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Responding to a Mass Environmental Tort Litigation

A HOW-TO

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Authors

Mark Ter Molen, Partner
Miriam R. Nemetz, Partner

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The following Mayer Brown attorneys assisted in the preparation of this publication:

Corwin Carr
Associate

Chris Comstock
Partner

Chris Ferro
Associate

Jaimy Hamburg
Counsel

William Michael
Partner

Roger Patrick
Counsel

Linda Shi
Partner

Matt Sostrin
Counsel

C.J. Summers
Counsel

Evan Tager
Partner

Brantley Webb
Partner

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Foreword

The lawyers in Mayer Brown's Environmental Litigation practice have a lengthy and successful track record handling and resolving large and complicated environmental tort claims involving hundreds, if not thousands, of plaintiffs, overlapping agency investigations, multiple defendants, and complicated expert issues.

Our more than 75 lawyers and professionals are spread geographically throughout the major commercial and regulatory centers in the United States and include attorneys recognized by *Chambers* and *Legal 500* for their dispute resolution capabilities, regulatory insight, and strategic counseling skills.

The practice includes experienced environmental and trial lawyers with extensive multi-district litigation experience, top-notch class-action defense lawyers, leading criminal defense lawyers, and a peerless appellate practice group.

We hope that this book will serve as a helpful resource in preparing for and responding to large environmental tort claims.

Sincerely,

Mark R. Ter Molen
Partner, Mayer Brown LLP
Co-Chair, Environmental Litigation Practice

Introduction

With the goal of providing useful insights for real-life incidents, this book guides a hypothetical client through the hypothetical incident described below. Using this incident as a case study, we discuss all steps in managing the legal fallout from an accidental chemical release, beginning with the initial emergency response and ending with the resolution of ensuing litigation.[1]

Hypothetical: Alpha's Accidental Release of TCE

Alpha Chemical Company's plant suffered an explosion that resulted in the release of the solvent TCE. The county fire chief led the ensuing emergency response. Media criticized the fire chief for taking over two hours to arrive at the scene of the explosion, waiting two days before ordering responders to wear appropriate protective equipment, and failing to evacuate residents who lived within a quarter mile of the explosion, as required by the county's emergency response plans and the current Emergency Response Guidebook when there is a TCE release of this magnitude. Within a few hours of the explosion, Alpha's industrial hygienist recommended to the fire chief that he evacuate nearby residents and order that responders wear personal protective gear. The fire chief disregarded that recommendation, because he did not want to alarm residents. Alpha's industrial hygienist also provided all Alpha employees involved in the response with the appropriate protective equipment. While Alpha employees wore the equipment, many county responders did not, and several required medical attention, because they exceeded OSHA-mandated exposure thresholds. Media personnel attempted to interview many responders during the chaos of the response. An Alpha employee told the media that residents should expect to be

evacuated, but a county responder told a different reporter that evacuation was unnecessary.

Investigation determined that significant quantities of TCE from the explosion and release reached the groundwater and a neighboring river. Investigators also identified pre-existing groundwater TCE contamination, dating from when another company, Delta Corporation, owned the Alpha facility. Part of this historic groundwater plume originated from a neighboring industrial park, where there are two other facilities, owned by Beta and Theta companies, respectively, which formerly used TCE. The groundwater plume appears to have migrated beneath a residential subdivision that includes over 500 homes. These homes historically have relied on individual wells to provide their water supply, as has an elementary school located within the subdivision.

The explosion, chemical release, and historic plumes are being investigated by the state EPA, the state department of natural resources, the Army Corps of Engineers, U.S. EPA, and OSHA. A prominent plaintiff's law firm has brought in Erin Brockovich and has advertised a "town meeting." At the meeting, Ms. Brockovich discussed the dangers presented by the TCE plume and offered the law firm's services to injured residents. A number of the first responders from the local fire department and other agencies claim that they were not provided with proper respiratory equipment and have suffered injuries from exposure to vaporized TCE and other chemicals associated with the explosion and release.

The First 24 Hours

The Initial Emergency Response

In the typical response to emergencies like the explosion presented in this hypothetical, companies like Alpha are involved but not in control. State laws generally give emergency response authority to local and state agencies, permitting them to call on federal authorities if the response requires resources beyond state and local capacity.

In this hypothetical, the Alpha industrial hygienist was right to make recommendations to the fire chief based on existing emergency plans and protocols, but the fire chief ultimately had authority to determine whether to order an evacuation. Though not in charge, Alpha should remain involved in the emergency response to the extent that it is safe and helpful to do so. Alpha should also insist that its employees follow pertinent protocols and use appropriate personal safety equipment, even if the authority in charge does not require it. To mitigate liability and to present important optics to the public, Alpha should offer local authorities and the public whatever relevant assistance and resources it safely can. Local authorities are often understaffed, undertrained, and under-resourced, and companies like Alpha might have valuable technical expertise, resources, and equipment to contribute.

PRACTICAL TIPS

Before an incident:

- Ensure that employees likely to be involved in emergency responses have current and appropriate training and certifications.

- Ensure that proper emergency response equipment, including personal protective equipment, is available and functional.
- Ensure that emergency response plans are up to date. Good response plans contain simple instructions that clearly state the conditions that trigger specific actions.
- Confer with local authorities in developing emergency response plans and collaborate on training.

During an incident:

- Alert relevant authorities immediately.
- Ensure that employees involved in an emergency response understand which authority is in charge of the response and act at the direction of that authority.
- Ensure that employees who decide to deviate from emergency response plans or protocols appropriately justify and document those decisions to the extent possible.
- Instruct response employees to wear appropriate personal protective equipment whenever common sense and/or protocol suggest they should (even if the authority in charge does not order it).
- Instruct response employees to decline to speak with media unless specifically authorized to do so. In an effort to convey consistent and accurate information to the public, companies should appoint a media liaison. (In this hypothetical, an Alpha employee conveyed an inconsistent message to the public, likely causing confusion.)

- Comply with applicable OSHA regulations (e.g., provide medical monitoring to all employees who experienced exposure risks).
- Provide needed resources to affected residents (i.e., safe drinking water, evacuation assistance, access to medical evaluations).

After The Imminent Danger Is Neutralized

Offering Early Settlements

In response to the incident described in the hypothetical, Alpha should consider seeking an early settlement with potential plaintiffs in exchange for a release of future claims. Large-scale chemical releases lend themselves to this strategy, because there is usually a defined list of affected residents and businesses that comprise the majority of a potential class of plaintiffs. Approaches vary based on circumstances, but claimants can be reached by canvassing door to door or by setting up a settlement office a safe distance from the incident. Typical claims in these situations include lost wages (lost income for businesses), and reimbursement of housing and meal expenses incurred while residents were required to relocate.

PRACTICAL TIPS:

- If plaintiffs' counsel is retaining clients, company counsel should confer with plaintiffs' counsel to obtain current and updated client lists.
- Instruct settlement assistance personnel not to communicate with represented parties.
- Require represented parties who want to negotiate an early settlement without counsel to demonstrate that they have terminated representation before engaging with company settlement assistance personnel.
- Consult with counsel about the scope of any release. This will require thought and research. For example,

some jurisdictions may require particular language for the releases to be effective.[2] Also, releasing "all claims" may be problematic if, for example, diseases have not manifested.

- Consult with counsel regarding settlements with minor children. In some jurisdictions, including California and New Jersey, parents or guardians cannot dispose of a child's cause of action without statutory authority or a judicial determination that the settlement is fair and reasonable.[3] See § 5(g) below.

Litigation Positioning

Hiring Outside Counsel

Alpha should retain experienced outside counsel promptly. Incidents like the one described in the hypothetical almost always result in tort litigation. Because the potential liability in such cases is often in the hundreds of millions of dollars, it is critical to retain counsel with expertise in handling the broad range of issues that these cases frequently present. Of course, familiarity with the defendant company is also helpful and important.

PRACTICAL TIPS:

- Consider retaining either one firm that can handle all of the anticipated issues (e.g., tort liability, agency investigations, potential criminal enforcement, insurance coverage, *etc.*), or a "virtual" firm composed of lawyers at different firms who collectively possess the needed expertise.
- Consult with outside counsel as soon as possible about response activities, evidence preservation, claims and releases, and media responses.
- When dealing with insurers, insist on retaining experienced outside counsel with a proven track record. Insurers may try to minimize outside counsel costs by recommending less sophisticated counsel, but that will not stop them from contesting coverage if there is a bad outcome.

Notifying Insurance Carriers

Alpha should notify insurance carriers promptly and in accordance with relevant policy terms.

PRACTICAL TIPS:

- Notify all relevant layers of insurers.
- Put in place a reliable insurance notification procedure to ensure that relevant insurers receive required notice of each incoming complaint. In situations like the hypothetical, plaintiffs will likely file multiple complaints throughout the statute of limitations period.
- Consult with outside counsel regarding coverage. Where there are environmental releases, insurers may argue that they are not responsible for coverage due to "pollution exclusion" language commonly included in insurance policies issued in the past 20 years.[4] To the extent that releases occurred before that language was added (such as the historic groundwater contamination in the hypothetical), some coverage may still apply.

Managing the Media Response

In the presented hypothetical, if Alpha does not already have a public relations advisor, it should consider hiring one as soon as possible. A media consultant can help draft press releases and respond to media inquiries, as well as prepare Alpha executives and other personnel who may need to speak with the media directly. The media consultant's goal is to defend Alpha against negative press and, to the extent possible, foster positive press coverage (e.g., emphasizing that, in the wake of

the explosion, Alpha responders worked around the clock to ensure residents' safety).

After an incident like the explosion Alpha has experienced, information flow is critical. In consultation with a media expert and legal counsel, Alpha should acknowledge what occurred, explain the circumstances in non-technical terms, and explain what it is doing to address the situation. Clear communication on these points will help mitigate harm to the public and preserve Alpha's operations and reputation. Alpha should not, however, let the media response drive its legal strategy.

PRACTICAL TIPS:

Selecting a Media Consultant:

- Retain a media consultant who is familiar with the relevant industry and market.
- Check the consultant's references to determine if the consultant has done similar work for peer companies.
- Compare consultant candidates by asking about their plans for responding to negative press and/or fostering positive press.
- Retain a media consultant who is familiar with the relevant geographic area and population demographics. For example, social media is a quick way to disseminate important information to the public, but it is effective only if the population is likely to include a high percentage of social media and smart phone users.

Before the incident:

- Identify a media consultant so resources are available when an incident occurs.
- Develop a crisis communications plan.

- Conduct training sessions with the media consultant and company representatives who will likely handle the company's response to a crisis.

During the incident:

- Develop a strategy for responding to inquiries in consultation with legal counsel. Messaging should be clear and concise and guided by the goal of mitigating harm to the public and to the company's operations and reputation.
- Coordinate messaging with law enforcement and emergency response authorities.
- Deliver instructions and approved messaging to all personnel with whom the public or media interact, including switchboard operators and employees who work in customer relations.
- Instruct employees not to speak with media unless specifically authorized to do so. Inconsistent messaging puts the public and emergency response operations at risk.
- Monitor relevant media to identify inaccuracies, and provide clarifying information where needed.
- Establish secure internal communication protocols. Inconsistent and confusing messaging can result from media personnel "overhearing" communications that were not intended for public exposure.
- Set up communication lines for relatives of employees participating in the emergency response, and, if necessary, assist injured parties and their families in dealing with the media.

- Avoid making broad unqualified statements on issues relevant to litigation, such as whether the chemicals at issue are harmful, whether other entities are responsible, *etc*.

Retaining Experts on Key Issues

Alpha's defense will involve experts from a variety of disciplines, including toxicology, epidemiology, industrial hygiene, hydrogeology, meteorology, and various medical specialties, among others. Experienced outside counsel will be familiar with and can quickly retain leading experts across the necessary range of disciplines. (See also § 5(f) below.)

PRACTICAL TIPS:

- Depending on the scope of the litigation, consider hiring two sets of experts, consulting and testifying. While it increases defense costs, this approach enables evaluation of the experts for purposes of testifying strength and compartmentalization of evaluations for purposes of privilege.
- Integrate relevant experts into the media planning and decision-making processes to ensure accurate messaging.
- Consult with legal counsel regarding whether expert communications are privileged. If not, consider negotiating a stipulation with opposing counsel to protect expert communications.

