-07)).

In a recent case from the Southern District of Indiana, for example, the court held that plaintiffs must establish that “they have been subjected to a significant exposure to a hazardous substance.” *See Allgood v. Gen. Motors Corp.*, 2006 WL 2669337, at \*27. However, where the methodology used by plaintiffs’ expert to define the background rate of exposure was flawed, plaintiffs were unable to establish a “significant exposure.” *Id.*, at \*\*28-29.

At least one jurisdiction requires the exposure to be “direct” and “discrete.” *See Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993) (ruling that secondary exposure to asbestos from laundering third-party clothes was insufficient to establish a medical monitoring claim). However, exposure probably does not need to be proved via tissue or blood sampling. *See, e.g., Patton v. Gen. Signal Corp.*, 984 F. Supp. 666, 673-74 (W.D.N.Y. 1997) (medical monitoring claim involving asbestos).

## **2. “Proven hazardous substance”**

Plaintiff’s burden of demonstrating the nature of the hazard to which he was exposed is unclear. The Utah Supreme Court, for example, explicitly stated that “the substance must be toxic to humans rather than to other forms of life.” *Hansen*, 858 P.2d at 979; *see also, e.g., Ayers*, 525 A.2d at 310-11 (exposure to known carcinogens emanating from a landfill). In West Virginia, however, the high court stated that plaintiff only need demonstrate a “probable link” between the substance at issue and human disease. *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 433 (W.Va. 1999).

In the class action context, courts have found that representative plaintiffs cannot satisfy the proven hazardous substance element where the substance at issue is a pharmaceutical product approved by the FDA as safe and effective for the indication prescribed. *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 640 (Fla. Dist. Ct. App. 2006), *review denied*, 950 So. 2d 413 (Fla. 2007) (table); *see Albertson v. Wyeth*, No. 2944 Aug. Term 2002, 2005 WL 3782970, at \*\*11-12 (Pa. Com. Pl. May 3, 2005) (Prempro not shown to be proven hazardous substance as to purported class); *see also In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 571-72 (E.D. Ark. 2005) (noting improbability of a court granting medical monitoring class certification when the alleged hazardous substance is a “prescription drug . . . still on the market and approved by the FDA”).

## **3. “Significantly increased risk”**

In jurisdictions that require plaintiffs to show a significantly increased risk of disease, expert testimony may be required to quantify (to some extent) how

much a plaintiff's exposure to the substance at issue has increased his risk of disease. *See, e.g., Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334-35 (9th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994). Demonstrating that an exposure causes temporary changes in body function may be insufficient to establish an increased risk of disease. *See In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 825-26 (N.D. Ohio 2004) (granting summary judgment for defendant where evidence offered by plaintiffs showed that the drug Meridia raised patients' blood pressure while taking the medication but did not show any increased risk of disease), *aff'd*, 447 F. 3d 861 (6th Cir. 2006). In West Virginia, "[a]ll that must be demonstrated is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposures." *Bower*, 522 S.E.2d at 433. Moreover, *Bower* purports to judge a plaintiff's increased risk against the risk in the general population, possibly failing to take into account plaintiff-specific factors that may already increase his risk of disease as compared to the general population. *See id.* at 432. Where a plaintiff fails to adduce evidence regarding actual exposure levels, he fails to establish increased risk and cannot prevail on a medical monitoring claim. *Player v. Motiva Enters.*, No. Civ. 02-3216 (RBK), 2006 WL 166452, at \*10 (D.N.J. Jan. 20, 2006).

#### **4. "Serious latent disease"**

The Fen-Phen defendants argued unsuccessfully that medical monitoring claims were improper in part because plaintiffs were proposing screening tests that would detect *existing* disease rather than latent disease. *In re Diet Drugs Prods. Liab. Litig.*, No. MDL 1203, Mem. Opp. Class Certification at 88. Still, latency remains a consideration in most of the case law. *See, e.g., Hoyte*, 2002 WL 31892830, at \*49.

#### **5. "Reasonably necessary monitoring"**

Most courts require plaintiffs to show that the proposed medical monitoring is reasonably necessary. *See, e.g., Perez*, 218 F.R.D. at 265 (Florida law requires plaintiffs to demonstrate, *inter alia*, that "the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles" (citing *Petito*, 750 So. 2d at 106-07)); *see also Wroble v. Lockformer Co.*, No. 02 C 4992, 2006 WL 695254, at \*2 (N.D. Ill. Mar. 17, 2006) (summary judgment appropriate due to absence of evidence that monitoring was necessary); *Jensen*, 862 N. E.2d at 1100-01 (no evidence submitted that medical monitoring is reasonably necessary). Under the *Bower* decision, the plaintiff's burden of proving medical necessity is minimal:

While there obviously must be some reasonable medical basis for undergoing diagnostic monitoring, factors such as financial cost and the frequency of testing need not necessarily be given significant weight. Moreover, the requirement that diagnostic



testing must be medically advisable *does not necessarily preclude the situation where such a determination is based, at least in part, upon the subjective desires of a plaintiff for information concerning the state of his or her health.*

522 S.E.2d at 433 (emphasis added). However, the plaintiff still bears the burden of proving this element. *See In re Tobacco Litig.*, 600 S.E.2d 188, 194 (W. Va. 2004) (upholding defense verdict that was based, in part, on the jury's finding that medical monitoring was not reasonably necessary).

## **6. "Possible and beneficial testing"**

As some courts have observed, medical monitoring relief is inappropriate when there is no known effective treatment for the medical conditions that the monitoring may detect. *FAG Bearings Corp.*, 846 F. Supp. at 1410 n.8; *see also Hoyte*, 2002 WL 31892830, at \*\*31-32 (holding that plaintiffs "cannot show . . . that medical monitoring is either warranted or beneficial" because there is no medical treatment for latent diseases identified by plaintiffs' expert which, "if given in the asymptomatic period, would significantly reduce morbidity or mortality"); *In re Paoli R.R. Yard PCB Litig.*, Nos. 86-2229, 87-1190, 87-1258, 87-3227, 2000 WL 274262, at \*7 (E.D. Pa. Mar. 7, 2000) ("monitoring should not be conducted if early detection and the prospect for successful treatment are not available for the disease").

A defendant also may challenge the "benefits" of medical monitoring by relying on scientific studies showing that the screening tests sought are not reliable or effective. *E.g., Dombrowski v. Gould Elecs., Inc.*, 31 F. Supp. 2d 436, 442-43 (M.D. Pa. 1998) (excluding expert testimony where lack of standards made it impossible to decide the significance of the proposed test); *see also Paoli*, 2000 WL 274262, at \*\*8-9 (medical monitoring opinion was excluded under Fed. R. Evid. 702).

In addition to classic *Daubert* challenges, a defendant should keep in mind that, according to the *Guide to Clinical Preventive Services* published by the U.S. Preventive Services Task Force (International Medical Publishing, Inc., 2d ed. 1996), a screening test for disease must meet the following criteria to be considered effective: (1) the test must be accurate in that it is "able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive results," and (2) early detection must be effective in that "treating persons with early disease should improve the likelihood of favorable outcomes . . . compared to treating patients when they present with signs or symptoms of the disease." *Id.* at xiii; *see also Guide to Clinical Preventive Services* (3d ed. Periodic Updates 2002-2004) at M-16 – M-19 (analytic framework for determining screening effectiveness). The *Guide to Clinical Preventive Services* evaluates dozens of screening tests according to these requirements, providing a useful source to determine which diseases may

be the subject of medical monitoring claims.<sup>19</sup> *See also Paoli*, 2000 WL 274262, at \*8 (setting forth guidelines to determine the propriety of medical monitoring using a risk/benefit analysis: “(1) determining whether a screening test is capable of detecting the disease in question (the ‘target condition’) early enough to improve the patient’s clinical outcome, . . . (2) determining whether the test is sufficiently accurate, measured by its sensitivity and specificity, to be a useful means of looking for the target disease, taking into account the test’s accuracy and predictive power, . . . and (3) determining the likelihood that the test under consideration will find what [the physician] is looking for in the person or group being screened”).<sup>20</sup>

### **7. Monitoring regime “different than” usual**

Even when the need for medical monitoring is more urgent for people exposed to the substance at issue than for the general population, a plaintiff still has the burden of demonstrating that the requested monitoring is different from the monitoring that is normally recommended for the general population. *See Redland Soccer Club Inc. v. Dep’t of Army*, 55 F.3d 827, 848 (3d Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *Paoli II*, 35 F.3d at 788; *see also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 137, 155 (3d Cir. 1998) (denying claim “[b]ecause annual physical examinations and cardiovascular risk assessments are routinely recommended to all persons in the absence of exposure”), *cert. denied*, 526 U.S. 1114 (1999); *Abuan*, 3 F.3d at 335 (affirming defense summary judgment where plaintiffs’ experts opined that the requested tests would be “justified” at any level of exposure and would be a “good idea” for the general population). In other words, plaintiff must show that exposure to a hazardous substance “result[s] in the need for a medical monitoring program that is different from one needed if the exposure had not taken place.” *Goasdone v. Am. Cyanamid Corp.*, 808 A.2d 159, 170 (N.J. Super. Ct. Law Div. 2002); *see Albertson*, No. 2944 Aug. Term 2002, 2005 WL 3782970, at \*\*9-11 (plaintiffs failed to satisfy a different regime element where medical monitoring sought was “precisely the same medical standard as recommended for all post-menopausal women”).

Plaintiffs seeking medical monitoring relief often ask courts to certify their lawsuits as class actions, but defendants may have good arguments to defeat class certification. For example, a Florida trial court denied certification to a putative medical monitoring class of former workers at a phosphorous plant. *See Hoyte*, 2002 WL 31892830, at \*\*55-56. The court issued lengthy findings of fact and conclusions of law that amount to a compelling primer on how to defeat class

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<sup>19</sup>A number of the screening tests are for various cancers. *See Guide to Clinical Preventive Services: Report of the U.S. Preventive Services Task Force* (3d ed. 2000).

<sup>20</sup>Expert testimony offered in support of the medical monitoring program must, of course satisfy *Daubert* standards as well. *See, e.g., Allgood*, 2006 WL 2669337, at \*\*29-32 (excluding plaintiffs’ medical monitoring expert’s testimony).

certification motions. *See id.*, at \*48 (“The facts required to prove . . . an exposure to a proven hazardous substance above background levels proximately resulting in a significantly increased risk of contracting a latent disease . . . are highly individualized and not common to the putative class members.”); *id.*, at \*51 (“Whether a monitoring regime should be established for any single worker that would be different from that normally recommended in the absence of exposure is an individualized inquiry. . . . [T]he focus of medical monitoring should be on the individual, and individual risk factors and preferences must be considered in recommending any medical monitoring regime.”) (citation omitted).

In other cases, efforts to obtain certification of medical monitoring classes have met with mixed success. *Compare, e.g., Olden v. LaFarge Corp.*, 383 F.3d 495, 510 (6th Cir. 2004) (certifying medical monitoring class action brought by homeowners against cement manufacturing plant despite defendant’s argument that individual questions regarding causation would predominate), *cert. denied*, 545 U.S. 1152 (2005), *In re Diet Drugs*, No. MDL 1203, 99-20593, 2000 WL 1222042, at \*\*19-20 (E.D. Pa. Aug. 28, 2000) (approving class settlement which provides, in part, for medical monitoring), *Josephat v. St. Croix Alumina, LLC*, No. 1999-0036, 2000 WL 1679502, at \*\*11-12 (D.V.I. Aug. 7, 2000) (red bauxite, certified), *Elliott v. Chicago Hous. Auth.*, No. 98C6307, 2000 WL 263730 (N.D. Ill. Feb. 28, 2000) (lead poisoning, certified), *Lamping v. Am. Home Prods., Inc.*, No. DX-97-85786/93 (D. Mont. Feb. 2, 2000) (diet drug users, certified), *Gibbs v. E.I. DuPont De Nemours & Co.*, 876 F. Supp. 475, 480-82 (W.D.N.Y. 1995) (employee exposure to chemicals, certified), *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993) (groundwater contamination, certified), *Foust v. Se. Penn. Transp. Auth.*, 756 A.2d 112, 115 (Pa. Commw. Ct. 2000) (class certified for medical monitoring claims for persons “living near or working at the Paoli Railroad Yard”), *appeal denied*, 771 A.2d 1289 (Pa. 2001) (unpublished table decision), *Lewis v. Bayer AG*, No. 002353 Aug. Term 2001, Control 091172, 2004 WL 1146692, at \*17 (Pa. Com. Pl. Nov. 18, 2004) (certifying statewide class action in Baycol litigation), and *In re W. Va. Rezulin*, 585 S.E.2d at 76 (certifying state-wide class of diabetes drug users seeking court-supervised medical monitoring program); *with, e.g., In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, 425 F.3d 1116 (8th Cir. 2005) (reversing certification of medical monitoring class based on “myriad of individual issues making class certification improper”), *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (6th Cir. 2004) (upholding denial of medical monitoring class certification to African-American residents living near a former nuclear weapons facility), *Barnes*, 161 F.3d at 143 (tobacco, not certified), *Redland*, 55 F.3d at 834 n.2 (land contamination, not certified), *Sanders v. Johnson & Johnson, Inc.*, Civ. No. 03-2663 (GEB), 2006 WL 1541033, at \*\*6-11 (D.N.J. June 2, 2006) (medical device case, certification denied), *Snow v. Atofina Chems. Inc.*, No. 01-72648, 2006 WL 1008002 (E.D. Mich., Mar. 31, 2006) (chemical exposure class denied because of factual differences among class members), *Wall*, 211 F.R.D. at 280-81 (MTBE exposure due to pipeline

spill, not certified), *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 71-75 (S.D.N.Y. 2002) (diabetes drug, not certified), *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133 (E.D. La. 2002) (heartburn drug; not certified), *Lockheed Martin*, 63 P.3d at 922 (residential drinking water contamination; not certified), *Gottlieb*, 930 So. 2d 635 (reversing and remanding for decertification of the class, due to individual issues overwhelming common issues, plaintiff's atypicality, and plaintiff's failure to adequately represent the class), *Bourgeois v. A.P. Green Indus., Inc.*, 06-87 (La. App. 5 Cir. 7/28/06), 939 So. 2d 478, 493 (rejecting asbestos class action), and *Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 2004-Ohio-5847, 817 N.E. 2d 59 (upholding trial court's denial of class certification based on lack of cohesiveness in the proposed class).<sup>21</sup>

A request to certify a multi-state or nationwide medical monitoring class action may be denied based on the difficulty of applying the different laws of the fifty states to individual claims. *See Zehel-Miller v. AstraZeneca Pharms., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) (denying motion for certification of Rezulin class action under Fed. R. Civ. P. 23(b)(3) (2007)); *State of W. Va. ex rel. Chemtall Inc. v. Madden*, 607 S.E.2d 772, 783-84 (W. Va. 2004) (vacating and remanding class certification order based on lower court's failure to consider whether class representative's claims were indeed typical of claims proceeding under different states' laws); *Lewis*, 2004 WL 1146692, at \*11 (denying certification of nationwide class action in Baycol litigation due to conflicting state laws).

Courts have also reached differing results when deciding whether medical monitoring claims should be characterized as injunctive or monetary relief (a critical distinction when evaluating class certification issues or the right to a jury trial, for example). *Compare Zinser v. Accufix Research Inst., Inc.*, 253 F.3d

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<sup>21</sup>Also denying class certification: *Buynie v. Airco*, No. ESX-L-5502-03 (N.J. Super. Ct. Jan. 27, 2006) (vinyl chloride monomer); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 211-13 (D. Minn. 2003) (cholesterol-lowering drug); *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 662-63 (M.D. Fla. 2001) (Malathion), *cert. denied*, 126 S. Ct. 419 (2005); *Guillory*, 2001 WL 290603, at \*7 (tobacco); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999) (tobacco); *Reed v. Philip Morris, Inc.*, No. 96-5070, 1999 WL 33714707 (D.C. Super. Ct. July 23, 1999) (tobacco); *In re Diet Drug Cases*, JCCP 4032 (Cal. Super Ct.-Los Angeles, Aug. 19, 1999) (diet drugs); *Harding v. Tambrands, Inc.* 165 F.R.D. 623 (D. Kan. 1996) (tampons allegedly causing toxic shock syndrome); *Blaz v. Galen Hosp. Ill., Inc.*, 168 F.R.D. 621 (N.D. Ill. 1996) (radiation treatments); *Hurd v. Monsanto Co.*, 164 F.R.D. 234 (S.D. Ind. 1995) (PCBs); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995) (spinal fixation devices); *Newton v. S. Wood Piedmont Co.*, 163 F.R.D. 625 (S.D. Ga. 1995) (wood treatment plan chemicals), *aff'd*, 95 F.3d 59 (11th Cir. 1996) (unpublished table decision); *FAG Bearings Corp.*, 846 F. Supp. at 1404-05 (TCE); *Blake v. Chemlawn Servs., Corp.*, No. 86-3413, 1988 WL 6151 (E.D. Pa. Jan. 26, 1988) (lawn pesticides); *Brown v. Se. Pa. Transp. Auth.*, Nos. 86-2229, 86-4037, 86-5886, 1987 WL 9273 (E.D. Pa. Apr. 9, 1987) (PCBs); *Linkous v. Medtronic, Inc.*, No. 84-1909, 1985 WL 2602 (E.D. Pa. Sept. 4, 1985) (cardiac pacemakers); *Caruso v. Celsius Insulation Res. Inc.*, 101 F.R.D. 530 (M.D. Pa. 1984) (formaldehyde foam insulation); *Mertens v. Abbott Labs.*, 99 F.R.D. 38 (D.N.H. 1983) (DES); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D. S.C. 1979) (DES); *Kennedy v. Baxter Healthcare Corp.*, 50 Cal. Rptr. 2d 736 (Ct. App. 1996) (latex gloves); *Askey*, 477 N.Y.S.2d at 248 (toxic waste).

1180, 1193-95 (refusing to certify medical monitoring subclass in pacemaker lead litigation because claim for creation of “a medical monitoring fund” primarily sought damages rather than equitable relief, and certification was therefore inappropriate under Fed. R. Civ. P. 23(b)(1)(A)), *amended* 273 F.3d 1266 (9th Cir. 2001), and *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 251 (Md. 2000) (certification not proper because claim is “primarily for money damages and not for injunctive relief”), *with Wall*, 211 F.R.D. at 281 & n.8 (request for court-supervised medical monitoring program is injunctive relief), *In re Diet Drugs*, No. 98-20626, 1999 WL 673066, at \*6 (E.D. Pa. Aug. 26, 1999) (request for comprehensive medical monitoring program is equitable in nature), *Katz v. Warner-Lambert Co.*, 9 F. Supp. 2d 363, 364 (S.D.N.Y. 1998) (claim for medical monitoring and research fund is injunctive in nature), *Gibbs*, 876 F. Supp. at 479 (same), and *Petito*, 750 So. 2d at 106-07 (same). One court has adopted the approach that a medical monitoring fund created and supervised by the court constituted injunctive relief, while the payment of a lump sum or payment of medical bills directly from a defendant to a plaintiff constitutes monetary relief. *See Wilson*, 817 N.E.2d at 64-65.

A court may order a defendant to pay a plaintiff a lump sum of money, which may or may not then be used by the plaintiff for “monitoring” expenses. Or a defendant may be required to pay a plaintiff’s medical expenses directly. Or, a court may establish a monitoring program of its own, managed by court-appointed court-supervised trustees, but financed by defendant. *See Barnes*, 161 F.3d at 147 (and cases cited therein); *Bower*, 522 S.E.2d at 434 (deferring form of remedy to trial court discretion). However, the Supreme Court expressed disfavor for lump sum damages in *Metro-North*, noting concerns over their inherently speculative nature and the potential for unlimited and unpredictable liability. 521 U.S. at 439-42; *see also, e.g., Friends for All Children*, 746 F.2d at 823 (mandating court-supervised fund); *Hansen*, 858 P.2d at 982 (rejecting lump sum payments); *Ayers*, 525 A.2d at 313-14 (same); *Burns*, 752 P.2d at 34 (same).