Codefendant Issues

EXECUTING A JOINT DEFENSE AGREEMENT

1. As the hypothetical illustrates, mass environmental incidents often involve more than one allegedly responsible party. Executing a joint defense agreement is often a helpful strategy. The typical purposes of that strategy are to confirm the existence of a shared "joint defense privilege" to permit information sharing without waiver of attorney-client privilege,[5] and to defer litigation of cross-claims via a tolling agreement to allow the co-defendants to present a united front in the defense of plaintiffs' claims.
2. Any joint defense agreement should be carefully drafted to account for a potential break-up, including, for example, provisions requiring the return or destruction of documents and stipulations that counsel who have received confidential information from the parties will not be subject to disqualification should the parties subsequently become adverse.

SHARING EXPERTS

If the defendants' interests are closely aligned, Alpha may want to consider sharing experts to reduce defense costs and ensure uniform approaches. Sharing can be risky, however, especially in the early stages as defendants sort out the facts, analyze their potential liability, and determine their legal positions. If conflicts emerge, there is a risk that shared experts who have obtained confidential information from more than one codefendant may be barred from participating in the litigation. Moreover, the defendants may benefit from having multiple experts in each relevant discipline helping to identify issues.

Document Preservation

Companies are obligated to preserve evidence when litigation and/or a regulatory investigation are reasonably anticipated. After an explosion like the one Alpha suffered, both are a near certainty. As soon as practical after the incident, legal counsel for Alpha should suspend any routine document destruction practices that might affect relevant evidence and issue a document preservation notice to any employee likely to possess relevant evidence. The notice should clearly explain the employee's obligation to preserve information and should require employees to confirm receipt of the notice. For the duration of the litigation and investigation, legal counsel should periodically remind employees of their continued obligation to preserve evidence. Courts can hold companies and outside legal counsel accountable, in the form of adverse inferences and sanctions, for any failure to ensure evidence preservation.[6]

PRACTICAL TIPS

Before an incident:

- In consultation with legal counsel, develop and implement a document retention policy. That policy should include templates for a document retention notice, a receipt confirmation certificate, and follow-up preservation reminders.
- Inform employees that, if they choose to communicate about work-related matters over personal cell phones or email accounts, they may have an obligation to preserve those devices and communications as evidence (i.e., personal emails, call logs, text messages, and voice mails), and subject their personal devices and accounts to collection, review, and production procedures.

After an incident:

- Ensure that legal counsel have the expertise necessary to avoid inadvertent destruction of relevant evidence, particularly electronic evidence, such as metadata, and to handle sizable quantities of electronic evidence.
- Memorialize efforts to preserve evidence in case a court requires justification of the process later (often years later as large-scale litigation can persist for extended periods of time).
- If evidence is lost, memorialize loss prevention and recovery efforts.
- Update legal holds as necessary as complaints are filed.

Handling Criminal, Civil and Internal Investigations

Any chemical release, such as the one at Alpha's plant, will almost certainly trigger criminal and regulatory investigations, and should lead to an internal investigation as well. If the incident receives significant media attention, Congress may also schedule public hearings. Handling these investigations, while also anticipating significant tort claims, poses a number of significant considerations.

Corporate Criminal Liability

Criminal investigations and prosecutions can be the most damaging consequence of an environmental incident like the one in this hypothetical. A criminal investigation can have a disastrous financial impact on a company and destroy its hard-earned reputation. And the damage is often done well before the investigation reaches a conclusion. The criminal investigation might become public either as a result of investigative actions or because of a required public disclosure.[7] If Alpha is a public company, mere news of a criminal investigation could adversely affect its stock price and cause it to lose significant market capitalization.

Corporations act through their agents (i.e., directors, officers, and employees). An agent of the corporation who commits crimes within the scope of his or her employment subjects the corporation to potential criminal charges.[8] To subject a corporation to criminal liability, the following three elements must be met:

1. each element of the crime charged against the corporation was committed by one or more of its agents; and

2. in committing those acts, the agent[s] intended, at least in part, to benefit the corporation; and

3. each act was within the scope of employment of the agent who committed it.[9]

Activities falling within the scope of employment generally are those that (1) the employee is employed to perform, (2) occur substantially within the authorized limits of time and space, and (3) are actuated, at least in part, by a purpose to benefit the corporation.[10] Whether the actions actually benefited the corporation is immaterial: If the corporate agent intended to benefit the corporation when he or she engaged in the conduct at issue, the "benefit to the corporation" element will be satisfied.[11]

In some circuits, under the doctrine of "collective knowledge," the knowledge and intent necessary to hold the corporation criminally liable may be found, even if no single corporate office or employer possessed the requisite mental state, by imputing to the corporation the "collective knowledge" of all the individuals involved in the action.[12] Corporations compartmentalize knowledge by subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation. Under the collective knowledge theory, it is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation.[13] As corporations routinely operate their day-to-day activities through collective knowledge, they can be held criminally liable under a theory of imputed collective knowledge.

Criminal Investigations

The government may institute a criminal action against Alpha to investigate and punish potential violations of criminal laws, including criminal offenses contained in environmental statutes that govern incidents like the one in the hypothetical.[14] Such criminal investigations can be conducted simply to assure authorities that no criminal violations have occurred. Should criminal liability be imposed, however, the financial penalties, which may include both restitution and fines, can be significant. A company like Alpha may also face significant collateral consequences, such as appointment of a monitor or debarment from government programs.[15] These potential penalties heighten the stakes for the company and its employees in responding to a criminal investigation, and also dramatically increase the government's leverage in negotiations to resolve a potential criminal action.

Civil Investigations

The environmental statutes give government agencies authority to initiate investigations into potential violations of civil regulations and statutes and to bring civil enforcement proceedings.[16] Some statutes allow government agencies to conduct both criminal and civil investigations and to initiate both criminal and civil enforcement actions simultaneously (typically referred to as "parallel proceedings"). The EPA, however, has a policy of preferring criminal investigations where possible.[17] If Alpha finds itself subject to multiple investigations, it should attempt to reach a global resolution of all proceedings.

Responding to Government Inquiries

The government may employ subpoenas, search warrants, and employee interviews to obtain information from a company during a criminal investigation. Each form of inquiry gives rise to different rights and duties and must be handled appropriately.

SEARCH WARRANTS

1. A search warrant is an order issued by a magistrate or judge authorizing law enforcement officers to search a particular place for specific documents or tangible property or for types of documents or property. Search warrants are used in criminal investigations and are ordinarily granted to government investigators without notice to either the party being investigated or the party whose property is to be searched. To obtain a search warrant, the government must establish that "probable cause" to conduct the search exists. Investigating agencies commonly use a government investigator's affidavit to establish probable cause. A judge must issue a warrant based on the presented evidence.[18] Search warrants are typically used when the government believes it needs to prevent destruction or concealment of evidence, when it expects the target to be uncooperative, or when it wishes to secure evidence immediately.

PRACTICAL TIPS:

General Preparation:

- Prepare a list of emergency contact numbers to be used if the company is served with a search warrant. This list should include the general counsel, key corporate personnel, and an outside defense attorney who is experienced in the representation of corporations in such situations.

- Identify key employees, and provide them with advance training on actions to take when agents are on-site executing a search warrant. Develop a plan to send all nonessential employees home.
- To ensure continuity of operations in the event of a seizure, maintain duplicates of payroll, inventory, accounts receivable, and accounts payable records at an off-site location.

Search Warrant Execution:

- Key employees should review the warrant immediately to ensure a full understanding of its scope.
- Instruct employees not to interfere with the agents conducting the search and not to hide, destroy, or change any documents or evidence.
- Direct to counsel any agent requests for consent to search any additional property or area, or to seize any additional property.
- Legal counsel should instruct agents how the company marks and stores attorney-client privileged documents, assert that there is no waiver, and object to any attempt to seize privileged documents. If agents insist on seizing privileged material, counsel should immediately contact the law enforcement supervising attorney and propose that the documents be sealed until the privilege can be litigated.
- If allowed, a key employee should accompany the searching agent at all times and take notes on the locations searched, items reviewed, and items seized.
- Obtain the identities of searching agents, if possible.

- Prepare for related publicity. Proceed with caution when making any public statements.

SUBPOENAS

A subpoena (sometimes in the form of a civil investigative demand) is a directive to produce described documents or other items of tangible property in the possession or control of the company. Subpoenas may be issued by attorneys or courts in connection with civil litigation[19] and may also be issued by some federal and state governmental agencies.[20] Rules governing subpoenas provide the party served with a definite time to respond and include methods for challenging the subpoena's validity, including improper service or irrelevance. If Alpha receives a subpoena, it should be discussed immediately with counsel.[21] The information produced could be used as evidence in a potential enforcement action against the company or its employees.

PRACTICAL TIPS:

Consult with Legal Counsel to:

- Identify the responsible agency issuing the subpoena and determine the scope of the agency's investigative authority.
- Determine the type of investigation (i.e., grand jury subpoena, authorized investigative demand, *etc.*) if possible.
- Determine the production due date.
- Review the specific demands to determine the scope of the inquiry and identify the company employee(s) best situated to collect responsive documents.

- Consider contacting the issuing authority to seek to limit the subpoena's scope, obtain an extension, make a "rolling" production, establish logistics concerning responsive electronic material, or prepare summary material. Memorialize all discussions with issuing agency representatives.
- Determine whether a motion to quash is appropriate.
- Issue appropriate hold notices or related instructions regarding the company's document retention policy.
- Develop a collection and production plan, with a detailed timeline, that specifies the locations and custodians of responsive material and describes how the material will be collected, processed, reviewed for responsiveness and privilege, stored, copied, identified, Bates-labeled, and transmitted to the issuing agency.
- Interview employees about the location of potentially responsive material.
- Maintain a record of the collection process, the individuals responsible for each part of the process, and the custodians of documents collected, especially hard copy documents.
- Ensure that the electronic collection process is conducted appropriately to avoid harmful errors (i.e., inadvertent destruction of key metadata). Consider retaining a document vendor with collection and hosting experience for large collections of electronic data.
- Ensure that a team is properly trained to review documents for responsiveness to the subpoena's requests and claims of privilege and that a privilege log is created.

- Keep an internal, privileged "hot doc" list that of key documents identified during the review process.
- Maintain a record of all documents produced.
- Consider whether an internal investigation is warranted.

INTERVIEWS OF EMPLOYEES

If a governmental agency initiates an investigation against Alpha, the investigator or prosecuting attorney may contact Alpha's employees directly and request that they meet with investigators to discuss the issues under investigation. To the extent possible, Alpha should involve legal counsel. Agents conduct employee interviews not only to gather information, but also to "lock" individuals into positions on issues relevant to the investigation. An employee's admissions or unfavorable statements can be used against the company in civil or criminal proceedings.

Often, investigators contact employees in an informal manner at their homes or businesses and ask those employees to consent to interviews. An employee may speak to the agent at that time but is under no obligation to do so. Instead, the employee may inform the agent that he or she wishes to speak to counsel before any interviews occur. If an employee already has personal counsel at the time he or she is contacted, that employee may want to call his or her counsel when the agent arrives. Counsel can speak to the agent directly, determine who the agent works for, and the subject matter of the investigation. If the employee contacts corporate counsel instead of his or her private counsel, corporate counsel should ascertain whether the interview relates to company matters and, if so, whether the employee wants corporate counsel at the interview.[22] Corporate counsel cannot direct the employee to decline the interview, but should strongly encourage the employee to retain his or her own counsel or

permit corporate counsel to attend so as to protect the employee's and the corporation's interests.

If an employee is interviewed without counsel, company counsel should immediately debrief the employee on the content of the interview. The topics covered can provide helpful insight into the subject matter of the investigation, the individuals the agent believes are involved, and how long the investigation has been under way. Counsel should ask the employee to provide as much detail as possible about the interview, including the subjects covered, individuals discussed, and documents discussed or reviewed.[23]

PRACTICAL TIPS:

- Discuss options with employees regarding their right to representation if the government approaches them.
- Advise employees appropriately about speaking to government investigators and the media, and maintaining the company's legal privileges.
- Determine whether it is necessary to retain independent counsel for employees who are the subject of agency interviews.
- Legal counsel should coordinate requests for interviews to the extent possible.
- Notify the investigating agency that legal counsel desires to be present during any employee interviews.
- Legal counsel should interview every employee interviewed regarding the nature of questioning and responses given.