## **B. Decreases In Property Value (“Stigma” Damages)**

Plaintiffs often attempt to use various liability theories, especially private nuisance and trespass, to recover for decreases in property value due to public perception, whether or not rational, that their property has been contaminated. Such “stigma” damage claims may be unduly speculative, especially if they seek damages for post-remediation diminution in property value before the environmental remediation has been completed. *See Allgood v. Gen. Motors Corp.*, No. 102CV1077DFHTAB, 2006 WL 2669337, at \*\*35-37 (S.D. Ind. Sept. 18, 2006) (dismissing claims for post-remediation stigma damages without prejudice, because remediation was pending and “any estimate of post-remediation value of the plaintiffs’ land would be speculative and premature”).

Courts are split on whether stigma damages are recoverable absent actual harm to or interference with the property. *See Cook v. Rockwell Int'l Corp.*, 147 F.R.D. 237, 240, 244-45 (D. Colo. 1993) (noting that whether or not proof of existing contamination is required in loss of property market value claims is an unsettled issue of law, and refraining from settling the issue).<sup>22</sup>

***I. Most Courts Require A Showing Of Actual Harm To Recover For Stigma Damages, But Some Differentiate Between Permanent Harm And Transitory Harm***

In the absence of physical damage to plaintiffs' property, most courts reject stigma damages resulting solely from public fear of dangers in the vicinity that may reduce residential property values. *See, e.g., Ogden v. Star Enter.*, 70 F.3d 1262, 1995 WL 709862, at \*1 (4th Cir. 1995) (unpublished table decision) ("Neither fear of harm nor diminution in property value resulting from mere proximity to the plume is enough.") (citing *Adams v. Star Enter.*, 51 F.3d 417 (4th Cir. 1995)); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822 (5th Cir. 1993) (Mississippi law does not allow recovery for "stigma" damages in the absence of physical harm to the property), *cert. denied*, 510 U.S. 1117 (1994); *St. Joe Co. v. Leslie*, 912 So. 2d 21, 25 (Fla. Dist. Ct. App.) ("because no proof was adduced that any of the class representatives' land was contaminated, the concept of 'stigma' damages is inapplicable"), *review denied*, 918 So. 2d 292 (Fla. 2005) (unpublished table decision); *Halliday v. Norton Co.*, 696 N.Y.S.2d 549 (App. Div. 1999) (rejecting claim for diminution of property value due to stigma because no proof of contamination or any other defendant-caused action); *Ramirez v. Akzo Nobel Coatings, Inc.*, 153 Ohio App. 3d 115, 2003-Ohio-2859, 791 N.E.2d 1031, 1033 ("stigma damages cannot be recovered unless there is actual, physical damage to a plaintiff's property") (citing *Chance v. BP Chems., Inc.*, 77 Ohio St. 3d 17, 1996-Ohio-352, 670 N.E.2d 985); *Carter v. Monsanto Co.*, 575 S.E.2d 342, 347 (W. Va. 2002) (holding that fear alone is an insufficient basis for recovery in private nuisance action seeking, *inter alia*, diminution in property value). In one frequently cited case, *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992), the Michigan Supreme Court found that plaintiffs could not recover damages for a reduction in property value without actual harm to the property:

We are persuaded that the boundaries of a traditional nuisance claim should not be relaxed to permit recovery on these facts. Compensation for a decline in property value caused by

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<sup>22</sup>Ten years later the same court found that Colorado law permits plaintiffs to recover for decreased property values in nuisance claims if they demonstrate actual contamination of their property "and/or other circumstances" that interfere with their use and enjoyment of their land. *Cook v. Rockwell Int'l Corp.*, 273 F. Supp. 2d 1175, 1209 (D. Colo. 2003). In February 2006, a jury returned a verdict in this case in favor of a class of over 12,000 property owners. The verdict (against Dow Chemical Company and Rockwell International Corporation) assessed a total of \$354 million compensatory damages and \$200 million punitive damages. *See Mealey's Emerging Toxic Torts*, Vol. 14, Issue 22 (Feb. 17, 2006).

unfounded perception of underground contamination is inextricably entwined with complex policy questions regarding environmental protection that are more suitably resolved through the legislative process.

*Id.* at 717.

A Kentucky court recently explained why plaintiffs were not entitled to property-value-diminution damages for their trespass and nuisance claims even though they had proved that defendants' negligence caused radiation contamination at above-background levels on their properties. *Cantrell v. Ashland Inc.*, Nos. 2003-CA-001784-MR, 2003-CA-001865-MR, 2006 WL 2632567 (Ky. Ct. App. Sept. 15, 2006). Based on the principle that the "law does not allow relief on the basis of an unsubstantiated phobia," *id.*, at \*9 (quoting *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 627 (Ky. Ct. App. 2003)), the court held that plaintiffs "have not shown that the mere presence of low levels of radiation would unreasonably interfere with their use and enjoyment of the properties" and therefore "they cannot recover damages arising from an unsupported fear of radiation." *Id.* Some courts go even further in determining whether stigma damages should be permitted and not only require "harm" but also differentiate between permanent harm and temporary harm.

## **2. Cases Permitting Recovery For Stigma Damages For Permanent Harm Only**

Some jurisdictions that require a showing of harm also limit recovery for stigma damages to situations in which the harm is considered "permanent." *See, e.g., Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400, 408 (5th Cir. 2003) (Texas law permits a plaintiff to recover "the difference in the market value of the land immediately before and immediately after the trespass" in the case of permanent trespass and limits recovery for temporary trespass to the "amount necessary to place the owner of the property in the same position he occupied prior to the injury") (citations omitted); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 743-44 (W.D. Ky. 1998) (confirming that, under Kentucky law, a plaintiff may recover the difference in fair market value only if the injury is permanent); *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 372 (M.D.N.C. 1997) (North Carolina law allows recovery of stigma damages for a permanent nuisance, but does not allow stigma damages for temporary or abatable nuisances); *Santa Fe P'ship v. Arco Prods. Co.*, 54 Cal. Rptr. 2d 214 (Ct. App. 1996) (denying recovery for stigma damages based on a temporary nuisance claim arising out of contamination of plaintiffs' property, as California law only permits recovery for diminution of value in nuisance cases where the nuisance is permanent). In these jurisdictions, if the harm is not considered permanent, stigma damages cannot be recovered.

- Cases Limiting Recovery For Stigma Damages For Temporary Harm

Contrary to the jurisdictions limiting recovery of stigma damages to cases involving permanent harm, some jurisdictions limit recovery for stigma damages to temporary harm. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 462-63 (3d Cir. 1997) (*Paoli III*) (in Pennsylvania, “an award of stigma damages requires proof of the following elements: (1) defendants have caused some (temporary) physical damage to plaintiffs’ property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land”) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994) (*Paoli II*)); *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1246-47 (Utah 1998) (“stigma damages are therefore recoverable in Utah when a plaintiff demonstrates that (1) defendants caused some temporary physical injury to plaintiff’s land and (2) repair of this temporary injury will not return the value of the property to its prior level because of a lingering negative public perception). In these cases, the decrease in the property value lingers beyond the temporary injury.

**3. *Some Courts Define The Level Of Contamination Needed To Meet The “Harm” Requirement, While Others Do Not***

a. Courts That Require Certain Minimum Levels For Plaintiffs To Make A Showing Of Physical Harm

Some jurisdictions require that a plaintiff in a contamination case demonstrate that the contaminant at issue has reached a certain minimum level in order to show the necessary harm. *See, e.g., Adams v. Star Enter.*, 51 F.3d 417, 422-24 (4th Cir. 1995) (Virginia law does not permit recovery under a private nuisance theory for stigma damages where the contamination has not become physically detectable); *Trident Inv. Mgmt., Inc. v. Amoco Oil Co.*, 194 F.3d 772 (7th Cir. 1999) (applying Iowa law for the proposition that recovery is allowed where environmental problems made the property at issue unmarketable as a practicable matter) (citing *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1332 (S.D. Iowa 1997)); *Berry*, 989 F.2d at 829 (in Mississippi, plaintiffs claiming a public nuisance must show that the pollutants on the property at issue have reached a level that could endanger the public) (citations omitted)<sup>23</sup>; *Wilhite*, 143 S.W.3d at 620-25, 627 & n.106 (landowners must prove that PCBs in the quantities present on their property constituted a “scientifically demonstrable [but undefined] health hazard or safety hazard”).

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<sup>23</sup>But see *Berry*, 989 F.2d at 829 (Mississippi common law nuisance and trespass claims require evidence of an invasion but not evidence that the toxins reached dangerous levels).



b. Courts That Do Not Require A Showing That The Contaminant At Issue Has Reached A Minimum Level

Some jurisdictions are not concerned with the level of the contaminant and simply apply the law of trespass and nuisance to contamination cases in much the same manner as any other case. *See, e.g., Berry*, 989 F.2d at 829 (Mississippi common law nuisance and trespass claims require evidence of an invasion, but not evidence that the toxins reached dangerous levels)<sup>24</sup>; *Cook*, 273 F. Supp. 2d at 1209 (plaintiffs may recover for decreased property values in Colorado under a nuisance theory if they demonstrate actual contamination of their property “and/or other circumstances” that interfere with their use and enjoyment of their land; “[e]vidence that the affected property’s value has depreciated may be evidence . . . that actual contamination or other claimed factors of interference are substantial and unreasonable enough to give rise to nuisance liability”); trespass claims for property contamination do not require a showing that the contaminants are present at levels of toxicological concern or are otherwise causing damage); *see also Major v. AstraZeneca*, Nos. 5:01-CV-618, 5:00-CV-1736, 2006 WL 2640622, at \*25 (N.D.N.Y. Sept. 13, 2006) (“Even if these Plaintiffs cannot show that they have been exposed to contaminants from the Site in concentrations that exceed the regulatory standards, their past and potential future exposure to such contaminants in some measurable concentrations creates a genuine issue of fact with respect to their diminution of property value claims.”).

**4. *Some Courts Do Not Require Physical Harm In Order To Recover For Stigma Damages***

Some courts have held that stigma damages are compensable where based only on public fears regarding exposure to toxic substances, despite the fact that there is no physical harm to the property. *See, e.g., Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 57, 61 (D. Mass. 1999) (applying Massachusetts law in denying a motion to dismiss with respect to the private and public nuisance claims, where plaintiff alleged diminution of property value and health concerns related to PCB contamination in her neighborhood but was uncertain whether her own property was actually contaminated); *Terra-Prods., Inc. v. Kraft Gen. Foods, Inc.*, 653 N.E.2d 89, 93 (Ind. Ct. App. 1995) (holding that a party is entitled to recover damages for any proven reduction in fair market value of real property remaining after remediation); *Bonnette v. Conoco, Inc.*, 2001-2767 (La. 1/28/03); 837 So. 2d 1219 (affirming trial court’s award based on public perception and stigma effect even after property remediated); *see also In re Tutu Wells Contamination Litig.*, 909 F. Supp. 991, 994, 997 (D.V.I. 1995) (in applying Virgin Islands law, the court denied the defendants’ motion for summary judgment, finding that “a plaintiff may recover damages in nuisance for significant harms which may, but

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<sup>24</sup>However, the opposite is true for *public* nuisance cases in Mississippi, as public nuisances require a showing of injury to a public right as opposed to a private right. *See Berry*, 989 F.2d at 829.

need not, be physical in nature;” and citing the Restatement for the proposition that harm is to be understood in the general sense, and can include impairment of pecuniary advantage, intangible rights, and “other legally recognized interests”) (citation omitted).

Moreover, plaintiffs in these jurisdictions may not have to demonstrate that the public fear is reasonable to recover for diminished property value. For example, according to *Criscuola v. Power Auth.*, 621 N.E.2d 1195, 1196 (N.Y. 1993), property values may be lessened “even if the public’s fear is unreasonable. Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact.” *Criscuola* involved an eminent domain proceeding for recovery of consequential damages associated with fear of electromagnetic emissions from power lines placed on the plaintiffs’ properties. *Id.* at 1196-97. The issue was whether the taking adversely affected the market value, *id.* at 1196, not whether plaintiffs were entitled to stigma damages for a trespass or nuisance claim.

## **C. Punitive Damages**

Punitive damages are notoriously on the rise throughout the nation. Perhaps the most stunning award was \$145 billion in *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273-CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000). The award came in a class-action trial of 700,000 members, with individual liability and compensatory damages to be decided in later proceedings. The trial court denied defendants’ motion for a new trial or for remittitur, *id.*, but the Florida Court of Appeals reversed. *See Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003). The Florida Supreme Court affirmed this ruling, holding that the trial court had improperly allowed the jury to award classwide punitive damages prior to the determination of total compensatory damages and that the award of punitive damages was clearly excessive. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

### ***1. Traditional Availability of Punitive Damages***

Punitive damages have existed at common law for hundreds of years. Traditionally, the purpose of punitive damages has been to punish improper behavior, and to deter instances of similar improper behavior in the future. Because the purpose of punitive damages is *not* compensation of the plaintiff, they are not always available. At common law, punitive damages are awarded only for outrageous conduct, conduct motivated by an evil intent, or reckless indifference to the rights of others. *See* Restatement (Second) of Torts § 908(2). According to the Restatement, punitive damages cannot be awarded for mere negligence or mistakes of judgment. *See id.* § 908, cmt. b. Some jurisdictions also forbid the imposition of punitive damages for gross negligence unless the defendant’s conduct created an extreme risk of harm and the defendant was

aware of the risk and consciously disregarded it. *See, e.g., Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1251 (10th Cir. 2000) (permitting punitive damages under a finding of gross negligence, but defining gross negligence as “an act or omission done with conscious indifference to harmful consequences”) (New Mexico law); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (punitive damages available only upon a finding of actual malice) (Ohio law), *cert. denied*, 523 U.S. 1094 (1998); *see also Boeing Co. v. Blane Int’l Group, Inc.*, 624 S.E.2d 227, 231 (Ga. Ct. App. 2005) (holding that “negligence, even including gross negligence, is insufficient to support a claim for punitive damages.”), *cert. denied* (2006); *AC&S Inc. v. Godwin*, 667 A.2d 116 (Md. 1995) (vacating \$3.5 million punitive award to three illustrative asbestos plaintiffs in consolidated litigation involving 8,555 plaintiffs in absence of showing of bad faith or conscious disregard). “Malice” does not necessarily include actual intent. *Borg-Warner Corp. v. Flores*, 153 S.W.3d 209 (Tex. App. 2004) (although “malice” requires actual, subjective awareness of risk, a manufacturer can be assumed to have such knowledge because they are held to the knowledge and skill of an expert in the substances they manufacture).

In addition, a plaintiff must show that the defendant’s reckless or malicious actions were directed toward him. In practice, this ordinarily translates into a showing that the actions were directed toward the class of people to whom the plaintiff belongs. For example, in *Owens-Corning Fiberglas Corp. v. Mayor of Balt. City*, 670 A.2d 986, 997 (Md. Ct. Spec. App.), *cert. denied*, 677 A.2d 565 (Md. 1996) (unpublished table decision), the court overturned a \$2.6 million punitive damages award based on plaintiff’s failure to prove by clear and convincing evidence that the defendant had actual knowledge its asbestos product posed a serious health risk to ordinary users of the buildings where the product was installed. The court found that knowledge of the danger to asbestos trade workers did not suffice.

In some jurisdictions, statutes or case law may permit the argument that injury must be “likely” or “probable” in order to warrant a punitive damages award. *Toole v. McClintock* holds that punitive damages cannot be awarded under Alabama law unless an act or failure to act makes injury “likely” or “probable.” 999 F.2d 1430, 1435 (11th Cir. 1993) (unpublished table decision); *see also Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 73-75 (Cal. 2005), *cert. denied*, 127 S. Ct. 48 (2006). The Eleventh Circuit held that where the incidence of injury from the alleged product defect was less than one percent, it could not be said that injury is “likely,” and so the jury should not be instructed with regard to punitive damages. *Toole*, 999 F.2d at 1435.

In awarding punitive damages, the trier of fact typically may consider:

- the character of the defendant’s act;

- the extent of harm to the plaintiff that the defendant caused or intended to cause; and
- defendant's wealth.

Restatement (Second) of Torts § 908(2); *see also Day v. Ingle's Mkts., Inc.*, No. 2:01-CV-325, 2006 WL 239290, at \*13 (E.D. Tenn. Jan. 25, 2006) (under Tennessee law, the jury also may consider "the number and amount of previous punitive damages awards against the defendant based upon the same wrongful act.")<sup>25</sup>

A fine illustration of the application of traditional punitive damages principles to overturn a verdict occurred in *Liggett Group v. Engle*, the name of the appeal which challenged the notorious \$145 billion *Engle v. R.J. Reynolds* verdict. In *Liggett*, the Florida Court of Appeals reversed the entire judgment in part due to the trial court's failure to comport with traditional punitive damages principles in multiple respects. 853 So. 2d at 450. In 2006, the Florida Supreme Court agreed that the trial structure had placed the cart before the horse, holding that a finding of liability is required before entitlement to punitive damages can be determined. *Engle*, 945 So. 2d at 1262. Moreover, the court found due process violations because, absent a fixed amount of compensatory damages, a reviewing court would not be able ensure there was a reasonable relationship between the compensatory and punitive damages. Therefore, the Florida Supreme Court approved the appellate court's holding that the \$145 billion award of punitive damages be vacated. *Id.* at 1276.

## **2. Constitutional Challenges to Punitive Damages as Grossly Excessive**

A punitive damages award violates the Due Process Clause of the Fourteenth Amendment when the award is grossly excessive in relation to the state's interest in punishment and deterrence. In 1996, the Supreme Court provided long-awaited guidance for determining when such awards are "grossly excessive." *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). To aid lower courts in determining when an award is grossly excessive, the Court laid out

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<sup>25</sup>Courts may closely review the admissibility or sufficiency of the evidence introduced in support of a claim for punitive damages. *See, e.g., Conde v. Velsicol Chem Co.*, 816 F. Supp. 453 (S.D. Ohio 1992) (granting defendant's motion for summary judgment on punitive damages where plaintiffs failed to show that the chemical at issue caused their injuries or was even capable of causing the injuries alleged), *aff'd*, 24 F.3d 809 (6th Cir. 1994); *Hilgeman v. Am. Mortgage Secs., Inc.*, 994 P.2d 1030 (Ariz. Ct. App. 2000) (punitive damages could not be upheld in absence of any record to support it). In *Ripa v. Owens-Corning Fiberglas Corp.*, 660 A.2d 521, 537 (N.J. Super. Ct. App. Div.), *cert. denied*, 665 A.2d 1111 (N.J. 1995) (unpublished table decision), the court reversed a \$5.5 million punitive damages award based on the improper admission of a potentially inflammatory research study. In *Schiavo v. Owens-Corning Fiberglas Corp.*, 660 A.2d 515, 520 (N.J. Super. Ct. App. Div. 1995), however, the same court upheld a \$100,000 punitive damages award in a case involving the same research study, finding the admission to be harmless error because the modest size of the award made "clear that this jury was not inflamed."

several factors. The *Gore* criteria are binding on state as well as federal courts, and *Gore* has been cited in more than 1,300 state and federal cases as of March 2007.

a. Notice of Punishment and Severity of Penalty

To be constitutional under *Gore*, the defendant must have had notice that its conduct may subject it to punishment, and it must have had notice concerning the potential severity of the penalty. This requirement may not be met where punitive damages substantially exceed available statutory fines and penalties. *Gore*, 517 U.S. at 584-86. A defendant may be sufficiently on notice, however, simply based on the traditional availability of punitive damages for its conduct at common law or by statute. *See, e.g., Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 649 (6th Cir. 2005) (finding sufficient notice to casino based on prior case law that awarded punitive damages on same grounds), *cert. denied*, 127 S. Ct. 209 (2006); *Ky. Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.3d 815, 828 (Ky. 2005) (finding sufficient notice because “[i]t is hard to imagine that Kentucky Farm Bureau is unaware that there are substantial civil penalties when unfair claims settlement practices are involved”).

The Court established three “guideposts” relevant to the determination of “fair notice.” These “*Gore* factors,” which have subsequently been applied by hundreds of courts reviewing punitive awards, are: (1) the degree of reprehensibility of the conduct, (2) the ratio of the amount of the award to the actual or potential harm suffered, and (3) a comparison of the award to other civil and criminal penalties for comparable conduct.

(1) Degree of reprehensibility

Under *Gore* and cases applying it, the degree of reprehensibility is the most important indicium of the reasonableness of the punitive damages award. 517 U.S. at 575; *see, e.g., Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159 (10th Cir. 2000) (company’s disregard for safety concerns sufficiently reprehensible to justify punitive damages award); *Johansen v. Combustion Eng’g, Inc.*, 170 F.3d 1320, 1336 (11th Cir.) (punitive award properly reduced where defendant had taken steps, albeit unsuccessful, to restore property and prevent problem of acidic water run-off), *cert. denied*, 528 U.S. 931 (1999); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 415 (S.D.N.Y. 1996) (reducing punitive damages award where the defendant’s conduct was “serious but not repugnant”); *Axen v. Am. Home Prods. Corp. ex rel. Wyeth-Ayerst Labs.*, 974 P.2d 224 (Or. Ct. App. 1999) (failure to change label and actual notice of association with injury amounted to deliberate and continuing misconduct justifying \$20 million award), *cert. denied*, 528 U.S. 1136 (2000).

Assessing reprehensibility is not exact, but some principles have endured. Economic harm may warrant less punishment than harm to health or safety. *See*

*Watson v. Johnson Mobile Homes*, 284 F.3d 568, 573-74 (5th Cir. 2002) (reducing punitive damages award because harm was purely economic in nature); *Cont'l Trend Res., Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639 (10th Cir. 1996) (reducing punitive damages award for purely economic injury and noting the penalty could be higher if the defendant's conduct caused "loss of life, widespread health hazards, or major environmental injury"), *cert. denied*, 520 U.S. 1241 (1997); *cf. Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154, 156 (Fla. Dist. Ct. App. 1996) (upholding punitive damages award where defendant's conduct was "highly deleterious to human health"), *review denied*, 691 So. 2d 1080 (Fla. 1997) (unpublished table decision). However, there may be an exception to this rule when the defendant exploits the plaintiff's financial vulnerability. *See Gore*, 517 U.S. at 576 ("[I]nfliction of economic injury. . . when the target is financially vulnerable can warrant a substantial penalty."); *see, e.g., Krysa v. Payne*, 176 S.W.3d 150, 159-60 (Mo. Ct. App. 2005) (upholding substantial punitive damages award in non-injury case where plaintiffs purchased unsafe vehicle that "was at the upper limit of what they were able to afford" and they "were unable to obtain another vehicle for their use, leaving them with only one safe vehicle for their family").

Another factor to consider is evidence of repeated or long-standing behavior known by defendant to be illegal or unlawful. *See Gore*, 517 U.S. at 576-77; *Mackela v. Bentley*, 614 S.E.2d 648, 651 (S.C. 2005), *cert. denied* (2006). For example, the Oregon Supreme Court upheld a reinstated punitive damages award of \$79.5 million, in part, because the tobacco company had advertised to "keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century." *Williams v. Philip Morris*, 127 P.3d 1165, 1177 (Or. 2006). The United States Supreme Court recently reversed this ruling because a jury is not permitted to punish a defendant for harm caused to non-parties. *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007) (discussed below).

## (2) Ratio

The second *Gore* guidepost considers the ratio between punitive and compensatory damages. There must be a "reasonable relationship" between the two. Although there is no "mathematical bright line," *Gore*, 517 U.S. at 559, the Supreme Court has held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).<sup>26</sup> In *State Farm*, the plaintiff prevailed on bad faith, fraud and intentional

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<sup>26</sup>Historically the cases – including Supreme Court cases – failed to establish any uniform acceptable ratio. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (suggesting that a ratio of 90:1 was probably excessive); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (a ratio of 526:1 was accepted); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (a 4:1 ratio was described as "close to the line" but was approved); *Johansen*, 170 F.3d at 1320 (reducing 320:1 ratio to 100:1); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (upholding 10:1 ratio); *Szwast v. Carlton Apartments*, 102 F. Supp. 2d 777,

infliction of emotional distress claims stemming from the defendant insurance company's refusal to settle an auto accident claim, and subsequent refusal to cover excess liability. The Utah Supreme Court upheld \$1 million in compensatory damages, and reinstated a \$145 million punitive damages award. The United States Supreme Court reversed on grounds that the ratio was excessive. *Id.* The Court, however, reiterated that it was not imposing a bright-line ratio that a punitive damages award could not exceed. Specifically, the Court repeated that a punitive damages award exceeding a single digit multiplier might be justified if a "particularly egregious act has resulted in only a small amount of economic damages" or if "the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." *Id.* (quoting *Gore*, 517 U.S. at 582). Conversely, if compensatory damages are high, a lesser ratio of compensatory to punitive damages is warranted. Ultimately, courts "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id.* at 426.

The *State Farm* ruling has led many courts to revisit punitive damages awards on appeal and reduce or remand such awards to lower courts for further consideration. In *State Farm* itself, the Utah Supreme Court on remand ordered a reduction from \$145 million to just over \$9 million (based on a 9:1 ratio with the compensatory damages). *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, 98 P.3d 409, *cert. denied*, 543 U.S. 874 (2004); *see In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006) (original punitive damages award of \$5 billion and \$287 million in compensatory damages, reduced by district court to \$4 billion after first remand, raised to \$4.5 billion after second remand, reduced to \$2.5 billion by 9th Circuit Court of Appeals because \$4.5 billion exceeded by a material factor an appropriate ratio of 5:1 punitive damages to harm); *Clark*, 436 F.3d at 606 (overturning 13:1 ratio); *Casumpang v. Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1220 (D. Haw. 2005) (overturning 4:1 ratio where compensatory damages were high for emotional distress claim).

Particularly after *State Farm*, some courts have been hesitant to assess large punitive damages awards where compensatory damages awards are also large. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (although conduct was reprehensible, reducing punitives award from

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785 (E.D. Mich. 2000) (ratio of 133:1 "crosses far into the territory of constitutional impermissibility"); *Utah Foam Prods. v. Upjohn Co.*, 930 F. Supp. 513 (D. Utah 1996) (reducing punitive damages award from a 17.5:1 ratio), *aff'd*, 154 F.3d 1212 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999); *Schmizzi v. Ill. Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (reducing 13:1 ratio to 3:1); *Langmead v. Admiral Cruises Inc.*, 696 So. 2d 1189, 1194 (Fla. Dist. Ct. App. 1997) (noting that punitive damages award 3626 times higher than actual damage award would send "high Court into cardiac arrhythmia" and reducing punitive damages to zero); *Lister v. NationsBank of Del., N.A.*, 494 S.E.2d 449, 459 (S.C. Ct. App. 1997) (holding 23:1 ratio within "constitutionally accepted range"); *Parcelsus Health Care Corp. v. Willard*, 97-CA-01494-SCT, (Miss. 1999) (upholding ratios of 150:1 and 43:1), *cert. denied*, 530 U.S. 1215 (2000); *see also In re New Orleans Train Car Leakage Fire Litig.*, 97-1150 (La. 6/27/97); 697 So. 2d 239, 239 (holding that trial court may not instruct jury to use multiplier to determine punitive damages).

\$15 million to \$5 million because compensatory damages award was \$4,025,000); *Casumpang*, 411 F. Supp. 2d at 1220 (overturning \$1 million punitive damages award where plaintiff was awarded \$240,000 in compensatory damages for emotional distress).

### (3) Comparable Civil and Criminal Penalties

*Gore* requires courts to compare the punitive damages award and any civil or criminal penalties that the state might impose on such conduct, which are taken as an approximation of the seriousness with which the state legislature views the conduct. *See, e.g., Bielicki*, 225 F.3d at 1166 (punitive damages award permissible in light of the civil and criminal penalties available under FIFRA); *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207 (10th Cir. 2000) (although punitive damages of \$58,500,000 was greater than criminal penalties provided for under federal and state law, the damages were not grossly excessive), *aff'd*, 532 U.S. 588 (2001); *Sanchez v. Brokop*, 398 F. Supp. 2d 1177, 1195 (D.N.M. 2005) (upholding \$2 million punitive damages award, in part, because there was no civil penalty cap); *Szwast*, 102 F. Supp. 2d at 777 (punitive damages of \$400,000 excessive in light of the penalties available under the Fair Housing Act); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513 (reducing punitive damages award from 17.5:1 ratio to 2:1 to comport with civil penalties), *aff'd*, 154 F.3d 1212 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1991); *Schaffer v. Edward D. Jones & Co.*, 1996 SD 94, 552 N.W.2d 801 (noting penalties for criminal misconduct would have been \$10,000 fine and/or ten years in prison). If a statute provides for a range of penalties, however, a defendant is not necessarily on notice that the state's interest in the conduct at issue is represented by the maximum fine. *See, e.g., Johansen*, 170 F.3d at 1337 (where Georgia law provided for penalty of up to \$100,000 per day for stream pollution, but actual assessed penalty was \$10,000, trial court properly considered latter figure as most relevant state sanction).

The *Gore* guidelines are not exclusive, particularly because punitive damages, constitutionality aside, are governed in the first instance by state law. *Gasperini v. Ctr. for Humanities Inc.*, 518 U.S. 415 (1996). Thus, many courts assess a punitive damages award under state law first before turning to *Gore* to assess constitutionality. *See, e.g., Inter Med. Supplies v. EBI Med. Sys.*, 975 F. Supp. 681 (D.N.J. 1997), *cert. denied*, 528 U.S. (2000); *United Int'l Holdings*, 210 F.3d at 1207.

#### b. State's Interest

*Gore* directed trial courts to identify the "state interests that a punitive award is designed to serve." 517 U.S. at 568. Usually, a state's interest is in protecting its own residents from harm. *See, e.g., Mathie v. Fries*, 121 F.3d 808 (2d Cir. 1997); *Inter*, 975 F. Supp. at 681. For example, in *Jacque*, the Wisconsin Supreme Court upheld a \$100,000 punitive damages award on a \$1 nominal



damage award with the avowed purpose of ensuring the state's interest in protecting property owners from those who exhibit an "indifference and a reckless disregard for the law, and for the rights of others."

Attempts by plaintiffs to admit evidence of harm to out-of-state people have been rejected as being beyond the scope of the state's interest in protecting its residents. In *Sandoz Pharmaceuticals Corp. v. Gunderson*, the court vacated an \$11 million punitive damages award because the trial court had allowed evidence of conduct that occurred out-of-state. Nos. 2004-CA-001536-MR & 2004-CA-001537-MR, 2005 WL 2694816, at \*14 (Ky. Ct. App. Oct. 21, 2005). Although the evidence was admissible "to determine whether and to what degree the defendant's conduct within Kentucky had been reprehensible," it was reversible error not to instruct the jury "not to use out-of-state evidence to award punitive damages for conduct that occurred outside Kentucky." *Id.*; see also *Williams*, 127 S. Ct. at 1065.

*Gore* held that a state may not punish tortfeasors for "conduct that is lawful in other jurisdictions." 517 U.S. at 574. In a footnote, the Court declined to reach the issue whether a state could punish *unlawful* conduct done in another state. *Id.* at 573 n.20. In *State Farm*, the Court ruled as a general proposition that a state does not have a legitimate concern in using punitive damages to punish illegal acts that occur outside the state's jurisdiction. See 538 U.S. at 420-21. The Court also reiterated that a state cannot punish a defendant for actions that were lawful in the jurisdiction that they occurred. See *id.* Consequently, it appears that it is irrelevant whether the out-of-state conduct is lawful or unlawful: the state may not use punitive damages to punish either type of behavior. Evidence of out-of-state conduct could be used to demonstrate that the defendant's conduct was intentional, but it is crucial that the out-of-state evidence must have a nexus to the specific harm suffered by the plaintiff. *Id.* at 422-23 ("[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"). Thus, a defendant's dissimilar conduct, independent of the actions that gave rise to liability in the first place, cannot serve as the basis for punitive damages. See *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004) (in a products liability claim against Ford for an allegedly defective transmission, ruling that the jury was improperly presented with arguments for punitive damages based on national sales figures for the vehicles in question and reports of similar injuries nationwide); see also *Gunderson*, 2005 WL 2694816.

### **3. Constitutional Challenges to the Procedures Used to Assess or Review Punitive Damages**

Under Supreme Court precedent, punitive damages awards may also be found unconstitutional based on the inadequacy of the procedures used to assess them (*i.e.*, jury instructions) or the procedures used to review them. See *Williams*, 127 S. Ct. 1057; *Honda Motor Corp. v. Oberg*, 512 U.S. 415 (1994), *cert. denied*, 517 U.S. 1219 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443

(1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

a. Jury Instructions

The Supreme Court has made clear that trial courts must provide the jury with adequate guidance as to the purposes and intent of punitive damages. Under *Haslip*, “adequate guidance” means that the jury instructions must inform the jury that the purpose of punitive damages is to punish the defendant for “civil wrongdoing” and deter others from similar conduct. The instructions must also direct the jury to “take into consideration the character and degree” of the wrong and the necessity of preventing similar wrongs, and they must explain that punitive damages are not compulsory. *See, McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000) (jury instructions satisfied standards set forth in *Haslip*); *see also United Int’l Holdings*, 210 F.3d 1207; *Newport v. USAA*, 2000 OK 59, 11 P.3d 190. The suggested instructions closely replicate the factors identified in Section 908(2) of the Restatement. If even one of these elements is missing, the defendant may have a due process claim.

Jury instructions also must comply with the Supreme Court’s recent guidance on the constitutional limitations of what a jury may consider in awarding punitive damages. In *Williams*, a tobacco case, defendant Philip Morris had proposed a jury instruction at trial specifying that the jury could not seek to punish Philip Morris for injuries to other persons not before the court. 127 S. Ct. at 1061. The court rejected the jury instruction, and the jury awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages, a ratio of roughly 1:100. *Id.* The trial judge found the punitive damages award excessive, and reduced it to \$32 million, but the Oregon Court of Appeals restored the \$79.5 million award. After the Oregon Supreme Court denied review, the United States Supreme Court granted *certiorari*, vacated the judgment, and remanded the case in light of *State Farm*. However, the Oregon Court of Appeals adhered to its original view. The Oregon Supreme Court agreed. *Id.* at 1061. However, the United States Supreme Court held that a jury is not permitted to punish the defendant for harm caused to non-parties. *Id.* at 1065. Therefore, the Due Process Clause requires states to provide assurances that juries are not asking the wrong question, *i.e.*, seeking not simply to determine reprehensibility (for which juries are allowed to consider harm caused to non-parties) but also to punish for harm caused strangers. *Id.* at 1064. Although states have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection to defendants who may have harmed non-parties. *Id.* at 1065. The Supreme Court did not mandate specific jury instructions, but vacated the Oregon Supreme Court's judgment and remanded the case.

Similarly, in *Sand Hill Energy* the Kentucky Supreme Court reversed a punitive damages award that was based in part on the jury’s consideration of out-of-state conduct by the defendant. The court held that the jury should be

instructed to consider national sales and injuries solely for purposes of deciding whether defendant's conduct was reprehensible, and, if so, how reprehensible it was, but the evidence could *not* be used to award damages for conduct that occurred outside of Kentucky. 142 S.W.3d at 167; *see also Gunderson*, 2005 WL 2694816.

b. Post-Verdict Review

*Haslip* endorses post-verdict procedures that ensure meaningful and adequate review by the trial court of all punitive damage assessments, and appellate review to determine if the award is reasonably related to the goals of deterrence and retribution. 499 U.S. at 20-22. Moreover, the lack of adequate opportunity for meaningful judicial review will give rise to a due process claim even if the jury instructions are sufficient. *See Honda*, 512 U.S. 415. In *Honda*, the Court struck down an Oregon law precluding courts from reducing excessive awards because the law did not allow any recourse if a jury failed to follow the trial court's instructions. The *Honda* Court also noted that a trial court's ability to vacate unsupported verdicts provided inadequate protection because the courts were not empowered to determine whether the *amount* awarded was justified.

In 2001, the Supreme Court resolved a long-standing split among appellate courts at both the federal and state levels by holding that *de novo* review is the proper standard of review for challenges to punitive damages awards as being unconstitutionally excessive. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). This was an important ruling for defendants because it gives them a second chance to argue against a punitive damages award. In *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, itself, the Ninth Circuit on remand lowered the punitives award from \$4.5 million to \$500,000. 285 F.3d 1146 (9th Cir. 2002). The *Leatherman* ruling has also had less salutary effects. At least one federal district court relied on the new review procedures imposed by *Gore* and *Leatherman* to remand a case to state court following removal. *Arnold v. Guideone Specialty Mut. Ins. Co.*, 142 F. Supp. 2d 1319 (N.D. Ala. 2001). The court rejected defendant's attempts to argue that the amount in controversy exceeded \$75,000, given the restraint on punitive damages imposed by *Gore* and *Leatherman*. The court described *Gore* as placing a lid on punitive damages and *Leatherman* as tightening that lid to the point that the court was no longer concerned about "send[ing] a defendant like this one to its fate in state court." *Id.* at 1322; *see also Register v. Rus of Auburn*, 193 F. Supp. 2d 1273 (M.D. Ala. 2002) (potential punitive damages award necessary to satisfy amount in controversy would be unconstitutional).

c. Standard of Proof

*Haslip* requires only the civil standard of "preponderance of the evidence" in imposing punitive damages. 499 U.S. at 23 n.11 (stating that "there is much to be said in favor" of a higher standard, but holding that the Due Process Clause

does not require it (citation omitted)). Appendix A shows each state's standard of proof for punitive damages, the elements of proof required, and whether damages caps exist. *Honda* demonstrates that the mere adoption by a state of a standard of proof higher than a preponderance of the evidence will not cure procedural infirmities. As the Court noted, the Oregon law's "clear and convincing" standard provided no assurance against arbitrary awards. *Honda*, 512 U.S. at 433.

To date, only a handful of federal circuit or state Supreme Court decisions have found state standards or procedures inadequate under *Haslip* or *TXO*. See, e.g., *Johnson v. Hugo's Skateway*, 949 F.2d 1338 (4th Cir. 1991) (holding standards for post-trial and appellate review under Virginia law insufficient), *superseded*, 974 F.2d 1408 (1992); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (holding limits on jury discretion under South Carolina insufficient); *Garnes v. Fleming Landfill Inc.*, 413 S.E.2d 897 (W. Va. 1991) (holding post-verdict review inadequate under *Haslip*).

Some states have enacted statutes which alter their procedural requirements by providing for bifurcated trials or separate proceedings when punitive damages are at issue. See, e.g., Alaska Stat. § 09.17.020 (2006); Kan. Stat. Ann. §§ 60-3701 and 60-3702 (2005); Minn. Stat. § 549.20 (West 2007); Miss. Code Ann. § 11-1-65(1) (West 2006) (does not apply to asbestos); Mo. Rev. Stat. § 510.263 (2006); Mont. Code Ann. § 27-1-221 (2005); N.J. Stat. § 2A:15-5.13 (2007); N.C. Gen. Stat. § 1D-30 (2006); Ohio Rev. Code Ann. § 2315.21 (West 2007); 23 Okla. Stat. Ann. tit. 23 § 9.1 (West 2007); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.008(a) and 41.009 (Vernon 2006); see also *W.R. Grace & Co.-Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (bifurcation of determination of amount of punitives upon request); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900-01 (Tenn. 1992) (same). These procedures allow trial courts to exercise greater control over proceedings specifically concerning punitive damages and to minimize the amount of evidence of limited admissibility that is presented to juries during the liability phase.

d. Alleged Misconduct Towards Third Parties

Because the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injury inflicted upon non-parties, punitive damages awards based on such evidence amount to a taking of property from the defendant without due process. *Williams*, 127 S. Ct. at 1060, 1063. While evidence of harm to third parties can be considered in determining reprehensibility, *i.e.* posed a substantial risk of harm to the general public, states must provide assurance that juries are using such evidence simply to determine reprehensibility, not to punish for harm caused to third parties. *Id.* at 1064.