INTERNAL INVESTIGATIONS

Given the seriousness of the incident in the hypothetical, Alpha should undertake an internal investigation. Alpha should engage experienced outside counsel to assist it in making decisions about the timing, scope, staffing, and method of the investigation. The company and outside counsel should be prepared to revise the approach in response to information learned during the investigation.

Under the United States Sentencing Guidelines, Section 8C2.5, a corporation's "Involvement in or Tolerance of Criminal Activity," its "Effective Compliance and Ethics Program," and the company's "Self-Reporting, Cooperation and Acceptance of Responsibility" are all factors that can influence the penalty imposed. An immediate response to allegations of misconduct, therefore, may reduce exposure to criminal sanctions. Courts also have considered the immediacy of the investigation in determining whether the company took a reasonable and thorough approach to misconduct allegations.[24]

PRACTICAL TIPS:

- Engage independent and experienced counsel to conduct an internal investigation. When outside attorneys conduct the investigation, the probability that attorney-client privilege will apply increases.
- Ensure that an unbiased team conducts the internal investigation in a full and thorough manner. A company subjects itself to potential litigation if the investigation is not appropriately performed.[25] As the government does not have sufficient resources to investigate every allegation of corporate misconduct, it rewards self-evaluations through internal investigations to incentivize companies to be good corporate citizens. But,

conversely, as a deterrent mechanism, the government severely punishes corporations that do not conduct appropriately unbiased and thorough internal investigations.

- In consultation with outside counsel, determine the appropriate scope of the investigation. The scope of any investigation depends on numerous factors, including the nature of the allegations, the number of individuals potentially involved, the potential risks associated with the allegations, and the financial costs of conducting various aspects of an investigation. At a minimum, the investigation must address the allegations raised and any issues that would necessarily flow from those allegations. (In the hypothetical, that would include the cause of the explosion, the culpability of any company employee, and the extent of any personal and environmental damages.) Keep in mind that the government will view the appropriateness of the scope of the investigation with "20/20 hindsight."
- Consult with outside counsel about whether an investigation will result in a written or oral report, will include factual and legal conclusions and recommendations, and will remain internal or be disclosed to a government agency.
- Consult with outside counsel about whether any employees require separate counsel.
- When conducting interviews, provide employees with *Upjohn* warnings,[26] notifying them that the counsel administering the interview represents the company, not the individual employee, and that the company can choose to waive the attorney-client privilege and deliver the contents of the interview to the government.

- Consult with outside counsel about needed technical experts, including industry experts, chemists, forensics specialists, engineers, and operations experts. To preserve the attorney-client privilege and workproduct protection, outside counsel

should engage, supervise, and control communications with experts.[27] Engagement agreements should state that the expert is engaged to assist outside counsel in evaluating and interpreting technical information.

Managing Privilege Issues

If Alpha's legal counsel conducts an internal investigation for the purpose of advising Alpha on its legal obligations and preparing for potential litigation, attorney-client and work product privileges may protect the resulting information from disclosure to adversaries. Conducting an internal investigation under a claim of privilege, particularly using outside counsel,[28] also confers the benefit of encouraging frank and candid exchanges among counsel, company management, and employees.

But maintaining the privilege also carries some disadvantages. Because privileged information should be distributed only to employees who need it to perform their employment duties, the effort to maintain privilege may prevent other employees from learning lessons from the investigation and taking corrective measures. Additionally, the public, courts, juries, and regulatory agencies may view excessive assertions of privilege with suspicion. At times, voluntary disclosure of arguably privileged information may alleviate such suspicion and affirmatively demonstrate cooperativeness and forthrightness before a regulatory agency or judicial body.

Any disclosure of privileged material has important legal consequences; however, Companies should fully vet proposed disclosures with experienced counsel to ensure that they fully understand all potential implications of a privilege waiver.

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege will apply to communications by officers, directors, and employees of a company:

> "(1) Where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; (8) except the protection be waived."[29]

The privilege applies to communications that are shared with persons outside of that relationship only if the person to whom the communication is relayed is necessary to facilitate the attorney-client relationship, such as a translator or technical expert. Conversely, no privilege will exist when attorney-client communications are shared with individuals unnecessary to the attorney-client relationship or when the expert is retained by the company and not by counsel.[30] In most cases, if information is disclosed under mandatory reporting requirements to regulatory or other government bodies, that information will lose its privileged status.[31]

When former employees are interviewed, questions may exist as to whether the attorney-client privilege applies.[32] Generally, the privilege applies only when the communication is between corporate counsel and a former employee or representative, concerning a matter within the former employee's prior responsibilities that is of legal importance to the company.[33] Even if a communication is not subject to attorney-client privilege, work-product protection, as described below, may still protect the communications.[34]

WORK-PRODUCT DOCTRINE

The work-product doctrine is distinct from—although often overlapping with—the attorney-client privilege. As soon as litigation is reasonably foreseeable, the work-product doctrine applies to protect documents and other tangible things prepared in anticipation of litigation from mandated disclosure to an adverse party in that litigation.[35] Although the doctrine reaches a broader range of material and documents than does the attorney-client privilege,[36] the protection is not absolute. An adversary can obtain court authority to access privileged material by demonstrating "substantial need" for the protected material and "undue hardship" absent disclosure.[37]

Work-product protection does not cover "materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes,"[38] even if litigation is imminent.

SELF-EVALUATIVE PRIVILEGE

Some courts have recognized a limited "self-evaluative privilege," sometimes known as the self-critical analysis privilege, precluding discovery on public policy grounds of internal, self-evaluative activities.[39] Although no consistent test has been established, courts applying the self-evaluative privilege generally look for the following three elements:

"(1) the information must result from self-critical analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of the type whose flow would be curtailed if discovery were allowed…."[40]

However, because the U.S. Supreme Court has expressed a reluctance to recognize new privileges,[41] and because no court has recognized the privilege when a government agency desires

the disclosure of information,[42] the self-evaluative privilege is an available, but weak, basis upon which to argue protection.

PRACTICAL TIPS:

- Determine who the client is and who will receive investigation results. For example, if the client is the safety committee for a company, but the investigation report is given to the full board of directors, courts may find a privilege waiver.[43]
- In preparing an internal investigation report, determine whether investigative counsel should present recommendations in a separate written or oral report. If a company provides an investigative report to law enforcement or to regulators, that company should consider withholding recommendation sections as privileged.
- When an investigation implicates a company's own management and external counsel reports to a committee of the board of directors, privilege considerations may require walling off senior management or certain members of senior management from having input on the investigation.
- Both in-house and external counsel should take measures from the outset (including specific guidelines and procedures) to ensure that walled-off managers do not exert inappropriate influence on an investigation.

Litigation Strategy

If and when Alpha is sued over the chemical release, Alpha will need to consult with counsel and make decisions about numerous issues that will arise during the pre-trial stages of the litigation, including whether and how to (a) get the case heard in a more favorable judicial forum, (b) narrow the complaint through a motion to dismiss or motion to strike, (c) stage the litigation through third-party complaints, motions to stay, and other requests relating to case management, (d) oppose class certification if the case is brought as a class action, (e) move for summary judgment and (f) engage in expert discovery. The following discusses some of the considerations that are relevant to Alpha's decision-making.

Achieving the Best Forum

STATE COURT CONSIDERATIONS

Plaintiffs' counsel will file suit in the most favorable jurisdiction possible. A common venue is the defendant's home state, because the federal "forum-defendant rule" prevents defendants from removing cases from state court when the defendant is a citizen of that state. [44]

An effective tool against such forum shopping is a *forum non conveniens* motion, which typically asks a court to dismiss a plaintiff's complaint without prejudice so that plaintiff may file in the proper forum. Most courts consider a number of factors in analyzing such motions, including the plaintiff's choice of forum, the availability of the alternative forum (has the alternate forum's statute of limitations run and, if so, will another state's longer statute of limitations be borrowed?), the location of the accident, the location of evidence, the location of witnesses, the availability

of procedures to compel the testimony of out-of-state witnesses and production of out-of-state documents, choice of law issues, and the competing forums' interest in resolving the dispute.[45] The factors often tilt in favor of the forum in which the accident occurred. If a defendant would rather be in the forum in which the accident occurred (e.g., because removal would be possible or because courts in that forum would likely apply substantive law that is more favorable to the defense), the *forum non conveniens motion* is a helpful tool.

REMOVAL OPTIONS

Plaintiffs' counsel will usually try to keep all cases in state court. If Alpha wants to remove the case to federal court, it may confront two obstacles to removal that often exist in cases like this one: lack of diversity and the forum-defendant rule.

Diversity

In the case of a localized accident, the primary obstacle is usually a lack of diversity, because the defendant and the plaintiff are both citizens of the state in which the accident occurred.[46] That a defendant has a facility in a state, however, does not make it a citizen of that state. If the defendant is not incorporated in the accident state and does not have its "nerve center" (think location of executives) in that state, it is not a citizen there.[47]

There are three paths around lack of diversity, but each is very narrow and often will not apply to incidents like the one in our hypothetical.

First, if plaintiffs file a class action, the case may be removable if there is "minimal" diversity (at least one plaintiff and one defendant are citizens of different states), the class contains at least 100 members, and damages are valued at over $5 million.[48] This exception to the usual requirement of "complete" diversity

(no plaintiff shares citizenship with any defendant) does not apply, however, to class actions in which more than two-thirds of the plaintiffs and at least one primary defendant are citizens of the state in which the action is filed, the principal injuries were incurred in that state, and no other class actions asserting similar factual allegations have been filed against any of the defendants on behalf of the same plaintiffs in the past three years.[49] Most localized accidents will fall under this carve-out to the exception.

Second, if a large number of plaintiffs file a "mass action"—a case in which at least 100 plaintiffs are joined together—minimal diversity plus an amount of controversy over $5 million will support federal jurisdiction.[50] Once again, however, there is a "local" carve-out: "mass action" does not include an action in which all of the claims arose from an event or occurrence in the state in which the action was filed and allegedly resulted in injuries in that state or in contiguous states.[51] Most localized accidents will fall under this carve-out.

Third, in the unfortunate event that a single accident claims the lives of at least 75 people in a discrete location, cases arising from that accident may be removed to federal court if minimal diversity is present and if (1) the defendant has residency in a state other than that in which the accident took place, (2) any two defendants reside in different states, or (3) substantial parts of the accident took place in different states.[52] This jurisdictional route is unavailable, however, where (1) the primary defendants and a substantial majority of plaintiffs are citizens of the same state and (2) the claims asserted will be governed primarily by the laws of that state.[53]

Forum-Defendant Rule

1. There is a path around the forum-defendant rule known as "removal before service." The forum-defendant rule

provides that an action "may not be removed if any of the parties in interest properly joined *and served* as defendants are a citizen of the State in which such action is brought." The upshot of a strict reading of this language is that the forum-defendant rule will not prevent removal if the case is removed *before* the local defendant is served. The courts are currently split over whether and under what circumstances this tactic is permitted.[54]

Narrowing the Complaint

Punitive Damages

In response to the incident in the hypothetical, Plaintiffs will likely seek punitive damages from Alpha if they are available. There are relatively few bases on which to move to dismiss a claim for punitive damages. One potential basis to consider is whether plaintiffs pleaded the requisite mental state for the imposition of punitive damages.

There are few true affirmative defenses to punitive damages, much less ones that can be established on the face of the complaint. One potential basis for dismissing a claim for punitive damages arising out of the hypothetical described above, however, involves the statute of limitations. Although few courts have addressed the topic, there is a compelling conceptual argument that the statute of limitations for punitive damages should run from the date of the conduct for which punishment is sought, not the date of injury or discovery of injury, as would be the case for the underlying claims. The basic idea is that the penal nature of punitive damages makes it appropriate to apply criminal law limitations principles, under which the statute of limitations normally runs from commission of the wrongful act.

The Supreme Court has explained that "compensatory damages and punitive damages . . . serve distinct purposes" and that, while "[t]he former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct, . . . [t]he latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."[55] Because "[punitive] awards serve the same purposes as criminal penalties," [56] there is no reason why statute of limitations accrual principles developed for purposes of ensuring the right to compensation should apply to a claim for punitive damages.

Put another way, while it is one thing to allow victims of ancient conduct to recover fully for injuries they sustain many years after the conduct took place, it is quite another to punish a company for that ancient conduct when the perpetrators may have long since left the company and the burden of the punitive damages will fall on shareholders who cannot in any sense be said to have profited from the misconduct. Allowing plaintiffs to seek punitive damages in these circumstances serves neither of the twin purposes of punitive damages—retribution and deterrence.

Support for this approach may be gleaned from the Supreme Court's decision in *Gabelli v. SEC*.[57] In *Gabelli*, the Court held that the discovery rule, under which the limitations period for fraud is tied to the plaintiff's discovery of the claim, does not apply to suits seeking civil penalties.[58] One of the Court's rationales was that "[t]he discovery rule helps to ensure that the injured receive recompense. But this case involves penalties, which go beyond compensation, are intended to punish, and label defendants as wrongdoers." Because penalties are "intended to punish, and label defendants as wrongdoers," the Court held, "[i]t 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'"[59]

As the Seventh Circuit explained in *United States v. Midwest Generation, LLC,* under *Gabelli*, the time to pursue penalties "begins with the violation, not with a public agency's discovery of the violation."[60] *Midwest Generation* involved a lawsuit by the United States and the State of Illinois against a utility that had failed to obtain necessary construction permits under the Clean Air Act. In holding that the case was untimely, the Seventh Circuit reasoned:

> Plaintiffs' contention that a continuing injury … makes this suit timely is unavailing …. Today's emissions cannot be called unlawful just because of acts that occurred more than five years before the suit began. Once the statute of limitations expired, Commonwealth Edison was entitled to proceed as if it possessed all required construction permits. That's the point of decisions such as *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) and *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which hold that *enduring consequences of acts that precede the statute of limitations are not independently wrongful*.[61]

In short, even when a plaintiff is seeking compensatory damages for injuries that either occurred within the statute of limitations or that only recently manifested, there is a good argument that punitive damages are time-barred insofar as the conduct that caused the injuries occurred outside the statute of limitations. Thus, to the extent that the plaintiffs' claim for punitive damages against Alpha rests on groundwater contamination resulting from releases of TCE that occurred many years earlier when the facility was owned by Delta, Alpha can move to dismiss that claim on the ground that the conduct occurred outside the statute of limitations. The argument could be bolstered with policy and constitutional arguments about the unfairness and

irrationality of punishing a successor company for conduct that occurred in the distant past.

Medical Monitoring

Medical monitoring claims are, in many mass environmental cases, a key financial driver. In states where medical monitoring claims are allowed,[62] plaintiffs often seek to drive up the overall settlement value by aggregating large numbers of plaintiffs who arguably have been exposed to the chemicals at issue, even though they are not currently experiencing medical consequences. Plaintiffs will seek recovery for medical monitoring costs for the rest of their lives to guard against alleged latent injury concerns, particularly cancer where a form of cancer has been linked to the chemicals at issue.

Defendants may seek dismissal of a plaintiff's medical monitoring claims under the laws of some states, which provide that medical monitoring is a compensable item of damages rather than a cause of action. For example, in New Jersey and in California, courts treat medical monitoring as an element of damages, as opposed to a cause of action. The majority of New Jersey cases discussing medical monitoring implicitly treat it as a component of a plaintiff's damages.[63]

Trespass Claims

Trespass claims can often be dismissed, because they require intent under the governing state law.[64] For example, under New Jersey law, trespass requires an intentional rather than negligent intrusion.[65] Plaintiffs often make no allegation that the trespass was caused by any "intentional" actions and/or inactions of defendants. They also often fail to plead factual circumstances that reasonably support the inference that defendants intended to commit the tort at issue.

Fear of Harm Claims

Claims alleging a fear or risk of harm from contamination are also often susceptible to dismissal depending on the applicable state law. These types of claims come in two forms: (1) fear of harm to person, frequently involving allegations of an increased risk of or fear of cancer, and (2) fear of harm to property, usually arising through a claim of nuisance. Depending on the jurisdiction, both types of claims may be vulnerable to dismissal.

Defendants can often seek dismissal of a claim based on an increased risk or fear of harm to plaintiff's person. Many courts require allegations of a manifested medical condition and will dismiss claims alleging mere exposure to contamination, an increased risk of a medical condition, or a fear of developing an illness. For example, the Kentucky Supreme Court affirmed the dismissal of a complaint alleging only "increased risk of serious injury and disease" and, in doing so, held that "a cause of action in tort requires a present physical injury."[66] Similarly, the Supreme Court of Mississippi reversed a trial court's award of damages for emotional distress allegedly caused by a fear of future illness, reasoning that "this Court has never allowed or affirmed a claim of emotional distress based [solely] on a fear of contracting a disease or illness in the future, however reasonable."[67] The law in several other states also requires dismissal of claims where plaintiffs only allege a speculative risk or fear of harm rather than an actual injury.[68] In addition to dismissing these risk or fear of harm claims for lack of any actual injury, some courts also require dismissal based on the view that increased risk of future harm is only a compensable item of damages rather than an injury itself.[69]

While many courts allow defendants to avoid extensive discovery through these fear of harm claims, the law in other jurisdictions is less favorable to defendants. In several jurisdictions,

defendants may have to forgo a motion to dismiss as plaintiffs need only allege that a future harm is "reasonably probable" to occur.[70] Still other courts conclude that even an allegation of mere exposure to harmful chemicals is sufficient physical injury to state a claim.[71]

Defendants may also move to dismiss against claims based on fear of harm to plaintiff's property. Many jurisdictions have rejected nuisance claims based on plaintiffs' subjective fear of contamination. For instance, in *Smith v. ConocoPhillips Pipe Line Co.*,[72] the U.S. Court of Appeals for the Eighth Circuit reversed a Missouri district court's order certifying a class of property owners who sought to recover under a nuisance theory for their fears that nearby contamination might spread onto their property. 801 F.3d 921 (8th Cir. 2015). The Eighth Circuit held that unsubstantiated fears of contamination are insufficient to establish a claim of nuisance under Missouri law.[73] Respectively applying Virginia and Mississippi law, the Fourth and Fifth Circuits similarly require plaintiffs to show that the alleged nuisance is "visible or otherwise capable of physical detection from the plaintiff's property."[74] And, in line with those federal decisions, the Supreme Courts of Michigan, Utah, Kansas, and Ohio all reject nuisance claims based on "unfounded" fear of harm to plaintiff's property.[75]

Not all courts, however, share this view of nuisance claims. In several jurisdictions, fear of contamination provides sufficient basis for a claim of nuisance.[76]

Class Allegations

In addition to individual lawsuits, Alpha is likely to face one or more class actions—that is, an action in which one or more plaintiffs seek to represent individuals or businesses alleged to have similar claims. If the class plaintiffs seek a single unified

remedy, such as remediation of contamination in the river, Alpha may decide that the class action device will assist it in avoiding inconsistent decisions and achieving a global resolution. But, if the plaintiffs seek individualized injunctive relief or money damages, Alpha is likely to conclude that a class action is an inappropriate vehicle for resolving the claims against it, barring an effort at early overall settlement. We discuss potential objections to class certification in Section 5(d) below. Here, we discuss the possibility of narrowing the complaint by moving to strike class allegations.

If a class action is filed, Alpha will have the option of moving to strike the complaint's class allegations, opposing the plaintiffs' motion for class certification, or doing both in turn. Often, a motion to strike is based solely on the pleadings; it thus may be filed before discovery on class certification issues has been completed or has even commenced. In addition to that advantage, a motion to strike allows the defendant to file the opening brief, as well as a reply brief and to educate the court about the deficiencies of the class allegations early in the case. On the downside, an unsuccessful motion to strike will add the expense of an additional and potentially duplicative round of briefing. It also will give plaintiffs an early look at some of the arguments against class certification, potentially giving them a roadmap for discovery and for their motion to certify.

One challenge to class certification that is often amenable to resolution on a motion to strike is the argument that the class is not ascertainable. The requirement that a proposed class be "currently and readily ascertainable based on objective criteria" is "an essential prerequisite of a class action... under Rule 23(b)(3)."[77] The ascertainability requirement is found in Rule 23(c), which provides that "[a]n order that certifies a class action must define the class," and instructs the court to "direct to class members the best notice that is practicable under the

circumstances."[78] For a district court to satisfy these responsibilities, a plaintiff's class "definition must be precise, objective, and presently ascertainable."[79]

Currently, the federal courts of appeals disagree about what it means for a class to be ascertainable. The Third Circuit has defined a "heightened" ascertainability requirement under Rule 23.[80] For example, in Carrera v. Bayer Corp., the Third Circuit vacated certification of a class action involving all the purchasers of a dietary supplement in the State of Florida. According to the court, the ascertainability requirement was not satisfied, because there was no reliable or administratively feasible method to identify class members who had not purchased the product directly from defendant.[81] "If this were an individual claim," the court explained, "a plaintiff would have to prove at trial [that] he purchased" the product. The court held that the due process clause requires the same proof of putative class members: "[a] defendant has a . . . due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."[82]

While the Third Circuit cases are very favorable to defendants who seek dismissal of class claims where plaintiffs require an extensive factual inquiry to prove class membership, the Seventh Circuit has expressly disagreed with the Third Circuit in *Mullins v. Direct Dig., LLC*.[83] In Mullins, the Seventh Circuit affirmed the district court's decision granting class certification and rejected what it described as the "heightened" ascertainability requirement imposed by the Third Circuit and other courts on plaintiffs seeking certification under Rule 23(b)(3). Until the Supreme court resolves this circuit split, it would be a good idea for Alpha to raise and preserve the argument that a putative class action fails the ascertainability requirement.

General Limitations Arguments

A plaintiff's tort claim may also be barred entirely by the governing statute of limitations. For example, Kentucky has a five-year statute of limitations for "[a]n action for trespass on real or personal property." [84] Kentucky courts have interpreted this statute broadly to cover all claims for injury to real property, including permanent nuisance.[85] Under Kentucky law, a permanent nuisance claim accrues "once and for all" at the time the "operation" alleged to have caused the nuisance "commenced or … the date of the first injury, or … the date it became apparent there would be injuries resulting from the structure or its operation."[86] Thus, it is critical to examine when a plaintiff alleges that nuisance first began, and then compare that date against the state's governing law for the limitations period on permanent nuisance. XXX

PRACTICAL TIPS:

- Consult with counsel regarding removal options.
- Consult with counsel regarding ways to narrow a complaint via a motion to dismiss (depending on the jurisdiction, claims for punitive damages, medical monitoring, trespass, and fear of harm may be susceptible to a motion to dismiss).
- Consult with counsel regarding whether class resolution is advantageous. If not, consider a motion to strike class allegations.
- Consult with counsel regarding applicable statutes of limitations.

Staging the Litigation

THIRD-PARTY PRACTICE

Claims Against Contributors to Groundwater Contamination

To the extent plaintiffs claim injuries are due to exposure to groundwater contamination, Alpha should consider whether it has a basis for contribution claims against Beta and Theta based on their historic use of TCE and their location in an industrial park known to be a source of the groundwater plume.[87] Alpha should look not only to state law on contribution, but also to federal laws, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as the basis for potential claims. If plaintiffs have not named Beta and Theta as defendants, Alpha can bring them into the litigation by way of third-party complaint. If Beta and Theta are already in the litigation, Alpha can file cross-claims against them.[88]

Should the federal or state government file a CERCLA action against another party, Alpha should be aware that any settlement of that action potentially could extinguish Alpha's contribution claims against that party.