Moreover, under *State Farm*, a punitive damages can be imposed only for conduct that has "a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. In addition to the primary application of this principle – to exclude

or limit the application of evidence of conduct outside the state – courts have held that *State Farm* also limits the extent to which a plaintiff can present evidence of other misconduct by the defendant. For example, in *Durham v. Vinson*, 602 S.E.2d 760 (S.C. 2004), the South Carolina Supreme Court reversed and remanded a punitive damages award of \$15 million based in part on evidence that a surgeon – charged with medical malpractice in connection with a surgery – had given Valium to the plaintiff’s daughter and told her to distribute it to the family. This misconduct, the court held, was not directed toward the plaintiff, and thus was not admissible punitive damages evidence. In *Librado v. M.S. Carriers Inc.*, No. CIV. A. 3:02-CV-2095-D, 2004 WL 1490304 (N.D. Tex. June 30, 2004), a lawsuit for personal injuries allegedly caused by the negligence of a trucking company’s driver, the court excluded plaintiffs’ proffered evidence of the defendant’s negligent attitude with regard to safety issues in general. Such acts were held to be independent from those that allegedly caused the accident, and therefore were not admissible to prove punitive damages.

#### **4. *Constitutional Reductions in Punitive Damages and the Seventh Amendment***

The federal appellate courts have grappled with the question of the procedure they must follow to avoid depriving plaintiffs of their Seventh Amendment right to a jury trial when reducing punitive damages awards. With respect to reductions in compensatory damages, or reductions in punitive damages for other than constitutional reasons, the rule is clear: a federal court cannot alter a jury’s findings of fact (including as to the measure of damages) without running afoul of the Seventh Amendment. However, a federal court *does* have the power to order a new trial, which gives the court the derivative power to force a plaintiff to choose between “voluntarily” remitting a portion of the damages awarded or facing a new trial. The question is whether this same procedural maneuver – imposing a choice between remittitur or new trial – is required when punitive damages are reduced for exceeding a *constitutional* cap. Some courts have required plaintiffs to be given the choice regardless of the reasons for the reduction in damages. *See, e.g., Cont’l Res.*, 101 F.3d at 643 (plaintiff must be offered choice between reduced verdict and new trial). The more sophisticated view is that a jury’s award of punitive damages in excess of that permitted by the Constitution is not a finding of fact, but an issue of law not subject to the Seventh Amendment. Courts applying this reasoning have held that reductions for constitutional reasons – *i.e.*, under the *Gore* factors – do not require the plaintiffs’ consent or any offer of a new trial. *See, e.g., Johansen*, 170 F.3d at 1320.

This issue may well have been resolved by *Leatherman*, which analyzed whether searching appellate scrutiny of a district court’s conclusion that a punitives award was constitutional might itself violate the Seventh Amendment. The Court held that a jury’s award of punitive damages “does not constitute a finding of ‘fact’,” and thus that the Seventh Amendment does not tilt the balance

in the direction of deferential appellate review. 532 U.S. at 437.

## IV.

### CLASS ACTIONS

In recent years, countless individuals and corporations have been embroiled in seemingly endless litigation over injuries allegedly attributable to NSAID painkillers, “diet drugs,” tobacco, asbestos, and other products. Seeing little hope for effective legislative solutions to the daunting costs and problems raised by such claims, litigants and trial courts have turned to class actions as a possible alternative to the substantial costs and lengthy delays created by piece-meal litigation of individual cases. As a result, “class action practice has become ever more ‘adventuresome’ as a means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ one by one.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617-18 (1997) (quoting Fed. R. Civ. P. 1).

Some plaintiffs have attempted to use class actions as a procedural vehicle to force defendants to enter into early settlements or else risk large (often potentially bankrupting) classwide verdicts in hostile courts. Two key limitations on this sometimes abusive practice are now in place – one through meaningful Supreme Court decisions and one via statute.

The Supreme Court has placed limits on the ability of “adventuresome” litigants and their attorneys to resolve mass tort litigation in the federal class action framework through its rulings in two asbestos cases – *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem*, 521 U.S. at 591. In 2002, the Court erected another barrier to class certification in federal court when it held that an award of punitive damages to a particular claimant (presumably including absent class members) must be calculated with regard to the unique harm suffered by that claimant. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) (any award of punitive damages to a plaintiff “must have a nexus to the specific harm suffered by the plaintiff”); *see also Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (punitive damages cannot be awarded to punish a defendant for harm inflicted upon nonparties); *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 453 (Fla. Dist. Ct. App. 2003) (applying *State Farm* and holding that “the defendants are entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages”), *aff’d in part, rev’d in part*, 945 So. 2d 1246 (Fla. 2006). *But see Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147, 182 (Ct. App. 2006) (manufacturer’s pattern of improper conduct could be considered consistent with *State Farm* as part of analysis regarding reprehensibility of conduct toward particular plaintiff). The impact of these cases, combined with the Supreme Court’s application of the Full Faith and Credit Act to a state court class action settlement in *Matsushita Electric Industries Co. v. Epstein*, 516 U.S. 367 (1996),

may encourage litigants seeking effective, far-reaching settlements to choose state court class actions, rather than facing more stringent scrutiny in federal court.

A federal statutory limitation – the Class Action Fairness Act (“CAFA”) – became effective in February 2005 and was intended to stem the availability of state court class actions. One of the most important provisions of CAFA allows removal to federal court of a class action that (1) consists of at least 100 putative members, (2) involves an aggregate amount in controversy exceeding \$5 million, and (3) involves at least one putative class member who is a citizen of a state different from any defendant. Although there are situations in which the federal court may decline jurisdiction, those are limited by the statute. CAFA immediately provided defendants with new opportunities to reach federal courts. Moreover, since it became effective, CAFA has dramatically reduced the number of class actions filed in so-called “hellhole jurisdictions,” such as Madison County, Illinois. Nevertheless, as discussed in more detail below, courts continue to grapple with defining the terms of CAFA and to identify its scope.

The future role of state court class actions is uncertain, particularly in light of CAFA. Some state courts have been notably more amenable than federal courts to certifying toxic tort class actions, *see Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007) (reversing denial of certification of medical monitoring class because individual issues cited as bases for denial (such as duration of exposure) were applicable only to the personal injury class and not to the medical monitoring class); *Lewis v. Bayer AG*, No. 002353, 2004 WL 1146692, at \*25 (Pa. Ct. Com. Pl. Nov. 18, 2004) (granting certification of a national medical monitoring Baycol<sup>®</sup> class made up of Pennsylvania residents only, but denying the motion to certify a national injury or medical monitoring class); *see also Miles v. Philip Morris Cos.*, No. 00-LO-112, 2001 WL 34366710 (Ill. Cir. Ct. Feb. 1, 2001). As a result of these decisions, defendants in those jurisdictions now have greater opportunities for removal in cases qualifying for federal jurisdiction under CAFA. Other state courts have been as stringent as federal courts in their review of such cases. *See Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635, 643 (Fla. Dist. Ct. App. 2006) (reversing trial court’s certification of statewide class in hormone replacement therapy class action); *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 51-53 (Ill. 2005) (reversing judgment for plaintiffs on statutory grounds, which made a determination of the propriety of class certification moot, but including language indicating that certification would not have passed appellate review), *cert. denied*, 127 S. Ct. 685 (2006); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200 (Md. 2000) (approving decertification of tobacco class action); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (rejecting certification of class alleging injury from refinery tank fire). Whether defendants will elect to stay in such state court jurisdictions for strategic or other reasons remains uncertain.

Before examining the specific requirements for certification under Rule 23, it is important to note that, in the wake of *Amchem* and *Ortiz*, Rule 23 underwent some notable amendments that became effective on December 1, 2003. Although there is no real controversy in the case law about the scope of most of the rule changes, they are important to keep in mind when reviewing older cases under Rule 23. First, amendments to Rule 23(c)(1) require that a certification decision be made “at an early practicable time,” rather than “[a]s soon as practicable” as the Rule formerly required. *See* Fed. R. Civ. P. 23(c)(1)(A); *cf. Pyke v. Cuomo*, 209 F.R.D. 33, 35-37 (N.D.N.Y. 2002) (10-year lapse between filing of complaint and class certification motion did not render motion untimely).

Second, amendments to Rule 23(c)(1) added a new subpart, Rule 23(c)(1)(B), which specifies the required contents of an order certifying a class action. The order “must define the class and the class claims, issues, or defenses.” The purpose of this amendment is to facilitate interlocutory review under Rule 23(f), which is of particular importance given the prohibition against conditional certification. *See* Fed. R. Civ. P. 23(e)(1)(c).

Third, amendments to Rule 23(c)(1) allow an order granting or denying class certification to be amended at any point up to “final judgment,” rather than up to “the decision on the merits” as the Rule previously dictated. *See* Fed. R. Civ. P. 23(c)(1)(C). The amendments also delete the phrase “may be conditional,” thereby precluding the prior practice in some courts of conditionally certifying claims when the requirements of 23(a) and (b) could not be met.

Fourth, amendments to Rule 23(c)(2) provide that when certifying a class action under Rule 23(b)(1) or (2), the court “may direct appropriate notice to the class.” *See* Fed. R. Civ. P. 23(c)(2)(A). When certifying a class under Rule 23(b)(3), the court “must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” *See* Fed. R. Civ. P. 23(c)(2)(B). The notice “must concisely and clearly state in plain, easily understood language” a number of items including, *inter alia*: the nature of the action; the definition of the class; the claims, issues, or defenses; the right of a class member to enter an appearance through counsel; the right to request exclusion from the class; and the binding effect of a class judgment on a class certified under Rule 23(c)(3). *Id.*

Fifth, amendments to Rule 23(e) provide a series of guidelines regarding the court’s review and approval of a settlement class, notice to class members who would be bound by the settlement, and class members’ objections to a proposed settlement. One amendment allows for a second opt-out opportunity at the time a proposed settlement is presented to the court. The amendments are intended to strengthen the process of reviewing proposed class action settlements and they apply to all classes, whether certified initially as a settlement class or as an adjudicative class that then settles. *See* Fed. R. Civ. P. 23(e).



Sixth, amendments to Rule 23 added a new subpart, Rule 23(g), regarding “class counsel.” These amendments provide that the court certifying the class must appoint class counsel who “must fairly and adequately represent the interests of the class.” This subpart also provides a series of guidelines the court must and may consider in appointing class counsel. *See* Fed. R. Civ. P. 23(g)(1)(B).

Finally, amendments to Rule 23 created another new subpart, Rule 23(h). That section provides guidelines regarding the award of attorneys’ fees for plaintiffs’ counsel. *See* Fed. R. Civ. P. 23(h).

A plaintiff seeking class certification in federal court must demonstrate that the class satisfies the prerequisites set forth in Rule 23. *See, e.g., In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 565 (E.D. Ark. 2005); *Foster v. St. Jude Med., Inc.*, 229 F.R.D. 599, 602 (D. Minn. 2005). Many, but not all, states have adopted these requirements as well. The court must conduct a “rigorous analysis” of the Rule 23 prerequisites. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *see Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006); *O’Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003); *see also Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 183 (E.D. Pa. 2007) (denying motion for class certification related to use of Paxil® in minors); *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577, 584 (S.D. Ohio 2003) (denying motion for class certification of claims related to use of OxyContin®); *Brooks v. Norwest Corp.*, 103 P.3d 39, 43 (N.M. Ct. App.) (citing *Falcon* and noting that New Mexico law was “essentially identical” to Rule 23 and required the same level of analysis), *cert. denied*, 103 P.3d 1097 (2004) (unpublished table decision).

The court may not conduct a preliminary trial on the merits while considering whether to certify a class, but it must look behind the bare allegations in the pleadings to determine whether the Rule 23 requirements have been met. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (where a merits issue is identical or overlaps with a Rule 23 requirement, the Rule 23 decision is not binding on later consideration of the merits). Some courts have specifically refused to hold *Daubert* hearings while considering certification. *See, e.g., LaBauve v. Olin Corp.*, 231 F.R.D. 632, 644-645 (S.D. Ala. 2005) (at class certification stage, court can review expert testimony only to ensure that its basis is not so flawed that it would be inadmissible as a matter of law). District courts have “great discretion in certifying and managing a class action.” *Vizena v. Union Pac. R.R.*, 360 F.3d 496, 502 (5th Cir. 2004) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 478 (5th Cir. 2001)). Deference by an appellate court is “noticeably less. . . when [a district] court has denied class status than when it has certified a class.” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 58 (2d Cir. 2000); *see also Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002). However, all classes, including proposed settlement classes, must meet the requirements of

Rule 23(a) and (b). *Amchem*, 521 U.S. at 620; *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005).

## A. Rule 23(a) Prerequisites

Rule 23(a) contains four prerequisites, each of which must be satisfied before the more restrictive Rule 23(b) requirements can be considered. *See e.g.*, *In re Aredia and Zometa Products Liability Litigation*, No. 06-1760, 2007 WL 3012972, at \*3 (M.D.Tenn. October 10, 2007); *Blain*, 240 F.R.D. at 183-84; *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, (E.D. La. 2006); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 565; *Wethington*, 218 F.R.D. at 585. These prerequisites are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See Amchem*, 521 U.S. at 613. “The purpose of Rule 23(a) is to ensure that the bond between class representatives and other class members is sufficiently strong to justify lashing the fortunes of all class members to those of the named representatives.” *Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D. 273, 295 (S.D. Ala. 2006).

### I. Numerosity

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” The party seeking certification need not demonstrate that joinder is impossible, *see Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 953 (E.D. Tex. 2000); *Sweet v. Pfizer*, 232 F.R.D. 360, 366 (C.D. Cal. 2005), nor must that party establish that there exists some magic number of class members, *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 329-330 (1980). In *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the Fifth Circuit approved a class of only eight members based upon the possibility that the class might grow over time. This opinion is something of an anomaly, however, and most courts have required more class members to satisfy the numerosity requirement. *See Harik v. Cal. Teachers Ass’n*, 326 F.3d 1042, 1051 (9th Cir.) (reversing trial court’s certification of classes of seven, nine, and ten members), *cert. denied*, 540 U.S. 965 (2003); *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 431 (4th Cir. 2000) (rejecting putative class of 20 members); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (holding that class with 100 to 150 members “is within the range that generally satisfies the numerosity requirement”), *cert. denied*, 528 U.S. 1159 (2000); *see also In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 241 F.R.D. 185, 196 (S.D.N.Y. 2007) (class of over 40 people generally satisfies numerosity). Courts will also approve class treatment of a small number of plaintiffs if they are geographically dispersed, rendering joinder more difficult. *See Mullen*, 186 F.3d at 624.

Apart from a simple counting exercise, courts also require that the class be adequately defined so that potential members can be identified. *Fisher*, 238

F.R.D. at 301; *see also Suter v. Crawford*, No. 06-4032-CV-W-HFS, 2007 WL 188451, at \*1 (W.D. Mo. Jan. 23, 2007) (criteria not met where court would have to “guess or surmise” who plaintiffs intend to include in the class); *In re Paxil Litig.*, 212 F.R.D. 539, 548-49 (C.D. Cal. 2003) (numerosity requirement not met where class insufficiently defined to allow court “to even estimate the number of class members”); *Perez v. Metabolife Int’l, Inc.*, 218 F.R.D. 262, 266-67 (S.D. Fla. 2003) (rejecting class certification because of plaintiffs’ failure to adequately define the class); *Davoll v. Webb*, 160 F.R.D. 142, 144 (D. Colo. 1995) (same), *aff’d*, 194 F.3d 1116, 1147 (10th Cir. 1999); *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, at \*\*39-41 (Fla. Cir. Ct. Nov. 6, 2002) (numerosity requirement not met under Florida class action statute where class definition was “inadequate and overbroad” because a number of the proposed members could not satisfy the elements of Florida’s medical monitoring cause of action). If the class is not adequately identified, certification may be denied because a court is unable to determine whether joinder of putative class members is impracticable. *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980); *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602-03 (D. Colo. 1990); *see also KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 9 P.3d 683, 689 (Okla. 2000) (numerosity not shown under state analog to Rule 23(a)(1) where plaintiffs’ “numerous class definitions evidence the difficulty in defining a cognizable class”).

The court and putative class members must be able to ascertain who is in the class using objective criteria. *Earnest v. Gen. Motors Corp.*, 923 F. Supp. 1469, 1473 (N.D. Ala. 1996); *Ladd v. Dairyland Mut. Ins. Co.*, 96 F.R.D. 335, 339 (N.D. Tex. 1982). Moreover, a class definition may not incorporate factual, legal, or medical issues that will require adjudication in order to determine class membership. *See e.g., Snow v. Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002, at \* 8 (E.D. Mich. Mar. 31, 2006) (class definition is too vague under Rule 23 when individual proofs would be required to determine membership); *Newton v. S. Wood Piedmont Co.*, 163 F.R.D. 625, 632 (S.D. Ga. 1995), *aff’d*, 95 F.3d 59 (11th Cir. 1996) (unpublished table decision); *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D. Pa. 1995); *Brooks*, 103 P.3d at 46. However, some courts have held that certification is appropriate even if class members cannot be currently identified so long as its members will be subject to identification based on objective criteria *after* the jury makes certain findings of fact. *See In re MTBE Prods. Liab. Litig.*, 241 F.R.D. at 195-96 (certifying class of homeowners who may have experienced groundwater contamination even though the boundaries of the allegedly impacted area would be decided by the jury and therefore were not known when the court evaluated the class certification motion); *Gene & Gene v. Biopay*, 240 F.R.D. 239 (M.D. La. 2006) (possibility that some putative class members will ultimately fail to prevail on merits issue that is also criteria for class membership does not defeat Rule 23(a) requirements).

## 2. Commonality

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” “The test for commonality is not demanding and is met ‘where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.’” *Mullen*, 186 F.3d at 625 (citation omitted). *See also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527-28 (3d Cir. 2004) (“commonality element requires that the proposed class members share at least one question of fact or law in common with each other”); *In re Vicuron Pharms., Inc. Sec. Litig.*, 233 F.R.D. 421, 426 (E.D. Pa. 2006) (same); *In re MTBE Prods. Liab. Litig.*, 241 F.R.D. at 197 (same); *see also Shaw*, 91 F. Supp. 2d at 954; *Sweet*, 232 F.R.D. at 367; *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 549 (D. Minn. 1999). However, the commonality standard is a threshold – at least one court found that where plaintiffs seek to resolve both common and uncommon issues in one case, “the requirement is greater.” *Perez*, 218 F.R.D. at 270. Some courts have cautioned that “an issue of law or fact should be deemed ‘common’ only to the extent its resolution will advance the litigation of the entire case.” *Angeletti*, 752 A.2d at 226 (interpreting the Maryland analog to Rule 23 and citing to federal authority); *see also Wethington*, 218 F.R.D. at 585 (denying certification under Rule 23(a)(2) because, even though one common issue is sufficient to support certification if its resolution will materially advance the litigation, whether the common issue of defendants’ marketing practices would be reached in any specific plaintiff’s claims depended upon resolution of various individual issues).

The commonality requirement can be difficult to satisfy when putative class members are located throughout the country. Efforts to certify nationwide classes have often failed in such cases because courts have concluded that differences among the laws of the fifty states would make it impossible to grant relief on such a sweeping scale. *See, e.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741-44 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-01 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015 (7th Cir. 2002) (reversing district court’s certification of a class action after rejecting the trial court’s determination that only the law of the states where defendants’ headquarters are located applied and concluding that because the laws of 50 states plus U.S. territories apply, a nationwide class action – and even a statewide class action – was unmanageable), *cert. denied*, 537 U.S. 1105 (2003); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 562 (refusing to certify class requiring application of laws from between 24 to 28 states). *But see Rivera v. Wyeth-Ayerst Labs.*, 197 F.R.D. 584, 586 (S.D. Tex. 2000) (approving a nationwide class under Rule 23(a)(2) and finding that plaintiffs should have the opportunity to create a workable subclass plan to solve problems created by variations in state laws), *rev’d on other grounds*, 283 F.3d 315 (5th Cir. 2002); *Cheminova Am. Corp. v. Corker*, 779 So. 2d 1175, 1180 (Ala. 2000) (under Alabama analog to Rule 23, approving nationwide class for recovery of

economic damages in drug products liability action and noting that “state-law variations can be recognized and dealt with”).