Claims Against Prior Owner

Because there is evidence of preexisting groundwater TCE contamination dating back to the time when Delta Corporation owned the facility, Alpha should consider whether it has a basis for a claim against Delta Corporation. Alpha should evaluate potential claims under both state law and federal law (e.g., CERCLA).[89] Alpha also should review and analyze the relevant transaction documents governing the acquisition from Delta to identify any applicable provisions. The transaction documents might reveal that Alpha has a contractual right to indemnification, for example.

Public Entities

Public entities involved in the emergency response and regulation of chemical use may have information useful to Alpha in preparing its defenses. Such information may include documentation relating to the emergency response, the historic use of TCE by other entities in the vicinity, and investigations of the groundwater plume. Alpha should consider requesting copies of such documentation through the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and its state law counterparts.

Alpha should evaluate whether it has a claim against the fire department responsible for the emergency response actions. The fire chief failed to heed Alpha's recommendations regarding evacuation and the use of personal protective equipment, arguably contributing to the alleged injuries and damages. The contours of governmental immunity will need to be considered. For example, CERCLA generally provides that no state or local government shall be liable under CERCLA for costs or damages as a result of actions taken in response to an emergency created by the release or threat of release of a hazardous substance, except in the case of gross negligence or intentional misconduct[90].

Alpha will also want to consider the practical implications of bringing a claim against the fire department. Jury response and public opinion might be critical or even hostile, defeating the potential upsides.

Using the "Empty Chair"

Where the law underlying the substantive claims does not provide for joint and several liability, pointing to an "empty chair" might help reduce Alpha's share of liability, if any. If not all potentially liable parties are at trial, Alpha should consider

whether to identify them to the jury as "empty chairs" that are liable for the alleged injuries rather than Alpha. Potentially liable parties might not be present during the trial for a number of reasons. They may have been dismissed for procedural reasons, they may have immunity, they may have settled, or they may be outside of the court's jurisdiction. For example, if Beta, Theta, Delta, or the fire department are not defendants at trial, Alpha can attempt to place any blame at their door. Even if the jurors do not attribute all blame to the empty chairs, using this tactic increases the likelihood that, should Alpha be found liable, the jurors will attribute some liability to others, thereby reducing Alpha's share.

Different jurisdictions have different rules on whether and to what extent a defendant is permitted to inform the jury of other potentially liable parties that are not at trial. For example, under the law of some jurisdictions, a defendant cannot notify the jury that the plaintiff has already entered into a settlement or cannot specify the amount of any settlement.[91] Whether an absent defendant may be included on the verdict form and assigned a share of liability also varies by jurisdiction.[92] Alpha should evaluate the laws of the relevant jurisdiction to determine the rules that will apply to the claims it will be defending.

STAY PENDING AGENCY INVESTIGATIONS

If there are agency investigations or proceedings against Alpha, Alpha should consider filing a motion for a stay of proceedings pending the agency investigation.

Under the doctrine of primary jurisdiction, the court should stay proceedings that are properly within the jurisdiction of, and are, in fact, under consideration by, an agency with extensive regulatory powers over subject matter and parties involved. Where a regulatory agency possesses authority over a particular

subject matter, and where consideration of the same subject matter is sought before that agency and the courts, the possibility of a judicial-administrative conflict should be avoided. Where an agency is charged with responsibility for regulating a complex industry, that agency is much better equipped than the courts, "by specialization, by insight gained through experience, and by more flexible procedure," to gather the relevant facts that underlie a particular claim involving that industry.[93]

To determine whether it is appropriate to apply the doctrine of primary jurisdiction, courts evaluate factors that include (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.[94]

Note that plaintiffs' counsel often support a stay as they typically prefer to save costs by following the road map of an agency investigation.

STAY PENDING CLASS CERTIFICATION RESOLUTION

If the plaintiffs file a putative class action, Alpha should consider filing a motion for a stay of proceedings (including a stay of any merits discovery) pending resolution of class certification issues.

According to the Manual for Complex Litigation, "[d]iscovery relevant only to the merits delays the certification decision and may ultimately be unnecessary." [95] Many courts agree that discovery on class certification issues should be bifurcated from discovery on merits issues, staying merits discovery pending resolution of the class certification issue. Courts recognize that the class certification decision is likely to have far-reaching effects on the nature and scope of merits discovery.[96]

In support of its motion for stay of all other proceedings pending the resolution of class certification, Alpha can explain how the alleged damages for all potential plaintiffs, including the plaintiffs in individual cases, would be proven in a class action (including any associated expert analysis). Similarly, Alpha can argue that the proof of injury will be very different if approached on a class-wide, rather than on an individualized, basis. The goal would be to demonstrate that the costs of conducting class-wide merits discovery would be enormous, and that these costs would all be rendered unnecessary if class certification were denied.

Typically, mass environmental tort litigation involves a mix of putative class claims and consolidated individual claims. Defense counsel sometimes succeed in deferring discovery and action on the individual claims pending resolution of the class actions, on the theory that resolution of the class cases (e.g., through settlement) would effectively resolve many of the individual cases as well. If Alpha faces a mix of putative class claims and individual clams, Alpha should also move to defer discovery and action on the individual claims pending resolution of the class actions.

LONE PINE

Alpha should consider whether seeking a Lone Pine order[97] is an available and strategic option. Lone Pine orders are case management tools that have long been used in complex environmental tort cases to require plaintiffs to define their alleged injuries and to make an early *prima facie* showing of exposure and causation before full discovery proceeds. Defendants often seek *Lone Pine* orders to balance discovery burdens: requiring the plaintiffs (typically a large number of individuals claiming personal injuries and property damage) to provide some reasonable proof of potential liability before requiring the defendants (typically corporations) to engage in

extensive and expensive discovery, often involving a review of many thousands of corporate records, among other required responses. A *Lone Pine* order can be used to dismiss plaintiffs who fail to comply, to evaluate remaining claims, to assess plaintiffs' experts and their methodologies, to identify claims for bellwether trials (see below), and to derive potential settlement values.

Though *Lone Pine* orders are established practice in federal courts and in many states,[98] some recent state court decisions have criticized or rejected the use of *Lone Pine* orders or similar early case management tools for streamlining litigation. In *Antero Res. Corp. et al. v. Strudley*,[99] for example, the Colorado Supreme Court affirmed an appellate court decision holding that "*Lone Pine* orders" are not permitted by Colorado law. While *Strudley's* precedential effect is limited to Colorado law, it joins other recent decisions that take a narrow view of what case management tools are appropriate in environmental exposure and tort cases, notwithstanding that such cases often present unique challenges that could benefit from creative case management to avoid unnecessary expense and time.[100]

EXEMPLAR CASES

In many mass environmental tort cases, hundreds or even thousands of plaintiffs raise substantially similar claims against the same defendant. The sheer number of these claims can overwhelm traditional discovery tools and make trials of each plaintiff's claims impractical. Given these realities, courts frequently order and/or parties request "bellwether" discovery and trials to streamline proceedings.[101]

In bellwether proceedings, a subset of plaintiffs is selected for complete discovery, pretrial proceedings, and, if necessary, trials. Fact discovery on this subset can help the parties understand the

case and predict outcomes. Expert discovery, summary judgment proceedings, and *Daubert* challenges allow the judge to issue rulings that can effectively establish the law of the case (even if those rulings are not technically binding on other plaintiffs) and help the parties to refine their legal theories. And, if any case reaches trial, the parties will see how a jury values individual claims. The hope is that bellwether proceedings will allow the parties to price the remaining claims and move the parties toward settlement. For this process to be effective, the subset of plaintiffs selected for bellwether proceedings should be representative of all plaintiffs.[102] Depending on the facts of the case, plaintiffs can be grouped into different subsets (e.g., those directly exposed and those who were not, those who immediately saw doctors and those who did not, those who were evacuated and those who were not). The more representative the bellwether plaintiffs are, the more instructive bellwether outcomes will be.

Plaintiffs' lawyers typically prefer bellwether proceedings, because they streamline proceedings and enable settlements at relatively low costs. From the defendant's perspective, bellwether proceedings can be helpful for the very same reasons, but come with risks. Among those risks, non-bellwether plaintiffs might try to use adverse bellwether rulings as collateral estoppel against the defendant, while the defendant lacks the ability to use helpful bellwether rulings as collateral estoppel against non-bellwether plaintiffs; plaintiffs and courts might try to "extrapolate" the results of bellwether trials across all plaintiffs, though extrapolation would likely be unfair and violate defendant's rights; the defendant might lack sufficient information to determine whether the bellwether plaintiffs are fairly representative of all plaintiffs; and plaintiffs might respond to adverse rulings by improving their legal theories or by further developing their expert evidence, moving the target for future

cases. Properly managed bellwether proceedings can be an important method of organizing the litigation and bringing the parties closer together to help settle many claims, but it is critical that defendants consider how the bellwether process might unfold before agreeing to it.

Attacking Class Certification

As noted above, Alpha is likely to be sued by one or more plaintiffs seeking to represent a class of similarly situated individuals or businesses, who may seek damages or injunctive relief. In federal court, plaintiffs seeking class certification must satisfy the three threshold requirements of Rule 23(a) of the Federal Rules of Civil Procedure and one of the three subsections of Rule 23(b). Alpha likely will be able to raise objections to class certification under several of these provisions.

RULE 23(A) REQUIREMENTS

Numerosity. A class action may not be maintained unless the class members are "so numerous that joinder of all members is impracticable."[103] Here, the number of individuals and businesses with claims against Alpha may be limited, and many potential class members may elect to file individual actions or to settle. Thus, the class plaintiffs may be unable to establish that there are enough absent class members to warrant certification of a class action.[104]

Commonality. Plaintiffs also will be obliged to show that "there are questions of law or fact common to the class."[105] In *Wal-Mart Stores v. Dukes*, the Supreme Court held that, to satisfy this requirement, class members' claims "must depend upon a common contention . . . that is capable of classwide resolution"—meaning that "determination of its truth or falsity

will resolve an issue that is central to the validity of each one of the claims in one stroke." [106] When "[d]issimilarities within the proposed class . . . have the potential to impede the generation of common answers," class certification is improper.[107]

For example, if a class action is filed on behalf of property owners alleging damages resulting from contamination, Alpha may be able to defeat class certification by demonstrating that the properties were affected differently by the release and that there are, therefore, no common questions as to causation, injury, or damages.[108]

Typicality. The plaintiffs also must show "claims or defenses of the representative parties are typical of the claims or defenses of the class."[109] "The premise of the typicality requirement is simply stated: as goes the claim[] of the named plaintiff, so go the claims of the class."[110]

Alpha may oppose class certification based on lack of typicality by demonstrating that the named plaintiffs' claims do not sufficiently mirror the claims of absent class members. For example, the claims of a homeowner adjacent to the plant may not be typical of the claims of property owners farther away; similarly, the claims of a first responder who wore protective equipment may not be typical of the claims of first responders who did not.

Adequacy. Finally, the plaintiffs must show that the "representative parties will fairly and adequately protect the interests of the class."[111] This requirement "serves to uncover conflicts of interests between named parties and the class they seek to represent."[112]

In cases arising from hazardous releases like the one in the hypothetical, such conflicts may arise, for instance, between anyone "currently injured," for whom "the critical goal is

generous immediate payments," and "exposure-only" class members, whose goal is "ensuring an ample, inflation-protected fund for the future."[113]

RULE 23(B) REQUIREMENTS

In addition to satisfying the requirements of Rule 23(a), plaintiffs also must establish that class certification is appropriate under one of the subsections of Rule 23(b). Generally, plaintiffs seeking injunctive relief will seek certification under Rule 23(b)(2), and those seeking damages will seek certification under Rule 23(b)(3).

Certification Under Rule 23(b)(2)—Unitary Relief. A class may be certified under Rule 23(b)(2) where the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Rule 23(b)(2) "applies only when a single injunction or declaratory judgment would provide relief to each member of the class."[114] "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[115]

A suit seeking a single injunctive remedy—for example, seeking cleanup of the river—might be eligible for certification under Rule 23(b)(2). An action seeking remediation of various downstream properties, however, may not qualify for certification under this provision.

Certification under Rule 23(b)(3)—The Predominance Requirement. A class action may be certified under Rule 23(b)(3) only if "questions of law or fact common to class members predominate over any questions affecting only individual members." As the Supreme Court has explained, the predominance inquiry tests whether the proposed class is

"sufficiently cohesive to warrant adjudication by representation."[116] "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."[117] Generally speaking, then, the need for individual inquiries into causation are incompatible with Rule 23(b)(3)'s predominance requirement.[118] Similarly, the Supreme Court has recently held that class certification is inappropriate if "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."[119]

Thus, for example, if a class action is filed seeking damages for personal injuries arising from the explosion, individual issues surrounding exposure, dose, health effects, and damages likely will dominate at the trial, defeating any effort to demonstrate predominance.[120] Similarly, if property owners sue for damages, evidence that there is a potential difference in contamination on the properties may persuade the court that common issues do not predominate.[121]

Certification under Rule 23(b)(3)—The Superiority Requirement. In addition to demonstrating that common issues predominate over individual ones, plaintiffs seeking Rule 23(b)(3) certification also must show "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In making this determination, the court must consider, among other things, (1) "the class members' interests in individually controlling the prosecution or defense of separate actions," (2) "the extent and nature of any litigation concerning the controversy already begun by or against class members," and (3) "the likely difficulties in managing a class action."[122]

Alpha may be able to demonstrate that a class action is not a superior method of adjudicating the controversy, particularly if it faces multiple individual actions raising similar claims that have been consolidated before one judge.[123]

MOVING FOR SUMMARY JUDGMENT

Alpha should also consider whether there are any issues raised in the litigation with respect to which it could win summary judgment.

Punitive Damages

Whether Alpha has grounds for summary judgment as to plaintiffs' entitlement to punitive damages may turn in large part on the applicable law. Assuming that the applicable law requires the plaintiff to prove that the defendant acted willfully, wantonly, or recklessly—as the law of many states does—Alpha should maintain in its summary judgment motion that there is no evidence from which a jury could find that Alpha acted with that requisite mental state.[124] Alpha may be able to strengthen its argument if there is undisputed evidence that its conduct complied with all applicable state and federal regulations and/or that it employed state-of-the-art technologies. Some courts and commentators have explained that compliance with governmental regulations and/or industry standards may negate the state of mind necessary for imposition of punitive damages.[125]

Knocking Out Corporate Parents or Affiliates

Plaintiffs will sometimes assert claims against not only the company that actually owned or operated the facility (in this case, Alpha), but also its parent or other affiliated companies. While defendants frequently move to dismiss such claims, courts often allow claims against parents or affiliates to move forward based on minimal and sometimes conclusory allegations. To survive summary judgment, however, plaintiffs must come forward with evidence that would support holding a parent or affiliate liable. These claims are often ripe for summary

judgment, especially if plaintiffs did not sufficiently focus on parent-company liability in discovery.

It is hornbook law that corporations are separate legal entities and that a parent company is not generally liable for the acts of its subsidiaries. To hold a parent company liable, plaintiffs must establish some basis for either derivative or direct liability.

A parent company can be derivatively liable for its subsidiary's actions under traditional veil piercing principles. Courts have recognized derivative liability for both common law and statutory (e.g., CERCLA) claims.[126] The precise standard for piercing the corporate veil will vary by jurisdiction. For example, in New York, a parent company may be liable if it "dominates the subsidiary in such a way as to make it a 'mere instrumentality' of the parent."[127] New York uses a multifactor test to analyze the degree of domination, including, (1) the absence of corporate formalities (i.e., issuing stock, electing directors, keeping corporate records), (2) inadequate capitalization, (3) whether funds are moved in and out for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address, and telephone numbers, (6) amount of business discretion displayed by the subsidiary, (7) whether related companies deal with the subsidiary at arm's-length, (8) whether the corporations are treated as independent profit centers, (9) payments or guarantees of debt of the subsidiary, and (10) whether the corporation in question had property that was used by other corporations as if it were its own.[128] While the issue is often fact-intensive, plaintiffs ultimately must show more than the typical exercise of control that comes with stock ownership.[129]

A parent company can also be directly liable for its own actions. Pursuant to Supreme Court precedent on CERCLA, for example, a parent company has "direct liability for its own actions in

operating a facility owned by its subsidiary."[130] To be liable for operating a subsidiary's facility, a parent "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with government regulations."[131] Direct liability requires that the parent company exercise "control over the operation of the subsidiary's *facility*," not merely "oversight of a subsidiary."[132] Thus, plaintiffs can only survive summary judgment with evidence that the parent company actually played some active role in environmental decisions at the facility (which should be kept in mind when managing responses to environmental incidents like that experienced by Alpha).

PRACTICAL TIPS:

Consult with counsel regarding whether it is possible and strategic to:

- involve additional third-party defendants to break up damages claims;
- seek a stay pending a relevant agency investigation;
- seek to stay individual cases pending class resolution;
- seek a *Lone Pine* order requiring plaintiffs to make a prima facie showing of exposure and causation before proceeding to full-scale discovery;
- agree to bellwether trials to better predict trial outcomes and settlement values;
- oppose class certification in an effort to reduce settlement values and increase plaintiffs' counsels' costs; and
- narrow claims with a summary judgment motion.

Presenting Experts

DAUBERT ATTACKS

Both Alpha and plaintiffs will likely enlist a suite of experts to support their respective positions in litigation. Under Federal Rule of Evidence 702, before admitting expert testimony, a trial court must determine that the expert is qualified in the relevant field, that the testimony is relevant, and that the expert's methodology is reliable.[133] When determining whether a method is reliable, courts may consider: whether the method has been tested; whether it has been subject to peer review; whether there exist standards to control the method's operation, along with the known rate of error; and whether the method is generally accepted as reliable in the relevant field.[134]

In toxic tort litigation, like the lawsuit against Alpha, motions to exclude expert testimony can put an end to a case before the costs and risks of litigation create settlement leverage for even frivolous claims. To prove a claim against Alpha, plaintiffs likely will need experts to establish negligence (that Alpha violated a standard of conduct in a way that either led to the release or made matters worse following the release), exposure (that TCE from the release reached each of the plaintiffs), general causation (that exposure to TCE can cause each of the symptoms identified by the plaintiffs), and specific causation (that exposure to TCE from the release actually caused each plaintiff's claimed injury).[135] If Alpha can exclude expert testimony on any of those elements—by showing that the expert is unqualified to give an opinion, used an unreliable methodology to reach an opinion, or based an opinion on unreliable data—it may be able to obtain an early summary judgment with respect to certain categories of claims or, potentially, the entire case.

Because expert testimony is central to a toxic exposure case, Alpha should carefully review the expert reports and other information provided by the plaintiffs' experts in consultation with its own experts before conducting depositions or further discovery so that it can target potential weaknesses. Alpha should then challenge any experts or areas of testimony it believes are inappropriate, requesting a *Daubert* hearing at which it should consider presenting its own affirmative testimony on the flaws in the opinions offered by plaintiffs' experts. Although the specific grounds for objection to an expert opinion under *Daubert* are too varied to anticipate, for each opinion offered by plaintiffs' experts, Alpha's counsel should ask itself: is the opinion the proper subject of expert testimony?; is this expert qualified to give that type of opinion?; did the expert use reliable methods to gather data relevant to the opinion?; did the expert apply accepted and reliable methodologies to the data when forming the opinion?; and did the expert apply those methodologies in an accepted and reliable way? Alpha should keep the following general factors in mind:

a. Experts are qualified to give opinions only in their fields of expertise. Thus, an expert qualified to opine on the cause of the release may not be qualified to opine on the dispersal pattern of TCE following the release. Alpha should ensure that experts do not overstep the bounds of their demonstrated expertise.

b. Experts should opine only on matters that require expertise. Alpha should resist any effort by plaintiffs to have their experts serve as storytellers, weaving together a narrative of the release and subsequent events that includes background facts that are not necessary to their expert opinions or testimony on issues for which their expertise is not required. Precisely because "an expert is permitted wide latitude to offer opinions, including those

that are not based on firsthand knowledge or observation,"[136] the scope and subject matter of an expert's testimony must be carefully cabined. In particular, opinions supported by appeals to "common sense," "reason," or "logic" likely are either improper ipse dixit opinions or cover matters that do not require expert testimony and are properly left to the jury.

c. Theories of general causation are subject to heightened scrutiny if they are not generally accepted in the relevant field. Even though Daubert held that general acceptance no longer is a prerequisite to admissibility, the question whether a theory is widely accepted or novel remains critically important. If the plaintiffs' expert relies on theories of general causation that are not widely accepted in the relevant field, Alpha should push for an extensive, full-scale analysis of whether those theories are sufficiently reliable.[137]

d. Defendants in toxic exposure cases always should keep in mind that opinions on general causation must be analyzed at a low level of generality, specific to the actual agent that allegedly reached the plaintiff. Although this is not necessarily relevant to a case involving the release of a simple chemical (such as that against Alpha), it is important if the release involves a more complex compound, or if the released chemical was potentially altered through interaction with the environment.[138]

e. Experts on causation usually must establish a dose-response relationship. Because "all substances potentially can be toxic, … 'the relationship between dose and effect … is the hallmark of basic toxicology' and 'is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect.'"[139] The primary method for establishing a dose-response

relationship is an epidemiological study. But an expert presenting a novel theory of causation may try to conceal the lack of objective epidemiological evidence confirming their theory by offering up large volumes of collateral evidence that is not viewed as confirming evidence within the relevant field, provides support for only part of the theory, or addresses only tangentially related issues. Alpha should vigorously challenge any theory of causation that lacks a foundation in objective epidemiological studies, even if the plaintiffs' expert submits a deluge of case reports, animal studies, or literature speculating about a possible causal connection.

f. In a release case, experts on specific causation generally must establish each plaintiff's actual exposure level in order to show that the dose was sufficient to cause the alleged injuries. While there is a body of law holding that plaintiffs do not have to prove a quantitative exposure level, but can rely on qualitative estimates and comparisons, those cases can be distinguished, because they generally involve historical exposures for which it is now impossible to perform a quantitative assessment. When there is a contemporary release, such as in the case against Alpha, plaintiffs' experts should have no valid excuse for failing to employ recognized methods to measure each plaintiff's actual exposure to TCE from the release. Specifically, they should not be allowed to engage in circular reasoning that, because a plaintiff alleged symptoms consistent with TCE exposure, he must have been exposed to sufficient TCE from the release to cause the symptoms.[140]

g. The use of a "differential etiology" to establish specific causation raises rather than resolves questions under Daubert. Experts who are unable to establish a dose-response relationship through recognized testing methods

often claim to have based their specific causation opinion on a "differential diagnosis" or, more accurately, a "differential etiology." A valid differential etiology requires the expert to "compile a comprehensive list of hypotheses that might explain a plaintiff's condition" and then "provide reasons for rejecting alternative hypotheses using scientific methods and procedures and the elimination of those hypotheses must be founded on more than subjective beliefs or unsupported speculation."[141] Although differential etiology is a scientifically accepted methodology, invoking it does not end the Daubert analysis. As numerous courts have recognized, "[s]imply claiming that an expert used the 'differential diagnosis' method is not some incantation that opens the Daubert gate."[142] Instead, the use of a differential etiology shifts the focus of the Daubert inquiry to the data that the expert relied on and the methods that the expert used when ruling in and ruling out potential causes. Thus, if the plaintiffs' experts claim that their specific causation opinions are based on a differential etiology, Alpha should carefully scrutinize the data they claim to have relied on and the methodologies they used when identifying potential causes and ruling out potential causes other than exposure to TCE from the release. If the data or methods do not pass muster under Daubert, then neither does the opinion based on the expert's differential etiology.

h. Finally, Alpha must develop a full record supporting each challenge to the qualifications of an opposing expert, the methodologies employed by an opposing expert, or the general theories advanced by opposing experts. Specifically, Alpha should request pre-trial Daubert hearings that will address each aspect of the challenged testimony and should ask the trial court to enter explicit findings on

admissibility. Further, Alpha should object to any ruling by the trial court that would effectively punt the question of admissibility to the jury.[143] Indeed, while other circuits may decide the issue differently, the Ninth Circuit has held that, if the trial court fails to perform its gatekeeping role and the challenged expert testimony is prejudicial to the party seeking exclusion, the proper remedy on appeal is a new trial rather than a post-hoc Daubert hearing to determine whether the evidence was admissible.[144] That places significant pressure on parties and trial courts to develop a robust record on any challenged aspect of expert testimony. On the other hand, if the record developed below is sufficient, an appellate court may make its own Daubert findings, and, if it determines that expert testimony should have been excluded at trial and was indispensable to the other side's case, it may order entry of judgment for the party seeking exclusion of the testimony.