For many product liability cases, commonality involves a discussion of general versus specific causation. Plaintiffs will undoubtedly seek to separate these questions, arguing that whether the product is capable of causing the alleged injury is a “common” question and that whether the product did cause the injury in a specific plaintiff is a separate inquiry that can be conducted after common issues are resolved. Most Courts have rejected these arguments, finding that “the two parts of the causation issue cannot be separated.” *Blain*, 2007 WL 178564, at \*4; *see also In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 164-65 (2d Cir. 1987); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. at 570.

### 3. *Typicality*

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” *See Warfarin Sodium Antitrust Litig.*, 391 F.3d at 531. This is also not a “demanding [test].” *Mullen*, 186 F.3d at 625; *Shaw*, 91 F. Supp. 2d at 954. Courts have found that “typicality is satisfied where the claims of the class representatives and class members arise from the same alleged course of conduct by the defendant.” *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 1203, 2000 WL 1222042, at \*43 (E.D. Pa. Aug. 28, 2000).

As with commonality, however, the typicality requirement is not a mere formality. *See In re Aredia and Zometa Products Liability Litigation*, No. 06-1760, 2007 WL 3012972, at \*3 (M.D. Tenn. October 10, 2007) (“individual issues of fact” defeated typicality and precluded certification of the class for dental monitoring); *Blain*, 241 F.R.D. at 188-89 (“numerous critical factual and legal differences” between two alleged representatives and the absent class members, including key differences in individual medical histories, defeated typicality); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 458 (the need to apply different states’ substantive laws to class members claims defeated typicality); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 205-06 (D. Minn. 2003) (because purported class members took Baycol at different times, in different doses, and in different circumstances, representatives’ claims could not be typical); *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 209 F.R.D. 323, 337-38 (S.D.N.Y. 2002) (typicality requirement was not met where plaintiffs’ legal arguments were the same, but each plaintiff’s alleged well contamination resulted from “a factually unique set of circumstances”); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. MDL 1203 CIV. A. 98-20594, 1999 WL 782560, at \*11 (E.D. Pa. Sept. 27, 1999) (typicality requirement not met where class representatives’ exposure and alleged injury differed from those alleged by some other class members). Together with commonality, the typicality requirement ensures “that only those plaintiffs or defendants who can advance the same factual and legal arguments may be

grouped together as a class.” *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (reversing certification of franchisee class that did not satisfy commonality and typicality requirements).

#### **4. Adequate Representation**

Rule 23(a)(4) requires the representative plaintiffs to demonstrate that they “will fairly and adequately protect the interests of the class.” Determining whether this condition is met entails a two-pronged inquiry: (1) “the representatives’ attorneys must be qualified and willing and able to prosecute the case competently and vigorously,” and (2) “the named Plaintiffs’ interests must not diverge from those of the class as a whole.” *Thompson*, 189 F.R.D. at 550; see also *Warfarin Sodium Antitrust Litig.*, 391 F.3d at 532; *Foster*, 229 F.R.D. at 604; *In re Diet Drugs*, 2000 WL 1222042, at \*44. Rule 23(g) discusses criteria the court should use in appointing class counsel, including the lawyer’s skill and experience.

The requirement that a court assess the class lawyer’s competence is based on the recognition that “a lawyer for a plaintiff class has not only an impaired incentive to be the faithful agent of his (nominal) principal, but also the potential to do great harm both to the defendant because of the cost of defending against a class action and to the members of the class because of the preclusive effect of a judgment.” *Greisz v. Household Bank (Illinois) N.A.*, 176 F.3d 1012, 1013-14 (7th Cir. 1999) (affirming denial of class certification based on plaintiffs’ counsel’s history of “inept and wholly unsuccessful efforts to conduct class actions”); see also *Angeletti*, 752 A.2d at 241.

The principal focus of a court’s Rule 23(a)(4) analysis is whether the named plaintiff “has interests that are antagonistic to or in conflict with the objectives of those he purports to represent.” *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000). “[A] party’s claim to representative status is defeated only if the conflict between the representative and the class is a fundamental one, going to the specific issues in controversy.” *Id.*; see *Grimes v. Fairfield Resorts, Inc.*, No. 06-14363, 2007 WL 245128, at \*\*3-4 (11th Cir. Jan. 30, 2007) (conflicts defeating adequacy requirement may be economic or non-economic; once the Rule 23 requirements were not satisfied, the trial court did not abuse its discretion in refusing to allow amendment of class certification allegations); *Mullen*, 186 F.3d at 625-26 (mere “variances” in the ways that named plaintiffs and other class members may prove causation or damages do not render named representative inadequate); *Smith v. Nike Retail Serv., Inc.*, 234 F.R.D. 648, 661 (N.D. Ill. 2006) (adequacy requirement is met when all representatives experienced a similar ultimate injury as the class, such as exposure to a hostile work environment, even if each different wrongful conduct occurred to members of the class and none of the representatives).

For example, in the Baycol<sup>®</sup> litigation, the court found that the class representatives were not adequate because each had suffered an injury, which was a characteristic that many class members did not share. *Baycol Prods. Litig.*, 218 F.R.D. at 211; *see also Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003) (class representatives who have different economic interests than class members are inadequate); *Blain*, 240 F.R.D. at 189 (same individual issues that preclude a finding of typicality preclude satisfaction of the adequacy requirement); *Jensen v. Bayer AG*, 862 N.E.2d 1091 (Ill. App. Ct. 2007) (class representative who has claims different from the class is not adequate). *But see In re Vicuron Pharm., Inc. Sec. Litig.*, 233 F.R.D. at 427 (class representative is not inadequate simply because he served as a class representative in other litigation); *Murray v. New Cingular Wireless Servs., Inc.*, 232 F.R.D. 295, 299 (N.D. Ill. 2005) (representative may be adequate despite memory loss from stroke).

A purported representative is also inadequate if he engages in claim splitting to obtain certification because, as numerous courts have concluded, those who bring only a portion of their claims in an initial suit lose their ability to bring other claims based upon the same circumstances in a later action. *See In re MTBE Prods. Liab. Litig.*, 209 F.R.D. at 338-40 (class representatives alleging well contamination held inadequate where they sought only injunctive relief and had “weak incentive to prosecute” personal injury or property damage claims that other class members might have and where subsequent courts could preclude a later adjudication of such claims); *Foster*, 229 F.R.D. at 604 (denying certification where purported representatives sought compensatory damages and medical monitoring for themselves, but only medical monitoring for the class); *Thompson*, 189 F.R.D. at 550 (named representatives seeking to represent class of smokers in medical monitoring claim held inadequate where they sought to reserve individual personal injury and damages claims); *Hoyte*, 2002 WL 31892830, at \*\*41-44 (class representatives held inadequate under Florida statute where they sought only medical monitoring relief and asserted no “potentially valuable compensatory damage claims” and, furthermore, seemed unaware that all claims except medical monitoring had been dropped from the case). *But see Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64, 82-83 (M.D. Tenn. 2004) (when individual class members have little or no incentive to bring individual monetary claims, class representatives who do not bring monetary claims and therefore possibly preclude class members from doing so later under *res judicata* principles were not found to be inadequate); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 670 (D. Kan. 2004) (class representatives were not inadequate where they did not pursue certain legal theories, but did pursue others that, if successful, would allow class members to recover the same damages).

If it is already clear – when class certification is sought – that the named plaintiff’s claim is extremely weak or that the named plaintiff’s trustworthiness is questionable, these problems can be independent grounds to deny certification.

*See Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir.) (“One whose own claim is a loser from the start knows that he has nothing to gain from the victory of the class, and so has little incentive to assist or cooperate in the litigation; the case is then a pure class action lawyer’s suit.”), *cert. denied*, 528 U.S. 824 (1999); *Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998) (affirming denial of class certification based on “serious concerns as to [named plaintiff’s] credibility at any trial”). Further, class representative status may be denied on adequacy grounds “where the class representatives have so little knowledge of and involvement in the class action that they would be unwilling or unable to protect the interests of the class against the possibly competing interests of the attorneys.” *Baffa*, 222 F.3d at 61.

In *Amchem*, the Supreme Court rejected a proposed asbestos class settlement in part because the adequacy requirements of Rule 23(a)(4) were not met. The proposed settlement sought to establish a fund to pay both present claims to plaintiffs with “current” injuries and future claims to “exposure-only” plaintiffs. But the Court held that the differences among the class members were too significant. *See Amchem*, 521 U.S. at 626 (stating that the “named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses” and that, “[i]n significant respects, the interests of those within the single class are not aligned”). The Court also noted that there was no assurance – based on “the terms of the settlement or . . . the structure of the negotiations – that the named plaintiffs operated under a proper understanding of their representational responsibilities.” *Id.* at 627. In sum, the Court rejected the proposed settlement because the parties “achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected” and because, “[a]lthough the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.” *Id. But cf. Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1146-47 (8th Cir. 1999) (approving a 23(b)(3) class of property owners in an environmental claim arising from oil spill because potential conflicting interests arising from continuing migration of oil underground “failed to rise to a level in which the concerns expressed in *Amchem* or *Ortiz* would become applicable”).

## **B. Rule 23(b) Analysis**

Upon satisfying the criteria of Rule 23(a), proposed class action plaintiffs must then show that class treatment is appropriate under either Rule 23(b)(1) (limited fund class action), Rule 23(b)(2) (equitable relief class action), or Rule 23(b)(3) (common question class action). *See Amchem*, 521 U.S. at 614. While these subsections are designed to address different legal situations, the most significant pragmatic distinction for parties in toxic tort litigation is that class actions that proceed under Rules 23(b)(1) and (2) – unlike those that proceed under Rule 23(b)(3) – do not require notice to class members and, except in



limited situations, do not permit opt-outs.

Plaintiffs have sought class certification of claims in toxic tort cases under each of the three sub-parts of Rule 23(b), with mixed results. The availability of class treatment of toxic tort claims under Rule 23(b)(1) was dealt a serious blow in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which rejected a purported “limited fund” class action settlement of personal injury litigation against one asbestos defendant. Efforts to obtain Rule 23(b)(2) class treatment of toxic tort cases through medical monitoring claims have succeeded only sometimes. Compare *In re Diet Drugs Prods. Liab. Litig.*, No. Civ. A. 98-20626, 1999 WL 673066 (E.D. Pa. Aug. 26, 1999) (conditionally certifying medical monitoring class in “Fen-Phen” litigation), *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003) (reversing trial court’s refusal to certify medical monitoring class), and *Scott v. Am. Tobacco Co.*, 98-CA-0452 (La. App. 4th Cir. 11/4/98); 725 So. 2d 10 (approving certification of medical monitoring and smoking cessation assistance classes), with *Lockheed Martin Corp. v. Super. Ct.*, 63 P.3d 913, 1111 (Cal. 2003) (refusing to certify medical monitoring class in groundwater contamination case) and *Angeletti*, 752 A.2d at 251-254 (rejecting medical monitoring class in tobacco litigation under the Maryland analog to Fed. R. Civ. P. 23(b)(2)). Likewise, efforts to certify Rule 23(b)(3) “common question” toxic tort class actions have led to mixed results. Compare *Amchem*, 521 U.S. 591 (rejecting settlement of Rule 23(b)(3) asbestos class action), and *Angeletti*, 752 A.2d at 229-249 (denying certification of tobacco “common question” class), with *In re Diet Drugs*, 2000 WL 1222042 (approving settlement of “Fen-Phen” class action litigation under Rules 23(b)(2) and 23(b)(3)), and *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330 (N.D. Ohio 2001) (certifying class action and preliminarily approving settlement in hip prosthesis litigation under Rules 23(b)(2) and 23(b)(3)).

### ***1. The Limited Fund Class Action***

Rule 23(b)(1) allows a court to certify a class when separate actions by or against individual class members would create a risk of: (A) “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class,” or (B) adjudications with respect to individual class members that would “as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” Toxic tort plaintiffs have sought certification of classes under Rule 23(b)(1) by contending that a defendant has insufficient assets to satisfy all claims against it – a so-called “limited fund” class action. The advisory committee clearly recognized that the existence of a “limited fund” will support class certification under this prong of Rule 23(b): “In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are

made by numerous persons against a fund insufficient to satisfy all claims.” Fed. R. Civ. P. 23(b)(1) advisory committee’s note. These kinds of cases “are often referred to as ‘mandatory’ class actions” because, unlike Rule 23(b)(3), Rule 23(b)(1) does not entitle class members “to receive notice and to exclude themselves from class membership as a matter of right.” *Ortiz*, 527 U.S. at 834 n.13.

The *Ortiz* Court’s rejection of an asbestos “limited fund” class action settlement has significantly weakened the likelihood of certification of toxic tort class actions under Rule 23(b)(1). Although the *Ortiz* Court refused to decide the ultimate issue of whether Rule 23(b)(1) may ever be used to aggregate individual tort claims, the Court noted that the applicability of this rule to toxic tort cases is “subject to question,” *id.* at 864, and also observed that the drafters of Rule 23 “would have thought such an application of the Rule surprising.” *Id.* at 844-45. The Court instructed courts considering the propriety of “limited fund” class action certification “to stay close to the historical model.” *Id.* at 817.

Under *Ortiz*, a limited fund class settlement must satisfy three “presumptively necessary, and not merely sufficient [requirements],” *id.* at 817: (1) “the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, [must] demonstrate the inadequacy of the fund to pay all of the claims”; (2) “the whole of the inadequate fund [must] be devoted to the overwhelming claims”; and (3) “the claimants identified by a common theory of recovery [must be] treated equitably among themselves.” *Id.* at 838-39. The *Ortiz* Court determined that the proposed “limited fund” class settlement accepted by both lower courts failed to satisfy any of these three criteria. First, the Court criticized the district court for “uncritical[ly] adopt[ing] . . . figures agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy,” *id.* at 848 (footnote omitted), rather than making its own findings of fact “following a proceeding in which the evidence is subject to challenge [by opponents of class certification],” *id.* at 818. Second, the Court pointed out that, because the defendant-asbestos manufacturer would be allowed “to retain virtually its entire net worth,” the settlement did not appear to be “the best that can be provided for class members.” *Id.* at 860. Third, the Court found that the settlement did not provide equitable treatment to all class members because certain plaintiffs who had been excluded from the class received more favorable settlements than the class members and because the conflicting interests of different class members (on the issue of present versus future claims and the issue of more-valuable-pre-1959 claims versus less-valuable-post-1959 claims) were not protected by subclasses separately represented by conflict-free counsel. *See id.* at 863-64.

In the wake of *Ortiz*, federal appellate courts have consistently rejected “limited fund” class certification in toxic tort litigation. *See In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005) (reversing certification of tobacco class action as a “limited funds” class based on the assumption that there is a limited amount that

companies can pay in punitive damages); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870 (6th Cir. 2000) (rejecting “limited fund” class action settlement of claims against manufacturers of allegedly defective cardiac pacemaker leads); *see also Klein v. O’Neal, Inc.* No. 7:03-CV-102-D, 2006 WL 325766 (N.D. Tex. Feb. 13, 2006) (refusing to convert a Rule 23(b)(3) class to a Rule 23(b)(1) non-opt-out class because plaintiffs failed to establish maximum value of aggregate claims or that the claim value exceeded the available insurance coverage); *In re Diet Drugs*, 1999 WL 782560 (rejecting “limited fund” class settlement).

## **2. The Equitable Relief Class Action**

A court may certify a class under Rule 23(b)(2) when “the party opposing the class has acted or refuses to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief, or declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). As with Rule 23(b)(1), class actions certified under this subsection of Rule 23 are mandatory. In other words, individuals who fall within the class definition cannot opt out of the litigation and will be bound by the judgment. *See Cook v. Rockwell Int’l Corp.*, 151 F.R.D. 378, 387-88 (D. Colo. 1993). Accordingly, courts have mandated, as a condition precedent to certifying an equitable relief class, that the class exhibit “cohesiveness,” a requirement similar to Rule 23(b)(3)’s prerequisite of “predominance.” *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1122-23 (8th Cir. 2005) (reversing certification of medical monitoring class under Rule 23(b)(2) because it lacked cohesiveness); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663(GEB), 2006 WL 1541033, at \*8 (D.N.J. June 2, 2006) (in surgical device case, striking class certification and finding that plaintiff failed to show predominance of common issues); *Snow v. Atofina Chems., Inc.*, No. 01-72648, 2006 WL 1008002, at \*\*8-9 (E.D. Mich. Mar. 31, 2006) (in chemical contamination case, denying certification of class, in part due to lack of predominating common issues); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 460-61 (E.D. La. 2006) (in pharmaceuticals case, refusing to certify class suing drug manufacturer for personal injury and wrongful death because “common questions of law do not predominate”); *Foster*, 229 F.R.D. at 607 (in heart valve case, absence of predominant factual or legal commonality and inferiority of class adjudication rendered proposed medical monitoring class not sufficiently cohesive to grant certification); *In re Prempro*, 230 F.R.D. at 568-71 (in pharmaceutical case, proposed medical monitoring class lacked cohesiveness due to differences in state law and individual fact issues); *In re Rezulin Prods. Liab. Litig.*, 224 F.R.D. 346, 352 (S.D.N.Y. 2004) (refusing to reconsider decision that varying state laws made medical monitoring class impossible to manage); *In re MTBE*, 209 F.R.D. at 342-44 (denying certification where, among other things, individualized issues “destroy[ed] Rule 23(b)(2)’s presumption of cohesiveness”); *Wyeth, Inc. v. Gottlieb*, 930 So. 2d 635 (in pharmaceuticals case, reversing certification of medical monitoring class because common questions

did not predominate); *Albertson v. Wyeth*, No. 2944 Aug. Term 2002, 2005 WL 3782970 (Pa. Ct. Com. Pl. May 3, 2005) (rejecting certification of medical monitoring class of women who took Prempro because the proposed class lacked commonality and individual issues predominated); *Sweet*, 232 F.R.D. at 374 (in pharmaceuticals case, refusing to certify class seeking injunction on sale of drug because class lacked cohesiveness and there was no predominating question of fact or law).

A class action cannot be certified under Rule 23(b)(2) if the appropriate final relief consists exclusively or predominantly of money damages. *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (where claim is predominately for money damages, Rule 23(b)(2) certification is inappropriate); *In re Sch. Asbestos Litig.*, 789 F.2d 996 (3d Cir.) (same), *cert. denied*, 479 U.S. 852 (1986); *Mehl v. Canadian Pac. Ry.*, 227 F.R.D. 505, 520 (D.N.D. 2005) (rejecting certification, finding that “request for medical monitoring class is nothing more than a request for future damages and thus not ‘final injunctive relief or corresponding declaratory relief’”); *In re Rezulin*, 224 F.R.D. at 350-51 (refusing to reconsider denial of certification for medical monitoring class because plaintiff failed to show money damages did not predominate); *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d 59, 64-65 (Ohio 2004) (plaintiff’s request that defendant pay for a medical monitoring regime sought damages, not injunctive relief, precluding certification under state law equivalent to Fed. R. Civ. P. 23(b)(2)); *Johnson v. Abbott Labs.*, No. 06C01-0203-PL-89, 06-C01-206-CT-243, 2004 WL 3245947, at \*5 (Ind. Cir. Ct. Dec. 31, 2004) (refusing to certify medical monitoring class based on plaintiffs’ “[t]hinly-disguised damages requests”); *Angeletti*, 752 A.2d at 251 (citing federal case law); *see also* Fed. R. Civ. P. 23(b)(2) advisory committee’s notes. However, even if a lawsuit seeks money damages in addition to injunctive relief, Rule 23(b)(2) certification is not barred if the value of the latter far outweighs the value of the former or if damages may be determined on a class-wide basis. *See In re Allstate Ins. Co.*, 400 F.3d at 507 (Rule 23(b)(2) certification is not precluded in every instance where money damages are sought); *Olden v. LaFarge Corp.*, 383 F.3d 495, 510 (6th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005); *see also Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1240 & n.3 (9th Cir. 1998); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 1203, 2000 WL 1222042, at \*54 (E.D. Pa. Aug. 28, 2000). Nonetheless, “the fact that declaratory or injunctive relief is sought (and no, or only incidental, damages) should not automatically entitle the class to proceed under 23(b)(2).” *In re Allstate*, 400 F.3d at 507.