EXPERT DISCOVERY

Before any disclosure occurs, Alpha and its attorneys should carefully review the information and documents that they plan to share with their expert witnesses to ensure that the communications will not result in the waiver of any privileges or protection for otherwise undiscoverable or privileged information or documents. Alpha also may consider entering into a stipulation regarding expert discovery to protect against this possibility.

Prior to 2010, many courts broadly read the applicable federal rules as authorizing discovery of all communications between counsel and expert witnesses and of all draft expert reports. In 2010, Federal Rule of Civil Procedure 26 was amended to provide some protection against discovery of expert drafts and certain attorney-expert communications. At the time, the Civil Rules

Advisory Committee explained that routine discovery into attorney-expert communications and draft reports had created undesirable effects, including increasing costs and inhibiting robust communications between attorneys and expert trial witnesses, jeopardizing the quality of expert opinions.[145]

The revised version of Rule 26 now protects from discovery "drafts of any report or disclosure" by an expert.[146] In addition, expert reports are now required to disclose the "facts or data" considered by the expert rather than the "data or other information," as in the prior rule.[147] The Advisory Committee explained that this change was prompted by court decisions that had found the "other information" language to authorize discovery of all attorney-expert communications.[148]

The revised rule also generally provides work-product protection for communications between expert witnesses and attorneys with the exception of (1) communications relating to expert compensation, (2) the facts or data received from the attorney that the expert considered in forming the opinion, and (3) any assumptions the attorney provided to the expert that the expert used in forming the opinion.[149] Accordingly, "facts or data" and "assumptions" that are disclosed to an expert often are discoverable, while other communications may be more protected from discovery. The Advisory Committee's notes further explain that "facts or data" should be interpreted broadly to encompass any factual material considered by the expert in forming an opinion, not simply what the expert relied upon in forming the opinion.[150]

Despite the changes to Rule 26, several courts have narrowly interpreted the new protections for attorney-expert communications. The first major cases to test the new rule involved an ongoing dispute between Chevron and the Country of Ecuador. In each case, Ecuador sought information prepared

by or for Chevron's experts. Chevron argued that the materials were "trial preparation" materials prepared by a party's representative and, thus, protected from disclosure under Rule 26(b)(3). The Ninth, Tenth, and Eleventh Circuits all rejected this argument, finding that experts were not included in the list of representatives in Rule 26(b)(3), and, thus, expert materials were not included in the scope of that section.[151]

Chevron also argued that the materials were protected from discovery as expert materials under Rule 26(b)(4). The courts declined to adopt Chevron's argument, finding that the new version of Rule 26 was designed "to protect opinion work product—i.e., attorney mental impressions, conclusions, opinions, or legal theories—from discovery."[152] Accordingly, the courts found that materials exchanged between an attorney and an expert are discoverable to the extent they contain factual materials and data, but generally are protected to the extent they reflect an attorney's mental impressions and opinions.

Thus, Alpha should keep in mind that materials prepared by its experts or shared with its experts may be subject to discovery to the extent they contain factual material and data. To prevent this possibility, Alpha may attempt to work out a stipulation with plaintiffs' counsel in which both sides agree that expert discovery will be limited by agreement. A typical stipulation may provide that the following categories of information and documents are outside the scope of discovery:

> (a) Draft reports, draft studies, draft affidavits, or draft work papers, preliminary or intermediate calculations, computations, or data; or other preliminary, intermediate, or draft materials prepared by, for, or at the direction of an expert unless the expert relies on the aforementioned as the basis for his or her opinion;

> (b) Any notes or other writings taken or prepared by or for an expert, including, but not limited to, correspondence or memos to or from, and notes of conversations with, the expert's assistants and/or clerical or support staff, other expert witnesses, non-testifying expert consultants, or attorneys for the party offering the testimony of such expert, unless the expert relies on the aforementioned as the basis for his or her opinion;
>
> (c) Materials or information that may have been reviewed or considered but not relied upon by the expert; and
>
> (d) Written or oral communications between the expert and any party or counsel or other agent for the party on whose behalf the expert was engaged, except to the limited extent that an expert expressly relies on a communication of a matter of fact from such counsel, agent, or party in the expert's report.

Such stipulations are common in large and complex litigation, and a stipulation can streamline expert discovery and avoid wasting the parties' time and resources fighting about the scope of expert discovery. However, although a stipulation may be effective between the parties in a particular litigation, there is no guarantee that it will protect the information and documents shared with an expert from discovery sought by third parties in another setting. Accordingly, Alpha and its attorneys should carefully review the materials that are shared with the company's experts and understand the risks of potential discovery in the current litigation and future actions.

EXPERT PREPARATION

To prepare its experts, Alpha and its attorneys must understand the applicable procedure for presenting expert testimony. For example, in federal court, an expert may be deposed only after the expert has been identified and, if required to do so, has provided an expert report.[153] Absent a stipulation from the court, affirmative expert reports are due 90 days before trial, and rebuttal reports are due 30 days thereafter.[154] If the case is in state court, however, the procedure may vary depending on the jurisdiction. For example, in California, expert reports are not mandatory, and experts may be deposed from the time they are identified up until 15 days before trial.[155]

Preparing the expert to give testimony at a deposition is crucial, as this is the first time the expert will provide recorded testimony in the case. In preparing an expert for deposition, the attorney should understand the nuances of the expert's substantive opinion to ensure that the expert can explain that opinion clearly, succinctly, and accurately without committing errors.

The expert should already understand the area of expertise and the substance of the expert opinion. Thus, the attorneys should focus on explaining the procedures of the deposition to the expert and ensuring that the expert is comfortable giving testimony. The attorney should walk the expert through the deposition process, including where the expert will sit, who will be asking questions, the court reporter's role, and whether the deposition will be videotaped. The attorney should also explain the objection process and applicable privileges. The attorneys should consider practicing the deposition by having a colleague pretend to be the opposing counsel and questioning the expert as in a real deposition. This process may offer a preview of how the expert will react to a potentially aggressive questioner.

Prior to the deposition, the attorneys also should sit down with the expert and walk through all of the expert's reports. The expert will likely be questioned extensively regarding the content of the reports and the bases for the expert's findings and conclusions. The opposing counsel likely will hope to show that the expert's testimony undermines or contradicts the substance of the report, so the expert should fully understand the content of the report before providing testimony.

Following the 2010 amendments, Rule 26(a)(2)(B) now requires the following in an expert report:

i. a complete statement of all opinions the witness will express and the basis and reasons for them;

ii. the facts or data considered by the witness in forming them;

iii. any exhibits that will be used to summarize or support them;

iv. the witness' qualifications, including a list of all publications authored in the previous 10 years;

v. a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

vi. a statement of the compensation to be paid for the study and testimony in the case.

Finally, after the expert has provided deposition testimony, the expert will need to prepare to testify at trial. As with the deposition, the attorneys should ensure that the expert is familiar with the process of providing trial testimony. The attorneys should also have the expert review the expert reports and a transcript of the expert's deposition testimony. The expert's trial testimony should be consistent with both the reports and the

prior testimony. Again, it is helpful to have a "mock" cross-examination to prepare the expert witness for aggressive questioning at trial. The best advice for an expert, as with any witness, whether in a deposition or trial setting, is to tell the truth and remain calm and professional.

SHARING EXPERTS

Alpha may be interested in sharing experts on certain topics with other defendants in the case. Sharing experts can reduce trial costs and simplify the case by eliminating duplicative discovery and overlapping testimony. However, determining when and how to share experts is a complicated topic. The most important consideration is to ensure that the parties' interests in a particular topic are aligned before they agree to share an expert as to that topic.

For instance, Alpha may consider whether it makes sense to share experts with other potential defendants, including Beta and Theta, with respect to certain topics. Alpha, Beta, and Theta may decide to share the costs of retaining a toxicologist to testify with respect to whether any of the plaintiffs were actually injured by TCE or other chemicals that were used by all three companies. All three of these defendants may have the same interests with respect to this topic, namely, showing that any injuries to the plaintiffs did not result from exposure to TCE but from another cause that cannot be attributed to any of the defendants.

On the other hand, Alpha likely would not want to share an expert on topics in which its interests diverge from those of Beta and Theta. For example, Alpha may wish to retain an expert to show that Beta and Theta, rather than Alpha, are responsible for the groundwater TCE plume. Beta and Theta obviously would

have a divergent interest in arguing that Alpha is responsible for the presence of any TCE.

Thus, it is crucial that a company understand its own interests and the interests of other parties in the litigation before it agrees to share experts. In addition, the company should ensure that any testimony by a shared expert will not contradict or undermine testimony provided by any of the company's other witnesses, whether experts or fact witnesses. Thus, any sharing of experts should only be undertaken as part of a comprehensive litigation plan that considers the impact of each expert's testimony on the entire case.

If the parties do decide to share an expert on a particular topic, the parties should enter into a formal, written common interest agreement that sets out the exact terms of the expert's engagement and provides for the sharing of privileged and work-product documents and information. In addition, the expert's engagement letter should clearly explain the specific topics on which the expert will be testifying.

PRACTICAL TIPS:

- Before retaining an expert, review and evaluate all of the expert's relevant public statements and prior testimony.
- Prepare for offensive and defensive *Daubert* challenges.
- Evaluate applicable privilege rules before disclosing materials to experts.
- Evaluate whether expert communications are privileged. If not, consider negotiating a stipulation with opposing counsel to protect those communications.
- Prepare experts to be honest, consistent, and professional throughout proceedings.
- Share experts only after careful consideration.

Litigation Settlement Strategy

Settlement involves numerous considerations, and there is not a "one size fits all" approach. Following are some of the considerations typically involved in a case like the presented hypothetical.

Strategies for Co-defendants

The presence of co-defendants presents opportunities and risks in the context of settlement discussions. On the opportunity side, plaintiffs' counsel may want to narrow the field and focus for purposes of trial on a particular defendant that is allegedly more culpable and/or that presents a less formidable threat at trial. Plaintiffs' counsel may also be motivated to obtain up-front cash to assist in funding the remainder of the litigation. On the risk side, co-defendants may learn of settlement discussions and revoke joint defense agreements or take other steps to respond to what they may view as a hostile act. Also, note that, in general, settlement discussions can bog down defendants and hamper effective discovery and trial preparation, whether because they are time-consuming, because the client doesn't want to spend the money on litigating if settlement appears likely, or because of a concern that "full bore" litigation may antagonize plaintiffs and jeopardize settlement discussions. If co-defendants are able to agree on their respective shares of any settlement, they may be able to maintain a true united front and engage in collective settlement discussions.

Strategies for Multiple Plaintiffs' Counsel

The presence of multiple plaintiffs' counsel similarly presents risks and opportunities. For purposes of settlement, defendants may choose to negotiate with "weaker" plaintiffs' counsel, with the

thought of obtaining cheaper settlements. Defense counsel can use these settlements to set a low bar for purposes of settling with other, stronger plaintiffs' counsel. Typically defense counsel put together a settlement grid accounting for the key factors, such as degree of exposure, severity of injury, and age, among many potential factors, and work to obtain general buy-in by plaintiffs' counsel to resolve claims at the low end of the scale.

Strategies for Handling Governmental Claims in the Context of Pending Individual and Class Claims

Dealing with parallel governmental claims presents challenges. Governmental entities may have their own document requests and conduct their own depositions or witness interviews. That material, in turn, will generally be a matter of public record and available to plaintiffs' counsel. To state the obvious, if a defendant is using different counsel for purposes of handling the governmental claims, coordinating that defense with defense of the tort claims is important. And settling governmental claims presents issues of *res judicata* and collateral estoppel. While agencies generally are willing to settle using agreements that state there is no admission of liability on the part of the settling defendant, in some cases those agencies press for an admission, a position that presents a defendant with difficult choices.