Although an equitable relief class action usually would appear to be inappropriate for toxic tort cases (most of which seek predominantly money damages), plaintiffs have successfully sought class certification under Rule 23(b)(2) for medical monitoring claims in some cases. For example, the Fen-Phen class settlement included a medical monitoring component. *In re Diet Drugs*, 2000 WL 1222042 at \*19. The federal court in that litigation had

previously certified a class of plaintiffs asserting medical monitoring claims and stated that, while the various differences among class members (which had been emphasized by the defendant in opposing certification) “may present some difficulty in treating the claims in a single class . . . these difficulties are not insurmountable and could be dealt with through either the development of subclasses or through exclusions to the class.” *In re Diet Drugs*, 1999 WL 673066, at \*11.

Courts in other mass tort cases have also certified classes of plaintiffs asserting medical monitoring claims under Rule 23(b)(2). *See Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993) (finding class certification appropriate where plaintiffs seek to implement a court-supervised program requiring ongoing medical monitoring because such relief is injunctive in nature); *Gibbs v. E.I. Du Pont De Nemours & Co.*, 876 F. Supp. 475 (W.D.N.Y. 1995); *Cook*, 151 F.R.D. 378; *Day v. NLO, Inc.*, 144 F.R.D. 330 (S.D. Ohio 1992), *vacated on other grounds, In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993); *Lewis v. Bayer, A.G.*, No. 002353 Aug. Term 2001, 2004 WL 1146692, at \*1 (Pa. Ct. Com. Pl. Nov. 18, 2004) (certifying a state-wide medical monitoring class for users of Baycol<sup>®</sup>); *Foust v. Se. Pa. Transp. Auth.*, 756 A.2d 112 (Pa. Commw. Ct. 2000) (affirming certification of medical monitoring class of individuals allegedly exposed to PCBs under Pennsylvania class action statute), *appeal denied*, 771 A.2d 1289 (Pa. 2001) (unpublished table decision). *But see In re St. Jude Med.*, 425 F.3d at 1122-23 (reversing certification of medical monitoring claims due to lack of cohesiveness of proposed class); *Barnes*, 161 F.3d 127 (holding medical monitoring claims not suitable for Rule 23(b)(2) class certification due to predominance of individual issues); *Foster*, 229 F.R.D. at 607 (medical monitoring class certification denied due to lack of cohesiveness); *In re Prempro*, 230 F.R.D. at 568-71 (same); *Zehel-Miller v. AstraZeneca Pharms. LP*, 223 F.R.D. 659, 664 (M.D. Fla. 2004) (presence of varying state laws on issue of medical monitoring defeated commonality requirement of 23(a) rendering certification under 23(b)(2) inappropriate); *Perez v. Metabolife Int’l Inc.*, 218 F.R.D. 262, 274 (S.D. Fla. 2003) (predominance of individual issues precludes certification); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 211-12 (D. Minn. 2003) (factual differences among class members destroyed the required cohesiveness of interests under 23(b)(2)); *Gottlieb*, 930 So. 2d at 643 (same); *Albertson*, 2005 WL 3782970 (same); *Wilson*, 817 N.E.2d at 66 (claim lacked sufficient “cohesiveness” to permit certification under Rule 23(b)(2) state law equivalent); *Lockheed Martin*, 63 P.3d at 922 (affirming denial of class certification under California statute; holding that, although class treatment is available for medical monitoring claims, common issues did not predominate); *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, at \*\*44-59 (Fla. Cir. Ct. Nov. 6, 2002) (denying class certification under Florida statute where facts required to prove exposure levels, increased risk of disease, causation, and other elements of the medical monitoring claim were “highly individualized and not common to the putative class members”).

Plaintiffs cannot avail themselves of Rule 23(b)(2) simply by asserting a claim for medical monitoring. Moreover, courts have denied Rule 23(b)(2) class certification where plaintiffs seek money damages to pay for medical monitoring. *See, e.g., Zinser v. Accufix Research Inst. Inc.*, 253 F.3d 1180 (9th Cir. 2001); *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995); *see also Mehl*, 227 F.R.D. at 520 (rejecting certification and finding that “request for a medical monitoring class is nothing more than a request for future medical expenses and thus not ‘final injunctive relief or corresponding declaratory relief’”); *Perez*, 218 F.R.D. at 273-74; *In re Paxil Litig.*, 218 F.R.D. 242, 247 (C.D. Cal. 2003); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 71-75 (S.D.N.Y. 2002) (denying certification of medical monitoring subclass where equitable remedy did not predominate over claims for monetary relief); *Reilly v. Gould, Inc.*, 965 F. Supp. 588 (M.D. Pa. 1997); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 482-83 (E.D. Pa. 1997); *Harding v. Tambrands, Inc.*, 165 F.R.D. 623, 632 (D. Kan. 1996); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404-05 (W.D. Mo. 1994); *Angeletti*, 752 A.2d at 252-53; *Wilson*, 817 N.E. 2d at 64-65; *Johnson*, 2004 WL 3245947, at \*6.

Class certification may also be denied in medical monitoring cases even when claims for monetary damages are incidental, if the defendant’s conduct is not “generally applicable to the class.” *See In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 144-47 (E.D. La. 2002) (Rule 23(b)(2)’s “general applicability” requirement not only relates to defining the class, but also to “ensuring the manageability of a unified trial;” in addition, the potential applicability of many states’ laws defeats manageability); *see also In re Vioxx*, 239 F.R.D. at 460-61; *Sanders*, 2006 WL 1541033, at \*8.

Plaintiffs have sought Rule 23(b)(2) certification for toxic tort claims other than medical monitoring with varying degrees of success. For example, in *Olden v. LaFarge Corp.*, 383 F.3d at 510, the Sixth Circuit affirmed certification under Rule 23(b)(2) of a class of neighbors to a cement manufacturing plant seeking both injunctive relief and monetary damages because the court “believe[d] that the defendant is overestimating the potential difficulty in establishing a formula for money damages for the claims and is under estimating the importance of injunctive relief.” *See also Bently v. Honeywell Int’l, Inc.*, 223 F.R.D. 471, 486 (S.D. Ohio 2004) (certifying class of plaintiffs seeking injunction requiring remediation of environmental contamination); *Hurt v. Phila. Hous. Auth.*, 151 F.R.D. 555 (E.D. Pa. 1993) (certifying claim seeking injunctive relief requiring Philadelphia Housing Authority to eliminate dangers of lead-based paint in public housing). The plaintiffs in *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994) were less successful. They brought an action to recover response costs pursuant to CERCLA. The district court noted that some courts have characterized response costs as “equitable in nature,” but nonetheless denied certification under Rule 23(b)(2) because the relief sought by plaintiffs was predominantly money damages. *Id.* at 1403; *see also Sweet*, 232 F.R.D. at

374 (in pharmaceuticals case, refusing to certify class seeking injunction on sale of drug, due to lack of cohesiveness and lack of predominating question of fact or law); *In re MTBE*, 209 F.R.D. at 328-29 (denying certification under Rule 23(b)(2) and (3), noting “poor fit between the class action device” and “this hybrid environmental/products liability action” for injunctive relief).

### 3. *Common Question Class Actions*

Rule 23(b)(3) authorizes a class action where “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The relevant factors include:

- (a) the interests of the class members in individually controlling the prosecution of the claim;
- (b) the extent and nature of any litigation concerning the controversy already commenced by class members;
- (c) the desirability of concentrating the case in a particular forum; and
- (d) the difficulties of case management.

*See* Fed. R. Civ. P. 23(b)(3)(A)-(D). The Supreme Court has explained that this is “a nonexhaustive list of factors pertinent to a court’s ‘close look’ at the predominance and superiority criteria.” *Amchem*, 521 U.S. at 615.

The Advisory Committee Notes to the 1966 Amendment to Rule 23 state that mass torts resulting in injuries to numerous people are generally not appropriate for common question class actions “because of the likelihood that significant questions, not only of damages, but of liability and defense of liability, would be present, affecting individuals in different ways.” Fed. R. Civ. P. 23(b) advisory committee’s notes. This observation, made over forty years ago, has largely retained its vitality to the present day, and most – but not all – attempts to certify common question class actions in mass tort litigation have been rejected.

In *Amchem Products, Inc.*, 521 U.S. 591 (1997), the Supreme Court affirmed the Third Circuit’s rejection of a \$1.3 billion settlement in an asbestos liability class action based on improper class certification under Rule 23(b)(3). The Third Circuit had concluded that the proposed class, which included both presently injured plaintiffs and plaintiffs claiming only future injuries, failed to meet the requirements of commonality, adequate representation, typicality, and superiority. The Supreme Court agreed, holding that the class certification was improper in part because no common question “predominated” in view of the

enormous variety and individual nature of plaintiffs' personal injury claims, combined with the disparate state laws governing these claims. *Id.* at 622-25. This analysis, in addition to the Court's analysis under Rule 23(a)(4), discussed *supra*, suggests that Rule 23(b)(3) settlement class actions combining present and future injuries will be rigorously reviewed by the courts.

Relying in part on the Third Circuit opinion that was later affirmed by *Amchem*, the Fifth Circuit decertified a national class of smokers in a lawsuit filed against the tobacco industry alleging addiction as an injury. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). The *Castano* court held that the trial court failed to: (1) adequately consider the potential variations in state law that would govern the class members' claims in finding that common questions predominated over individual questions; (2) properly consider how these variations in state law would affect the manageability of the action; (3) consider how the claims would be tried and thus could not have known whether common questions would predominate over individual questions; and (4) recognize that the plaintiffs' theory of addiction as injury was an "immature tort." Without knowing what issues might arise in the context of such a novel theory of recovery (which had never been tried by any court in the country), the trial court could not properly determine whether common issues were a significant part of each claim. *See id.* at 744-45; *see also Angeletti*, 752 A.2d at 229-44 (denying certification of class of smokers with an extensive discussion of the Rule 23(b)(3) requirements).

In numerous other mass tort cases, courts have rejected efforts to certify Rule 23(b)(3) common question classes. *See In re St. Jude Med.*, 425 F.3d at 1120-21 (class certification denied because district court failed to conduct an individualized choice-of-law analysis in concluding that common issues predominated in consumer protection act claims); *In re Bridgestone/Firestone Inc. Tires*, 288 F.3d 1012 (7th Cir. 2002) (rejecting 23(b)(3) certification of national class in part because of insurmountable choice-of-law problems inherent in nationwide tort classes); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996) (decertifying penile implant class action where over ten different models were at issue and plaintiffs had differing complaints and received differing information from their treating physicians); *Applewhite v. Reichhold Chems., Inc.*, 67 F.3d 571 (5th Cir. 1995) (decertifying residential contamination class action because class certification requires at least two issues in common, and plaintiffs pleaded only one); *Boughton*, 65 F.3d 823 (affirming refusal to certify class of over 500 individuals who alleged that they and their property were exposed to hazardous emissions (radiation) from uranium mill); *Blain*, 240 F.R.D. at 191 (in pharmaceuticals case, denying certification because "determining liability in each case will require an individual fact intensive inquiry that will minimize any common questions"); *Fisher*, 238 F.R.D. at 305-06 (where the only common facts are "background facts" not going to essential elements of claims asserted, and where essential elements of claims will require individual proof, predominance requirement is not met); *Sweet*, 232 F.R.D. at 372-73 (denying certification in pharmaceuticals case because plaintiffs failed to



provide any choice-of-law analysis and, thus, there could be no finding that common issues predominated or that class action was superior); *LaBauve*, 231 F.R.D. at 685 (finding no predominating common factual issues among proposed class of personal injury plaintiffs or proposed class of persons that fished in the allegedly contaminated waterway); *In re Ephedra Prods. Liab. Litig.*, 231 F.R.D. 167, 170-71 (S.D.N.Y. 2005) (factual differences among putative class members precluded certification of settlement class under 23(b)(3)); *In re Prempro*, 230 F.R.D. at 566 (rejecting certification of consumer protection act class in pharmaceuticals case because “state-by-state variations in law trump the common issues of law or fact”); *Foster*, 229 F.R.D. at 605-06 (rejecting certification of medical monitoring class under 23(b)(3) because plaintiffs failed to take differences in state law into account); *Zehel-Miller*, 223 F.R.D. at 663-64 (existence of varying state laws governing claims dictated that individual issues predominated over common class issues); *Perez*, 218 F.R.D. at 273 (noting that severe manageability problems and the lack of dispositive common issues prevent certification under 23(b)(3)); *In re Baycol*, 218 F.R.D. at 213; *In re Paxil*, 218 F.R.D. at 249 (although general causation issues might be suitable to resolution, specific causation issues prevented class certification), *readopting In re Paxil Litig.*, 212 F.R.D. 539, 550-52 (C.D. Cal. 2003) (denying Rule 23(b)(3) certification where proposed class groupings would require applying multiple different state-law standards and, furthermore, individual causation questions “subvert any benefits” of class treatment); *In re Rezulin*, 210 F.R.D. at 66-68 (denying certification where “individual questions, particularly but not limited to causation and reliance,” overwhelm common questions concerning “characteristics of Rezulin and the manner in which FDA approval was obtained”); *In re Armstrong World Indus., Inc.*, No. 00-4471, at 11-15 (Bankr. D. Del. July 2, 2002) (denying certification of class seeking injunctive and monetary relief against former asbestos product manufacturer where individualized factual inquiries would overwhelm common issues); *Foister v. Purdue Pharma L.P.*, No. Civ. A. 01-268-DCR, 2002 WL 1008608 (E.D. Ky. Feb. 26, 2002) (refusing to certify class of individuals alleging injury due to use of pharmaceutical product OxyContin® because plaintiffs failed to establish common questions of law or fact); *Kemp v. Metabolife Int’l Inc.*, No. Civ. 00-3513, 2002 WL 113894, at \*4 (E.D. La. Jan. 25, 2002) (refusing to certify class action against manufacturer of weight loss product where liability is a “highly individuated issue, as are questions of damages and causation”); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484 (D.N.J. 2000) (refusing to certify class action against manufacturer of allegedly defective ignition switches due to differing state laws and individual issues on causation); *Thompson*, 189 F.R.D. at 551 (refusing to certify class of smokers where complaint “is riddled with individual questions”); *Watters v. Gen. Elec. Co.*, No. 4:98-CV-0195-HLM, 14 Toxics L. Rep. (BNA) 435 (N.D. Ga. Aug. 23, 1999) (refusing to certify class of plaintiffs alleging property damage from PCB contamination because liability and damages issues would require separate examinations of each class member’s individual property); *Harding*, 165 F.R.D. 623 (refusing to certify class action for toxic shock syndrome because of lack of legal and factual commonality);

*Newton*, 163 F.R.D. at 632 (refusing to certify class alleging exposure to emissions from wood treatment plant where there was “no unifying exposure by all putative class members”); *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667 (N.D. Ohio 1995) (denying class certification for DES daughters); *see also Pearson v. Phillip Morris, Inc.*, No. 0211-11819, 2006 WL 663004 (Or. Ct. App. Feb. 23, 2006) (rejecting consumer protection class claims for purchasers of light cigarettes because common issues did not predominate); *The St. Joe Co. v. Leslie*, 912 So. 2d 21 (Fla. Dist. Ct. App.) (individual factual determinations overwhelmed common issues regarding alleged environmental contamination of putative class members property); *review denied*, 918 So. 2d 292 (Fla. 2005) (unpublished table decision); *Hurtado v. Purdue Pharma Co.*, 800 N.Y.S.2d 347 (Sup. Ct. 2005) (denying certification of class of users of OxyContin<sup>®</sup> because common issues did not predominate); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 433-39 (Tex. 2000) (denying class certification of individuals allegedly injured from tank explosion with detailed discussion of the impropriety of Rule 23(b)(3) class treatment of personal injury claims); *Johnson*, 2004 WL 3245947, at \*5 (possible commonality of marketing practices and warnings insufficient to overcome individual issues regarding alleged injury from OxyContin<sup>®</sup>). Rule 23(b)(3) certification of claims for medical monitoring in groundwater contamination cases also has been denied because individual issues of causation and damage would overshadow common questions of law and fact, thus necessitating individualized consideration. *See FAG Bearings*, 846 F. Supp. at 1404; *Lockheed Martin*, 63 P.3d 913.

However, class certification has been granted under Rule 23(b)(3) in some toxic tort cases. In *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004), the Sixth Circuit affirmed certification of claims of neighbors alleging exposure to toxic emissions from a cement manufacturing facility, notwithstanding the possibility that individualized damage determinations might be required. The Court held that questions of damages can be bifurcated from liability issues, which it found presented common issues. *Id.* A federal district court in Pennsylvania also approved a Rule 23(b)(3) class settlement in the Fen-Phen litigation that provided for both medical monitoring and compensatory relief. *In re Diet Drugs*, 2000 WL 1222042. The class certification ruling is of somewhat limited significance, however, because it was issued in the settlement context, rendering irrelevant the otherwise problematic questions of the manageability of class treatment at trial. *Id.*, at \*55 (citing *Amchem*, 521 U.S. at 620); *see also, In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 239-40 (S.D. W. Va. 2005) (approving settlement class under Rule 23(b)(3) and holding that factual differences between drug users were irrelevant in the settlement context); *Bently*, 223 F.R.D. at 487 (finding predominating common questions of fact in environmental contamination suit); *Doyle v. Fluor Corp.*, 199 S.W.3d 784, 790 (Mo. Ct. App. 2006) (affirming certification of class based on finding of predominant common issues presented by neighbors’ claims against smelter for property contamination).

In *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000), the Fifth Circuit affirmed the certification of a class of floating casino workers who alleged that their respiratory illnesses had been caused by a combination of second-hand smoke and the casino's inadequate ventilation system. This case involved a number of relatively unusual circumstances that arguably made class certification more appropriate than in *Amchem* and *Castano*. Unlike the diverging fact patterns of the plaintiffs in those two cases, the putative casino employee class members were "all symptomatic by definition and claim injury from the same defective ventilation system over the same general period of time." *Id.* at 626. Moreover, because the plaintiffs were asserting only federal claims (under admiralty law), this case did not present any individual, state-by-state choice-of-law issues of the kind that troubled the *Amchem* and *Castano* courts. *Id.* The *Mullen* case also involved a smaller number of putative class members (100 to 150 casino workers) and thus did not pose the manageability problems – "the million-person class membership, the complex choice-of-law issues, the novel addiction-as-injury cause of action, and the extensive subclassing requirements" – that gave rise to the "Frankenstein monster" feared in *Castano*. *Id.* at 628.

A similar approach of focusing on certain common issues led a district court in another toxic tort case to certify a Rule 23(b)(3) class for property damage claims. *See Cook*, 151 F.R.D. at 378 (although resolution of claims required individualized proof regarding the nature and use of individual parcels of land, common questions regarding the ultrahazardous nature of defendant's activity, exercise of reasonable care to prevent release, what materials were released, what caused release, and foreseeability, predominated over individualized questions). The *Cook* Court also noted that a class action was superior to a consolidated proceeding because a class action would avoid duplicative discovery efforts. *See id.* at 389; *see also Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-98 (6th Cir. 1988) (upholding Rule 23(b)(3) certification because factual and legal issues of defendant's liability do not differ dramatically among plaintiffs); *Mehl*, 227 F.R.D. at 522 (certifying class of persons injured by inhalation of anhydrous ammonia discharged during train wreck because common issues predominated, notwithstanding individual issues regarding specific causation and damages); *In re Copley Pharm., Inc.*, 158 F.R.D. 485 (D. Wyo. 1994) (certifying national products liability class involving contaminated bronchodilator prescription pharmaceutical); *Int'l Union of Operating Eng'rs Local No. 68 v. Merck & Co.*, No. ATL-L-3015-03, 2005 WL 2205341 (N.J. Super. Ct. Law Div. July 29, 2005) (certifying class of third-party Vioxx<sup>®</sup> payors because common issues predominated with respect to consumer fraud claims), *aff'd*, 894 A.2d 1136 (N.J. Super. Ct. App. Div. 2006); *In re Pa. Baycol Third-Party Payor Litig.*, No. 1874 Sept. Term 2001, 2005 WL 852135 (Pa. Ct. Com. Pl. Apr. 4, 2005) (common questions predominated on claims involving reimbursement for purchased Baycol<sup>®</sup> rendered unusable by recall).

### C. Other Aspects of Rule 23

Rule 23 gives courts and litigants flexibility in dealing with differences among class members that may be sufficiently important to require separate treatment but not so pervasive and overwhelming as to bar certification of a class. For example, a class “may be divided into subclasses and each subclass treated as a class.” Fed. R. Civ. P. 23(c)(4)(B). Courts have emphasized the possibility of creating subclasses in response to arguments that a class contains too many diverse interests to be suitable for certification. *See Ortiz*, 527 U.S. at 854-58; *see also Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) (district court erred in denying class certification on manageability grounds based on the need to create subclasses); *In re MTBE*, 241 F.R.D. at 185, 201 (certifying homeowner subclass in groundwater contamination case, but denying certification of medical monitoring subclass). *But see Perez*, 218 F.R.D. at 273 (using Rule 23(c)(4) to create subclasses does not satisfy the predominance requirement); *In re Paxil Litig.*, 212 F.R.D. at 543-45 (rejecting proposed subclasses that grouped plaintiffs by applicable state law because the groupings failed to adequately account for state-law differences and the number of subclasses would undermine any efficiencies of class treatment).

A minority of courts have concluded that Rule 23(c)(c)(A) may be used to certify classes on particular issues, such as liability, regardless of whether the class as a whole satisfies Rule 23(b). *Compare In re Nassau County Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (certifying liability class only), *and Zeno v. Ford Motor Co.*, 238 F.R.D. 173, 196 (W.D. Pa. 2006) (class may be certified to address only certain common issues, with remaining issues left to individual adjudication), *with Castano*, 84 F.3d at 745 n.21 (5th Cir. 1996) (whole cause of action must satisfy Rule 23), *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 313-315 (S.D. Ill. 2007) (Rule (c)(4)(A) does not permit issue class actions where requirements of Rule 23(a) and Rule 23(b) are not met), *and Blain*, 240 F.R.D. at 189-90 (same).

Further, Rule 23(d) permits courts to make “appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument,” and allows those orders to be combined with the scheduling and management orders authorized by Rule 16. Fed. R. Civ. P. 23(d). Thus, class action trials may be bifurcated so that common issues are tried first, followed by – if necessary – trials of individual issues particular to one or more members of the class. *See, e.g., Olden*, 383 F.3d at 509 (“[a]s the district court properly noted, it can bifurcate the issue of liability from the issue of damages”); *Mullen*, 186 F.3d at 627-28 (discussing with approval the district court’s bifurcated trial plan); *see also Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003) (affirming certification in groundwater contamination case of the “core questions” – whether defendant illegally leaked TCE and contaminated the area at issue – and leaving questions of harm suffered and damages recoverable by

each class member for “individual hearings”).

The determination of how and when particular issues will be tried in toxic tort class actions can have major consequences and is often the subject of significant battles between plaintiffs and defendants. One example is the *Simon* class action litigation where the district court certified a nationwide tobacco litigation, punitive damages, limited-fund class under Rule 23(b)(1)(B). *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002). On appeal, the Second Circuit reversed and vacated the class certification, concluding in part that plaintiffs failed to demonstrate the necessary elements under *Ortiz* for an attempted limited-fund class. *In re Simon II Litig.*, 407 F.3d at 136-38. The court further held that, by certifying a class seeking an assessment of punitive damages prior to an actual determination and award of compensatory damages, the certification order failed to ensure either that a jury would be able to assess an award that bore a sufficient nexus to the actual and potential harm to the plaintiff class, or that the award would be reasonable and proportionate to those harms. *Id.* at 138 (citing *Campbell*, 538 U.S. 408 (2003)); *see also Engle*, 945 So. 2d at 1246 (holding that lower court erroneously permitted jury to award classwide punitive damages prior to compensatory damage determination).

Another important provision of Rule 23 is the requirement that a “class action shall not be dismissed or compromised without the approval of the court.” Rule 23(e). In determining whether to approve a class settlement, “the cardinal rule is that the District Court must find that the settlement is fair, adequate, and reasonable.” *Shaw*, 91 F. Supp. 2d at 959 (citations omitted); *see also DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 285-86, (W.D. Tex. 2007). Rule 23(e) also requires notice to class members before the court decides whether to approve the proposed dismissal or compromise. *See Amchem*, 521 U.S. at 617; *Petrovic*, 200 F.3d at 1152-53 (approving notice of settlement of environmental class action); *In re Diet Drugs*, 226 F.R.D. at 520 (approving notice plan for amendment to settlement); *In re Diet Drugs*, 2000 WL 1222042, at \*\*34-39 (approving original notice of settlement in Phen-Fen litigation). In cases where large numbers of individual suits are being settled simultaneously, courts have borrowed from Rule 23(e) case law to determine if the settlement is fair. *See In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006) (using Rule 23(e) to evaluate fairness of settlement of approximately 8,000 individual claims and finding that settlement was a “quasi-class action”). CAFA now also requires that a defendant in a settlement class provide specific notification to state and government officials regarding the proposed settlement. *See infra* (discussing class settlements under CAFA).

Another element of Rule 23 is the ability under Rule 23(f) to appeal from an order of a district court granting or denying class action certification. The party seeking to appeal must file a petition for permission to appeal under the procedures set forth in Fed. R. App. P. 5 and the appellate court has discretion to take the appeal. Rule 23(f) provides a “mechanism through which appellate

courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial.” *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). Rule 23(f) also “furnishes an avenue, if the need is sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law.” *Id.*

Relying on the purposes of the rule and the guidance provided by the Advisory Committee’s Notes, several circuit courts have examined the appropriate scope of Rule 23(f). For example, in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Seventh Circuit rejected a bright-line rule for granting review and instead identified three general categories of cases in which appellate review under Rule 23(f) would be appropriate. First are those cases where “denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation.” *Id.* at 834. Second are cases where a grant of certification sounds the death knell of the litigation for the defendant because the grant “can put considerable pressure on the defendant to settle,” independent of the merits of the plaintiffs’ claims, as the defendant may want to avoid the costs of defending a class action and risking potentially ruinous liability. *Id.* Third are cases in which an interlocutory appeal “may facilitate the development of the law” of class actions because such actions often settle or are resolved without clear resolution of procedural matters. *Id.* at 835. Although some circuits have elaborated on the three categories listed in *Blair*, each of the circuits that has considered Rule 23(f) agrees that *Blair* identifies the core situations when interlocutory review is most appropriate. See *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-58 (9th Cir. 2005) (approving *Blair* factors as providing core structural guidance for considering Rule 23(f) appeals); *In re Delta Air Lines*, 310 F.3d 953, 957-60 (6th Cir. 2002) (same), *cert. denied*, 539 U.S. 904 (2003); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 103-05 (D.C. Cir. 2002) (same); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138-39 (2d Cir. 2001) (same); *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 145-46 (4th Cir. 2001) (same); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1272-73 (11th Cir. 2000) (same); *Mowbray*, 208 F.3d at 293-94 (same).

Courts have also developed a fourth category of cases in which review is warranted: when the district court’s decision is manifestly erroneous. The Eleventh Circuit initiated the evolution of the manifest error factor by noting that when the certification decision is obviously wrong, interlocutory review may be warranted. *Prado-Steiman*, 221 F.3d at 1275; see also *Chamberlan*, 402 F.3d at 959 (interlocutory review warranted when district court decision is manifestly erroneous); *In re Lorazepam*, 289 F.3d at 105 (same); *Lienhart*, 255 F.3d at 145 (same).

Some circuits also have modified the third *Blair* category – unsettled questions of law – to limit the filing of meritless Rule 23(f) petitions. The First Circuit was concerned that the unsettled law situation would foster too many fruitless Rule 23(f) applications because “a creative lawyer almost always will be able to argue that deciding her case would clarify some ‘fundamental’ issue.” *Mowbray*, 208 F.3d at 294. To limit review of cases in which a novel legal issue is claimed, *Mowbray* restricted review to issues that are both important to the particular litigation and likely to escape effective review after the conclusion of the trial. *Id.* Other circuits have followed suit by confining the third category to novel legal questions that are important to class action law and likely to evade effective review after the completion of the case. *In re Lorazepam*, 289 F.3d at 105; *Sumitomo*, 262 F.3d at 140.

The committee notes also provide the essential guidelines for determining when interlocutory appellate review is appropriate under Rule 23(f). Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule. “The note reflects, on balance, a reluctance to depart from the traditional procedure in which claimed errors” are reviewed only after a final judgment. *In re Lorazepam*, 289 F.3d at 104-05. Interlocutory appeals are generally disfavored because they are “disruptive, time-consuming, and expensive.” *Mowbray*, 208 F.3d at 294. Such appeals add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court’s ability to manage the class action. *Prado-Steiman*, 221 F.3d at 1276-77.

#### **D. The Settlement Class**

A settlement class is a class for which certification is jointly sought by plaintiffs and defendants as part of a global settlement of plaintiffs’ claim. As the Supreme Court has explained, “[a]mong current applications of Rule 23(b)(3), the ‘settlement only’ class has become a stock device.” *Amchem*, 521 U.S. at 618 (considering Rule 23(b)(3) settlement class); *see also Ortiz*, 527 U.S. 815 (considering Rule 23(b)(1) settlement class). From either a plaintiff’s or a defendant’s perspective, a settlement class can be an attractive way to resolve an otherwise intractable morass of toxic tort litigation. *See id.* at 821-23 (stating that defendant involved in settlement was a defendant in one of the first asbestos personal injury cases filed in 1967); *id.* at 860 (“[o]ne great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation”).

Perhaps this strong incentive for cooperation between settling plaintiffs and defendants is one of the reasons why the Supreme Court closely scrutinized – and ultimately rejected – settlement classes in *Ortiz* and *Amchem*. *See Ortiz*, 527 U.S. at 845-47 (pointing out that settlement involving certification of mandatory class implicates due process and jury trial rights of absent class members and stating

that “in settlement-only class actions the procedural protections built into . . . Rule [23] to protect the rights of absent class members during litigation are never invoked in an adversarial setting”); *Amchem*, 521 U.S. at 620 (noting that “judicial inventiveness” must be limited by the text of the Rule and requiring that district courts give “undiluted, even heightened, attention [to Rule 23] in the settlement context”). The Supreme Court has also expressed concern about whether plaintiffs’ counsel will represent the class with sufficient zeal when a negotiated settlement has the potential for “gigantic” attorneys’ fees. *Ortiz*, 527 U.S. at 852-53. Thus, where the parties simultaneously seek class certification and settlement approval, a court should “‘be even more scrupulous than usual’ when examining the fairness of the proposed settlement.” *In re Diet Drugs*, 2000 WL 1222042, at \*59 (citation omitted); *see also In re Ephedra*, 231 F.R.D. 167 (refusing to relax Rule 23 certification requirements for a proposed settlement class).

Despite this heightened legal burden, district courts have continued to certify settlement class actions in toxic tort and other products liability litigation, at least in cases where class members are provided notice and opt out rights. *See id.*; *In re Serzone*, 231 F.R.D. 221 (certifying proposed settlement class containing opt-out provisions as fair, reasonable and adequate to class members); *In re Teletronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985 (S.D. Ohio 2001) (certifying second proposed settlement class with adequate opt-out provisions on remand after Sixth Circuit reversed certification of first proposed settlement class on *Ortiz* grounds).

The long-term viability of class settlements, however, has been called into question by the Second Circuit’s decision in an Agent Orange case, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff’d in part and rev’d in part*, 539 U.S. 111 (2003). In *Stephenson*, the Second Circuit held that two Vietnam veterans who discovered their Agent Orange injuries only after termination of the 1984 Agent Orange class settlement fund in 1994 had not been adequately represented and accordingly were denied due process in the earlier class settlement proceedings. The 1984 settlement therefore did not bar plaintiffs’ claims, and the Second Circuit vacated the district court’s dismissal and remanded for further proceedings. An equally divided panel of the Supreme Court affirmed the decision as to one veteran, but vacated the decision in favor of the second veteran based upon jurisdictional issues raised by the All Writs Act. *Stephenson*, 539 U.S. 111. Justice Stevens did not participate in the appeal, so the 4-4 decision on this issue resulted in a *de facto* affirmation of the Second Circuit’s decision. Until a full panel of the Court addresses this issue and provides more definitive direction regarding the finality of class action settlements where future claims are possible, new plaintiffs will likely continue to attack prior settlements. *See Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 171 (2d Cir. 2006) (collateral attacks permissible if plaintiff can show inadequate representation in original action); *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 540-42 (E.D.N.Y. 2006) (citing *Stephenson* as reducing the



“effectiveness of the class action as a means of settling a mass conflict” and noting that MDL court with a quasi-class action cannot exert pressure to settle because of collateral attacks and the likely filing of new cases).

Because Rule 23(b)(3) gives class members the right to notice and the opportunity to opt- out, settling mass tort cases by seeking to certify common question classes may create fewer constitutional problems than the kind of Rule 23(b)(1)(B) settlement at issue in *Ortiz*. See, e.g., *In re Telectronics*, 221 F.3d at 881 (“Rule 23(b)(3), with its notice and opt-out provisions, strikes a balance between the value of aggregating similar claims and the right of an individual to have his or her day in court.”); *In re Serzone*, 231 F.R.D. at 235 (providing notice of the option to opt-out); *In re Diet Drugs*, 2000 WL 1222042, at \*49 (relying on structural protections afforded by opt out rights). Of course, the absence of an opt-out provision is precisely what many defendants would want most when trying to buy complete peace from future litigation by entering into global settlements. Another disadvantage for defendants in a post-CAFA world is that the federal courts apply the same prerequisites to proceeding with a settlement class as with other classes, see *In re Ephedra*, 231 F.R.D. at 167 (proposed settlement class must meet Rule 23 certification requirements), and as noted below, CAFA requires heightened review of class settlements. As a result, the utility of using national settlement classes as a means of capping and wrapping up liability appears to be less available than in the past.

## **E. The Class Action Fairness Act (“CAFA”)**

### ***1. Pre-CAFA Landscape***

Until recently, innovative class counsel focused their efforts on class certification in state courts rather than federal courts. See Federalist Society, *Analysis: Class Action Litigation – A Federalist Society Survey*, 1 *Class Action Watch* 1, 5 (1999) (noting 1,000 percent increase in state class action filings against Fortune 500 companies from 1988 to 1998 as compared with 338 percent increase in such filings in federal court); American Tort Reform Association, *Bringing Judicial Hellholes To Justice*, 5 (2006) (prior to CAFA, plaintiffs’ attorneys brought actions in “hellhole” districts that often had nothing to do with the parties, the conduct, or the claims at issue, resulting in “lawyers raking in millions of dollars in fees while their clients, who may not even have known of the lawsuit, got coupons.” The limitations placed on federal court class actions by *Amchem* and *Ortiz* encouraged such efforts; state courts often apply a more liberal Rule 23 standard favoring class certification. See *In re W. Va. Rezulin*, 585 S.E.2d at 61 (chastising trial judge for apparently relying “almost exclusively” on federal law in denying certification); see also *Shea v. Chi. Pneumatic Tool Co.*, 990 P.2d 912 (Or. Ct. App. 1999) (rejecting federal authorities and holding that class should be certified on particular issues, even though certification would not be appropriate as to the action as a whole), *review*

*denied*, 6 P.3d 1099 (Or. 2000) (unpublished table decision). *But see, e.g., Bernal*, 22 S.W.3d at 438 (rejecting argument that courts should “relax their commitment to individualized treatment of causation and damages in the mass tort context”). In addition, the federal amount-in-controversy requirement contributed to the trend towards state court class actions as federal class actions were required to meet the two thresholds of diversity jurisdiction: sufficient amount-in-controversy and complete diversity. While the amount-in-controversy requirement of \$75,000 was not a significant hurdle in toxic tort litigation seeking compensation for already incurred personal injuries (where the liability to each plaintiff can be substantial), it presented a serious problem in class actions seeking medical monitoring or other types of relief where the potential recovery for individual class members was small and defendants could not rely on the aggregate cost of a medical monitoring program to meet the amount-in-controversy requirement. *See, e.g., Alinsub v. T-mobile*, 414 F. Supp. 2d 825, 830-32 (W.D. Tenn. 2006) (remanding case to state court because class could not aggregate damages to meet amount in controversy requirement); *Briggs v. Goodyear Tire & Rubber Co.*, 79 F. Supp. 2d 228 (W.D.N.Y. 1999) (dismissing putative medical monitoring class action for lack of jurisdiction).

Another factor contributing to the trend towards increased use of state class actions was the Supreme Court’s decision in *Matsushita Electrical Industrial Co. v. Epstein*, 516 U.S. 367 (1996). Applying the Full Faith and Credit Act, 28 U.S.C. § 1738, the *Matsushita* Court held that federal courts must give full faith and credit to a state court judgment approving a class action settlement, even when the settlement releases claims that are within the exclusive jurisdiction of the federal courts. *Id.* at 373-75. Although such state court judgments may be challenged in federal court, the scope of this review would be narrowly limited to determining whether the state court judgment violated due process and was therefore “constitutionally infirm.” *See, e.g., Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir.) (on remand from *Matsushita*, holding that Supreme Court necessarily concluded that Delaware class action judgment satisfied due process requirements; explaining that the extent of a federal court’s collateral review of state court judgments is “limited”), *cert. denied*, 528 U.S. 1004 (1999).

As a result of *Matsushita*, a properly structured state class action settlement could have far broader implications than the state law-based claims it appeared to settle on its face. Accordingly, mass tort plaintiffs had a strong incentive to file class actions in state courts, where they would be able to avoid some of the constraints imposed on federal class actions by *Ortiz* and *Amchem* and where the defendants’ interests in reaching global settlements could be accommodated by releasing not only state claims, but also federal claims that the class members could assert against the defendants. However, the continued viability of state class actions as a means to circumvent federal legal precedent has been severely circumscribed by the ability of defendants to remove to federal court under CAFA’s relaxed diversity requirements.

## 2. *Post-CAFA Landscape*

### a. Overview

President Bush signed the Class Action Fairness Act into law on February 18, 2005. CAFA applies to class actions “commenced on or after” February 18, 2005. *See* Class Action Fairness Act of 2005, Pub. L. 109-2, § 9, 119 Stat. 4 (2005) (“[t]he amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act”). CAFA makes two basic adjustments to class action practice. First, by expanding the concepts of diversity jurisdiction and removal, CAFA extends federal court jurisdiction over class actions based on state law. Second, by increasing the scrutiny of some class action settlement procedures, CAFA may make class actions less appealing.

### b. Relaxed Diversity Requirements

Congress intended to reduce class action abuses in state courts and, therefore, revised diversity jurisdiction requirements to ease removal of class actions to federal court. *See id.* Pub. L. No. 109-2, § 2 (purpose of CAFA is to ameliorate class action abuses and to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.”).

To achieve this goal, CAFA amended 28 U.S.C. § 1332 to give federal district courts original jurisdiction over class actions in which: (1) the number of members of all proposed plaintiff classes in the aggregate is 100 or more; (2) minimal diversity of citizenship exists, *i.e.*, where any one member of the proposed or certified plaintiff class (named or unnamed) and any one defendant is diverse; and (3) the amount in controversy – which may be calculated by aggregating the claims of the putative class members – exceeds \$5 million.<sup>27</sup> *See id.* at §§ 1332(d)(2), (d)(5)(B) and (d)(6).

Certain “mass action[s]” may also be deemed a “class action” and thereby fit within CAFA even if the case is not brought as a class action under state or federal class action rules. *See* § 1332(d)(11)(A). Mass actions are defined as “any civil action . . . in which the monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” *See* § 1332(d)(11)(B)(i). Excluded from the definition of “mass action” are (1) lawsuits in which all the claims arise from an event in the state in which the action was filed and that event allegedly resulted

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<sup>27</sup>Legislative history indicates that Congress intended that a court exercise federal jurisdiction “if the value of the matter in litigation exceeds \$5,000,000 either from the viewpoint of the plaintiff or the viewpoint of the defendant, and regardless of the type of relief sought (*e.g.*, damages, injunctive relief, or declaratory relief).” S. Rep. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40.

in injuries in that state or contiguous states; (2) claims joined upon motion of a defendant; (3) claims asserted on behalf of the general public pursuant to state statute; and (4) claims consolidated solely for pretrial proceedings. *See* § 1332(d)(11)(B)(ii). However, in a mass action, jurisdiction exists only over those plaintiffs whose claims individually satisfy the individual \$75,000 amount in controversy requirement.<sup>28</sup> *See* § 1332(d)(11)(B)(i). *But see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (when other elements of diversity jurisdiction are present, a federal court may exercise supplemental jurisdiction under 28 U.S.C. § 1367 over plaintiffs whose claims do not meet jurisdictional amount requirements if plaintiffs' claims are part of same case or controversy as at least one other plaintiff's claims that satisfy the \$75,000 amount in controversy requirement).

c. Exceptions to Expanded Jurisdiction

There are five exceptions to CAFA's expansion of original jurisdiction over class actions, the most complex of which is the "Home State" exception. This exception requires a district court to decline jurisdiction in some situations and permits the court to decline jurisdiction in other situations, even where the new amount-in-controversy and diversity requirements are met.

Under the "Home State" exception, the district court *must* decline jurisdiction in cases of "local controversy" when all of the following elements are present: (1) greater than two-thirds of all proposed class members are citizens of the state in which the action was originally filed; (2) at least one defendant (a) is a defendant from whom "significant" relief is sought, (b) is a defendant whose alleged conduct forms a "significant" basis for claims asserted by the purported class, and (c) is a citizen of the state in which the action was originally filed; (3) principal injuries resulting from the alleged conduct, or any related conduct of each defendant, were incurred in the state in which the action was originally filed; and (4) during the three-year period preceding the filing of the class action, no other class action has been filed on behalf of the same *or other* persons asserting identical or similar factual allegations against the same defendants. *See* § 1332(d)(4)(A). The court also *must* decline to exercise jurisdiction when two-thirds or more of all putative class members and the primary defendants are citizens of the state in which the action was originally filed. *See* § 1332(d)(4)(B).

Under the "Home State" exception, the district court *may* decline jurisdiction where more than one-third, but less than two-thirds, of the proposed class members and the primary defendants are citizens of the state in which the class action was originally filed. In exercising its discretion to decline

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<sup>28</sup>Unlike class actions, "mass actions" removed to federal court under CAFA are not subject to multidistrict litigation transfer under 28 U.S.C. § 1407. Section 1332(d)(11)(C)(i). *But see* § 1332(d)(11)(C)(ii) (mass action may be subject to MDL treatment if majority of plaintiffs request transfer pursuant to 28 U.S.C. § 1407, the action is certified as a class action under Rule 23, or plaintiffs propose that the action proceed as a class action under Rule 23).

jurisdiction, the district court must consider the totality of the circumstances, based upon six factors: whether (1) the claims asserted involve matters of national or interstate interest; (2) the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states; (3) the class action has been pleaded in a manner that seeks to avoid federal jurisdiction; (4) the class action was brought in a forum with a distinct nexus to the class members, the alleged harm, or the defendants; (5) the number of proposed class members are citizens of the state in which the action was originally filed is substantially larger than the number of proposed class members from any other state, and whether the citizenship of the other proposed class members is dispersed among a substantial number of states; and (6) during the three years preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same *or other* persons was filed. *See* § 1332(d)(3)(A)-(F); American Tort Reform Association, *Judicial Hellholes*, at iii (2006) (“Cases are only assured of being transferred when more than two-thirds of the plaintiffs are from out of state,” making CAFA of “less use” when cases are brought in the defendant’s home state). It remains to be seen whether any businesses will consider moving their corporate headquarters into another state in order to have a better chance at obtaining CAFA’s protections. *Id.* (In this regard, CAFA may be viewed as sending an “important signal” to corporations).

CAFA’s expanded jurisdiction has four other exceptions. The “State Action” exception excludes lawsuits from CAFA’s jurisdictional provisions that name as primary defendants states or other governmental entities against which a district court cannot order relief, thus avoiding federalism concerns. *See* § 1332(d)(5)(A); *see also Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546-47 (5th Cir. 2006) (“state action” exception does not create a loophole whereby plaintiffs can name a single state entity to avoid removal; all primary defendants must be states). This exception may be limited, however, as a state’s voluntary participation in removal to federal court waives sovereign immunity. *See Lapidus v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002) (state’s voluntary participation in removal to federal court waives immunity). Another exception for “Covered Securities” excludes claims solely involving “covered securities” as defined under the Securities Act of 1933 or the Securities Exchange Act of 1934, or claims regarding the rights, duties and obligations relating to or created by any security as defined by the Securities Act of 1933. *See* § 1332(d)(9)(A) and (C). The “Small Class” exception removes from CAFA’s purview class actions in which the aggregate number of members of all proposed plaintiff classes is fewer than 100. *See* § 1332(d)(5)(B). The “Corporate Governance” exception makes CAFA inapplicable to cases involving corporate governance issues and corporate internal affairs issues that arise under the laws of the state of incorporation. *See* § 1332(d)(9)(B).

d. Expanded Removal Power

Paralleling the extended scope of original jurisdiction are new rules for removing class actions from state court to federal court. First, CAFA has eliminated the provision that diversity cases must be removed within one year of commencement for putative class actions or “mass actions.” *See* 28 U.S.C. § 1453(b). Second, CAFA effectively eliminates the use of “sham” defendants by plaintiffs – the practice of adding a citizen of the forum state as a defendant in order to destroy complete diversity – by enacting “minimal diversity” provisions. Third, consent of all defendants to removal to federal court is no longer required. *See id.* Fourth, removal is permitted without regard to whether any defendant is a citizen of the state in which the action is brought in putative class actions or “mass actions” under CAFA. *See id.*

Since the passage of CAFA, courts have struggled to decide which party bears the burden of proving jurisdiction upon removal. Before CAFA, the party seeking to remove a case to federal court had the burden of establishing federal jurisdiction. *See, e.g., Garcia v. Koch Oil Co. of Tex., Inc.*, 351 F.3d 636, 638 (5th Cir. 2003). The legislative history of CAFA, particularly the Senate Judiciary Committee’s report, indicates that Congress intended the party opposing removal to bear the burden of demonstrating non-removability. *See* S. Rep. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40 (“If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (*i.e.*, that the applicable jurisdictional requirements are not satisfied)).”<sup>29</sup> Congress failed, however, to enact specific legislation that would shift the burden to the non-removing party.

Several courts, following the lead of the Seventh Circuit’s decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450 (7th Cir. 2005), have rejected CAFA’s legislative history as sufficient to change the traditional burden of proof regarding whether removal was proper. In these cases, the courts held that the party removing the case retains the burden of proving that federal jurisdiction is appropriate. *See Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006) (party seeking removal has burden to show to a legal certainty that jurisdiction is appropriate); *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271, 275 (2d Cir. 2006) (CAFA does not change traditional burdens of proof); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) (removing party has burden of establishing federal subject matter jurisdiction); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (CAFA does not shift burden of proof regarding subject matter jurisdiction from defendant to plaintiff); *Ongstad v.*

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<sup>29</sup>Further, Congress intended that in cases in which a court is uncertain about whether all matters in controversy in a putative class action “do not in the aggregate exceed the sum or value of \$5,000,000, the court should err in favor of exercising jurisdiction over the case.” *See* S. Rep. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 40 (emphasis added). However, this Senate report was issued ten days *after* the passage of CAFA, thus reducing (or eliminating) its value as persuasive legislative history.

*Piper Jaffray & Co.*, 407 F. Supp. 2d 1085, 1090 (D.N.D. 2006) (same); *Moniz v. Bayer A.G.*, 447 F. Supp. 2d 31, 34 (D. Mass. 2006) (same); *Schwartz v. Comcast Corp.*, No. Civ. A. 05-2340, 2006 WL 487915, at \*1 (E.D. Pa. Feb. 28, 2006) (same); *Rogers v. Cent. Locating Serv., Ltd.*, 412 F. Supp. 2d 1171, 1175, 1177 (W.D. Wash. 2006) (same); *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 694 (S.D. Tex. 2006) (same); *Judy v. Pfizer, Inc.*, No. 4:05CV1208RWS, 2005 WL 2240088, at \*2 (E.D. Mo. Sept. 14, 2005) (same). However, two district courts have concluded that CAFA shifted the burden of proof entirely. See *Waitt v. Merck & Co.*, No. C05-0759L, 2005 WL 1799740, at \*2 (W.D. Wash. July 27, 2005); *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 168 (D. Mass.), *aff'd on other grounds* by 424 F.3d 43 (1st Cir. 2005). This is the minority view, and these district court rulings likely would be decided differently today given the more recent rulings by all circuit courts that have addressed the issue that the burden shifts with the party seeking federal jurisdiction.

However, the removal burden of proof does not rest entirely on the defendant's shoulders. Once the removing party has shown that removal is proper under CAFA, the burden of proof regarding whether one of CAFA's exceptions to federal jurisdiction applies shifts to the party seeking remand. See *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 681 (7th Cir. 2006); *Frazier*, 455 F.3d at 546; *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006).

A heavily litigated aspect of CAFA continues to be whether an amended complaint "commences" a lawsuit and thus makes a state lawsuit removable to federal court even if it was not removable when the initial complaint was filed. Courts are in agreement that, for CAFA jurisdictional purposes, a state lawsuit commences when it begins in state court, not when it is removed to federal court. See *Natale*, 424 F.3d at 44 (CAFA's "commenced" language refers to when lawsuit commences in state court); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 726 (7th Cir. 2005) (same); *Bush v. Cheaptickets, Inc.*, 425 F.3d 683, 686 (9th Cir. 2005) (same); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005) (same). Under state law definitions, however, when an action actually begins and whether a later filing "relates back" may vary and thus may affect removability. Compare *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005) (late, post-CAFA service upon defendants made action properly removable), with *Jones v. Fort Dodge Animal Health*, No. 06-CV-47, 2006 WL 1877103, at \*4 (N.D. Fla. July 5, 2006) (under Florida law, action commences on date complaint filed, not on date of service, so action filed one day before CAFA's effective date but served well after date is not removable). See also *Patterson v. Dean Morris, L.L.P.*, 448 F.3d 736, 740-41 (5th Cir. 2006) (affirming remand to state court; plaintiffs' partial payment of filing fees were sufficient under Louisiana law to commence action pre-CAFA); *Pew v. Cardarelli*, No. 05-CV-1317, 2006 WL 3524488, at \*4 (N.D.N.Y. Dec. 6, 2006) (when complaint was dismissed without prejudice prior to the effective date of CAFA and refiled after that date, new filing did not relate back to original action and was therefore subject to removal);

*Eufaula Drugs Inc., v. TDI Managed Care Servs., Inc.*, No. 2:05-CV-293, 2005 WL 3440635 (M.D. Ala. Dec. 14, 2005) (late service of summonses with court clerk “commenced” action post-CAFA and CAFA therefore applies).

Federal courts also have recognized that when plaintiffs substantially change a pre-CAFA class action that would not relate back to the original complaint, *see* Fed. R. Civ. P. 15(c) (which would trigger a new action for statute of limitation purposes) or otherwise make a change to the action such that a defendant would have had no notice of the new claims (*e.g.*, changing the class definition), the amended complaint commences a new action for purposes of CAFA removal. *See, e.g., Braud v. Transp. Serv. Co. Ill.*, 445 F.3d 801, 804 (5th Cir. 2006) (addition of new defendant is sufficient to permit removal); *Knudson v. Liberty Mut. Ins. Co.*, 435 F.3d 755, 758 (7th Cir.) (holding that expansion of class definition in putative class action “commenced” action within CAFA’s coverage period), *cert. denied*, 127 S. Ct. 79 (2006); *Moniz*, 447 F. Supp. 2d at 38 (adding new claim regarding new product in amended complaint did not relate back to original filing date and thus action removable under CAFA); *Robinson v. Holiday Universal, Inc.*, No. Civ. A. 05-5726, 2006 WL 470592 (E.D. Pa. Feb. 23, 2006) (addition of new defendant “commenced” action for purposes of CAFA removal). Where, however, the amendment would “relate back,” courts have held that the amendment does not commence an action for removal under CAFA. *See Prime Care of Ne. Kan., LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1289 (10th Cir. 2006) (“whether a post-CAFA amendment triggers a substantive right of removal under CAFA . . . depends on whether the amendment relates back to the pre-CAFA pleading”); *Phillips v. Ford Motor Co.*, 435 F.3d 785, 788 (7th Cir. 2006) (adding new named plaintiffs to replace prior plaintiffs does not create new action and new plaintiffs’ claims “relate back” to original filing so long as claims arise out of same transaction or occurrence); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1074 (8th Cir. 2006) (holding that amended pleading did not commence a new action because the claims were identical in both pleadings and the replacement representative was a member of the putative class in original pleading); *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 751 (7th Cir. 2005) (holding that under Illinois law, “workaday” amendment to class definition related back to original filing and did not commence new action).

CAFA also eliminates the frustrating inability of defendants to obtain interlocutory review of orders granting motions to remand. CAFA provides for expedited and immediate federal appellate review of orders either granting or denying motions to remand in class or mass actions, but the appellate courts have discretion to accept or reject the appeal. *See* 28 U.S.C. § 1453(c). *Cf., Wallace v. La. Citizens Prop. Ins. Corp.*, 444 F.3d 697, 700 (5th Cir. 2006) (expedited review of removal decision not applicable to non-class action removed under 28 U.S.C. § 1441(e)(1)(B); court had no jurisdiction to hear appeal under § 1453(C)(1)).



A litigant seeking appellate review must make application to a court of appeals “not less than” seven days after entry of the order, § 1453(C)(1), but most courts have recognized this as a typographical error. All circuit courts addressing the issue have interpreted this deadline as “not more than” seven days. *See* § 1453(C)(1); *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006); *Pritchett*, 420 F.3d at 1093 n.2. If the court of appeals accepts the appeal, the court must rule within sixty days after the appeal was filed. *See* § 1453(c)(2). If the court does not finally adjudicate the appeal within sixty days, it is deemed to have been denied, *see* § 1453(c)(4), but the court may grant an extension of up to ten days to resolve the appeal if all parties agree and the extension is for good cause shown and in the interest of justice, *see* § 1453(c)(3). This places litigants in the unusual position of being able to give a court additional time in which to act. The appellate court could avoid this scenario by not accepting the appeal until it was ready to rule because CAFA does not set a corresponding requirement that the court accept the appeal within a set period of time.

e. Settlements and the Class Member “Bill of Rights”

CAFA contains certain provisions designed to protect the rights of class members and persons acting on their behalf. Often settlements provide consumers with coupons for discounts on future purchases from the defendant in lieu of cash awards. If the terms of a proposed coupon class settlement call for class members to receive all or part of their award in the form of coupons, the court must hold a hearing on the fairness of the settlement before approving it and must make written findings that the settlement is fair, reasonable, and adequate. *See* 28 U.S.C. § 1712(e). Class counsel’s fees in a coupon settlement must be based on either (a) the value of coupons actually redeemed by class members (as opposed to the number of coupons issued) or (b) the hours actually and reasonably billed in prosecuting the class action. *See* §§ 1712(a) & (b)(1). CAFA does not prevent the court from applying a lodestar with a multiplier method for determining attorney’s fees in coupon settlements. *See* § 1712(b)(2). Further, the court may require that the coupon settlement provide for distribution of a portion of the value of unclaimed coupons to a charitable organization or a government entity, but distributions to charities or government entities are not factored into the calculation of class counsel’s fee. *See* § 1712(e).

The court may approve a settlement under which a class member must pay sums to class counsel that will result in a net loss to the class member – but only upon a written finding that the non-monetary benefits of settlement to the class member “substantially” outweigh the monetary loss. *See* 28 U.S.C. § 1713. CAFA is silent on whether the court must take into account the tax consequences to the class member in making these findings. The court may not, however, approve a settlement that gives larger awards to certain class members only

because of their “closer geographic proximity to the court.” *See* 28 U.S.C. § 1714. This type of neighborhood advantage had occurred in certain state court settlements.

CAFA creates an opportunity for state and federal officials to have input or exercise their regulatory authority with regard to proposed class settlements. *See* 28 U.S.C. § 1715. Within ten days of the filing in the district court of a proposed class settlement, each settling defendant must serve a copy of certain documents relating to the settlement upon the person who has primary regulatory authority over the defendant or the persons “who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person” in each state where class members reside, and upon the United States Attorney General (or, if the defendant is a state or federal depository institution, upon its primary state or federal regulator). *See* § 1715(b). No final order approving the settlement may be issued for 90 days after service of that notice. *See* § 1715(d). If the notice has not been provided, a class member may elect not to be bound by the settlement. *See* § 1715(e). The “primary regulator” in states may not be a single body, given the large number of services provided by many corporate defendants. Thus, defendants must be prepared to identify these regulators prior to filing the proposed class settlement, given the short period the statute allows for serving notice.

The theory behind these notice provisions is that they will provide for some unspecified scrutiny of supposedly collusive settlements in which attorneys may receive high fees and the class members relatively little value. In reality, however, the notice provisions will likely inundate federal and state officials with many (and possibly duplicative) documents by defendants anxious to gain finality of their settlement agreement. In sum, while the settlement review process may benefit plaintiffs and make it more difficult for plaintiffs’ attorneys to reach quick settlements, it will also make obtaining settlements that are desirable for defendants more time consuming and difficult.

### **3. *Conclusion regarding CAFA***

Before CAFA, the “complete diversity” requirement made it difficult to litigate class claims based on state law in federal courts. With CAFA’s “minimal diversity” requirements, federal jurisdiction is designed to be available in most class actions and mass torts. Plaintiffs’ counsel, however, will have an incentive to avoid removal by tailoring class claims to fit the “Home State” and mass tort exceptions. The result is that a carefully pleaded state court case is especially likely to remain in state court when the defendants are companies with their principal places of business in the forum state.

Pre-CAFA class actions had the utility (from plaintiffs’ counsel’s perspective) of joining not-yet-identified claimants into a mass action, thus

increasing the putative economic value (or threat) of a class. The increased impediments to class certification created by CAFA may require plaintiff firms to make a greater investment up front to identify specific claimants. This may delay the filing of product liability cases once a new problem (like Vioxx<sup>®</sup>) is identified, and it may deter the filing of actions altogether, because the costs of entry for plaintiffs' firms will be increased. But when multiple class actions are filed in state court and then removed to federal court, the class actions are subject to consolidation under multidistrict litigation procedures. Thus, companies sued in multiple state courts may find some reprieve from having to maintain defenses on multiple fronts.

Finally, as defense counsel begin to take advantage of CAFA's removal provisions and settlement controls, state courts are adjudicating fewer and fewer state law class actions that are nationwide or interstate in their sweep. For example, in Madison County, Illinois, 82 class actions were filed in 2004, and 36 were filed in the month-and-a-half before CAFA took effect in February 2005. However, in the remainder of 2005, only ten class actions were filed. Peter Geier, *CAFA a year later? Not so bad*, *The National Law Journal*, Mar. 6, 2006, at 18. Thus, CAFA has already significantly affected the filing of class actions in state court "judicial hellholes."

## CONCLUSION

Although the legal bases for toxic tort liability, as well as the available damages and defenses, vary by jurisdiction, defendants should expect plaintiffs to utilize many or all of the theories discussed above to allow maximum flexibility for litigation strategy. The theories of liability discussed in this monograph will continue to evolve as plaintiff attorneys seek to expand existing theories and pursue new avenues of liability.



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