Strategies for Insurers/Use of Insurance Policies

If insurers are paying all or part of a settlement, there is significant incentive to keep those insurers informed and engaged in the settlement process. An additional approach is to consider using insurance policies to enhance settlement offers. Often in environmental tort matters the most significant claims,

at least in the eyes of the plaintiffs and their counsel, are claims associated with potential future medical issues associated with alleged exposure. Using insurance policies to address these claims can provide peace of mind and generally a higher potential payout than a straight payout or escrow approach should actual medical issues trigger the policies.

Strategies for Class Settlements

Class settlements present significant challenges and opportunities. On the opportunities side, with the cooperation of plaintiffs' counsel, it may be possible to settle many, if not all, pending claims via a class settlement. Some plaintiffs may opt out and pursue their claims individually, but use of the class vehicle will typically foreclose other, unfiled claims, at least to the extent that they are known at the time of the settlement. This settlement approach may have particular value to a defendant if it can be accomplished relatively early in the process, before the statute of limitations has expired for known claims.

Settling Claims of Minors

Alpha must also be wary when settling claims with minors, because state law varies in its treatment of those settlements. Some states permit settlement with a minor so long as the minor's parent approves.[156] A few states cap parent-approved settlement at a monetary limit.[157] Importantly, many other states require court approval for any settlement of a claim with a minor.[158] For example, under New Jersey law, "a parent or appointed guardian cannot dispose of a child's cause of action without statutory authority or judicial approval."[159] The failure to identify the applicable state law regarding settlement with minors can lead to complications. If Alpha were to settle with a

minor without seeking court approval in a jurisdiction where court approval is required, the settlement would be unenforceable, and the minor would be allowed to bring the settled claim again. As one court observed, "one who pays the parents to settle a minor's claim without judicial approval or statutory authority remains liable to the minor, and takes the risk that the parents' indemnification agreement may be an empty guarantee."[160]

PRACTICAL TIPS:

Consult with counsel regarding complications/potential advantages presented by settlements involving:

- Co-defendants;
- multiple plaintiffs' counsel;
- parallel government claims (seek a non-admission settlement where possible);
- insurance coverage;
- class claims; and
- minors (analyze applicable state law to ensure minor settlements are enforceable).

Checklist

In the event of a contamination-related emergency:

Initial Response:

- Alert and confer with local authorities in implementing emergency response plans.
- Instruct employees involved in the response to wear appropriate personal protective equipment whenever common sense and/or protocol suggest they should.
- Instruct employees involved in the response regarding media communications.
- Notify insurers of the incident.
- Engage experienced counsel to provide legal advice about the response, evidence preservation, and potential liability.

After Danger Is Neutralized:

- Consult with outside counsel regarding the possibility of early settlements with potential plaintiffs in exchange for a release of future claims.
- Engage a media consultant, and coordinate with counsel and relevant authorities regarding a media strategy.

Preparing for Litigation:

- In consultation with counsel:
    - engage relevant consulting and testifying experts;
    - consider whether joint defense agreement makes sense; and
    - develop and implement a plan for document and evidence preservation.

Preparing for Investigations:

- In consultation with counsel, consider whether a criminal or civil investigation is likely.
- If so, prepare for the possibility of a search warrant or subpoena:
    - create a list of emergency contacts, including outside counsel, to alert in the event of a search warrant;
    - identify key employees and provide training on what actions to take when agents are on-site executing the warrant;
    - develop a plan to send nonessential employees home; and
    - maintain duplicates for payroll, inventory, accounting records, and other essential documents at an off-site location to allow operations to continue after seizure.
- Consult with counsel regarding whether an internal investigation is warranted. If so, take care to maintain applicable privileges, where possible.
- If criminal or civil investigations are proceeding at the same time as litigation, consider seeking to stay the litigation pending those investigations.
    - seeking removal;
    - filing a motion to dismiss (i.e., are there vulnerable claims for punitive damages, medical monitoring, trespass, fear of harm *etc.*, or arguments that an applicable statute of limitations has run);
    - seeking a *Lone Pine* order requiring plaintiffs to make a *prima facie* showing of exposure and causation before full discovery proceeds or implementing bellwether trials

whereby a subset of plaintiffs proceed to trial while the remaining plaintiffs' cases are stayed; and

- filing a motion for summary judgment (i.e., to eliminate certain claims or parties).

- If plaintiffs file a class action, consult with counsel regarding whether a class action is an appropriate vehicle for resolution and, if not, regarding options for seeking to strike class allegations or defeat class certification.
- Consider also whether seeking to stay merits discovery pending resolution of class certification issues.
- Where multiple parties are potentially liable, consult with counsel regarding contribution claims and "empty chair" options.

Experts:

- Before retaining an expert, review and evaluate all of the expert's relevant public statements and prior testimony.
- Prepare for offensive and defensive *Daubert* challenges.
- Evaluate applicable privilege rules before disclosing materials to experts.
- Evaluate whether expert communications are privileged. If not, consider negotiating a stipulation with opposing counsel to protect those communications.
- Prepare experts to be honest, consistent, and professional throughout proceedings.
- Share experts only after careful consideration.

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    - multiple plaintiffs' counsel;
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    - minors (analyze applicable state law to ensure minor settlements are enforceable).

Contacts:

Mark R. Ter Molen
Partner, Chicago
+1 312 701 7307
mtermolen@mayerbrown.com

Miriam R. Nemetz
Partner, Washington DC
+1 202 263 3253
mnemetz@mayerbrown.com

About Mayer Brown

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Endnotes

[1] This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients. This is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice on actions to be taken with respect to the matters discussed herein.

[2] *See*, e.g., *Fair v. Bakhtiari*, 147 P.3d 653, 660 (Cal. 2006) (mediated settlement agreement must contain provision specifically stating that the agreement is enforceable or binding).

[3] *See*, e.g., *Scruton v. Korean Air Lines Co. Ltd.*, 39 Cal. App. 4th 1596, 1605-06 (1995); *Moscatello ex rel. Moscatello v. UMDNJ*, 776 A.2d 874, 879-80 (N.J. Super, 2001) (citing New Jersey Rule of Court 4:44-3).

[4] *See*, e.g., *Dimmitt Chevrolet, Inc. v. Se. Fidelity Ins. Co.*, 636 So.2d 700, 703-06 (Fla. 1993) (pollution exclusion clause precludes coverage for environmental-damages liability).

[5] *See generally* Restatement (Third) of the Law Governing Lawyers § 76 (2000); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989).

[6] *See*, e.g., *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432-33 (S.D.N.Y. 2004) (concluding that attorneys are obligated to ensure all relevant documents are discovered, retained, and produced); *see also Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932, at *7-12 (S.D. Cal. Jan. 7, 2008) (sanctioning party and attorneys for not producing documents that party claimed it failed to locate).

[7] For example, Regulation S-K (Item 103) requires disclosure of any "material pending legal proceedings." This includes information "as to any such proceedings known to be contemplated by governmental authorities." *See* 17 C.F.R. § 229.103.

[8] There is no federal statute defining criminal liability for a corporation; however, since 1909, the Supreme Court has recognized that a corporation can be liable for violations of criminal law. *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 492-94 (1909).

[9] Eighth Circuit Manual of Model Criminal Jury Instructions, Section 5.03 (2014); *see also United States v. Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *Egan v. United States*, 137 F.2d 369, 379 (8th Cir. 1943).

[10] *Gold*, 743 F.2d at 823.

[11] *Id*.

[12] United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987).

[13] *Id*.

[14] *See*, e.g., Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(b); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(b); Clean Air Act (CAA), 42 U.S.C. § 7413; Clean Water Act (CWA) 33 U.S.C. §§ 1319, 1321.

[15] E.g., EPA has mandatory debarment authority under Section 306 of the Clean Air Act following a company's criminal conviction and under Section 508 of the Clean Water Act and has discretionary debarment authority related to all federal contracts over which it has authority. CAA, 42 U.S.C. § 7606; CWA, 33 U.S.C. § 1368; 2 C.F.R. Parts 180 & 1532. The United States Department of Interior has discretionary suspension and debarment authority over the grants, cooperative agreements, leases, concessions, loans, or benefits it administers. *See* 2 C.F.R. Part 1400; 48 C.F.R. Part 1409.

[16] *See*, e.g., TSCA, 15 U.S.C. § 2615(a); CERCLA, 42 U.S.C. § 9609; CAA, 42 U.S.C. § 7413; CWA, 33 U.S.C. § 1319.

[17] *See* U.S. EPA, PARALLEL PROCEEDINGS POLICY, at 4 n.3 (Sept. 24, 2007) (stating that, "if a criminal proceeding can accomplish complete relief the matter should go forward criminally. However, where the civil proceeding has been significantly developed and the criminal proceeding is relatively undeveloped and speculative, then the civil matter should continue, maintaining coordination with the criminal program").

[18] *See*, e.g., *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012) ("When a judge receives an application for a search warrant, the judge's task is to make a practical, common-sense decision about whether the evidence in the record shows a fair probability that contraband or evidence of a crime will be found in a particular place.").

[19] *See* Fed. R. Civ. P. 45.

[20] *See*, e.g., CERCLA, 42 U.S.C. § 9622(e)(3)(B).

[21] *Cf. U.S.S.E.C. v. Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010) (discussing potential consequences for a non-party who did not respond to a subpoena from the SEC and noting that, although special attention will be paid to the procedural and substantive rights of a non-party witness, the SEC could move for contempt of court for failure to respond).

[22] Daniel Webb, *et al.*, CORPORATE INTERNAL INVESTIGATIONS § 13.02[1].

[23] *Id*.

[24] E.g., *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 875-76 (N.D.N.Y. 1995).

[25] *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1516-17 (D.D.C. 1987).

[26] *See generally Upjohn Co. v. United States*, 449 U.S. 383 (1981) (describing contours of attorney-client privilege as it relates to corporations and related employees).

[27] *See*, e.g., *ARCO v. Current Controls, Inc.*, 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997).

[28] *See*, e.g., *Fares Pawn, LLC v. Indiana*, 2012 WL 3580068, at *5 (S.D. Ind. Aug. 17, 2012) (quoting *BPI Energy, Inc. v. IEC (Montgomery), LLC*, 2008 WL 4225843 (S.D. Ill. 2008)) ("When a corporate officer also acts as general counsel, wearing 'two hats,' the nature of his communications must be closely scrutinized to separate business communications from legal communications, as the attorney-client privilege is narrow.").

[29] *See*, e.g., *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997). The party wishing to invoke the privilege has the burden of proving all of these essential elements. *Id.*

[30] *See id*. at 1462, 1464-65; *United States v. Ackert*, 169 F.3d 136, 139-40 (2d. Cir. 1999) (disclosure waived privilege where third-party was not a "translator or interpreter of client communications").

[31] The Eighth Circuit has adopted a theory that there is only a limited waiver of privilege when a company makes a voluntary disclosure to a governmental agency of the results of an internal investigation. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*); *see also Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 688-89 (S.D.N.Y. 1980). All other circuits to consider the question, however, have declined to modify existing waiver rules to protect disclosures of privileged materials to the government. *See In re Pac. Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012); *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1197 (10th Cir. 2006); *Burden–Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 295 (6th Cir. 2002); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1416-18 (Fed. Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Phil*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

[32] *Compare Hanover Ins. Co. v. Plaquemines Parish Gov't.*, 304 F.R.D. 494 (E.D. La. 2015) (upholding privilege as to former employees) *with Clark Equip, Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, at *5-6 (N.D. Ill. Oct. 1, 1985) (denying privilege as to former employees).

[33] Restatement (Third) of The Law Governing Lawyers, § 73 (2000), comment e.

[34] *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89 (S.D. Cal. 1987).

[35] Fed. R. Civ. P. 26(b)(3).

[36] *See United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (citing *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)).

[37] *See* Fed. R. Civ. P. 26(b)(3)(ii).

[38] *Pac. Gas and Elec. Co. v. United States*, 69 Fed. Cl. 784, 790-92 (Fed. Cl. 2006) (quoting Fed. R. Civ. Pro. 26(b)(3) Advisory Committee Note); *see also Allen v. Chi. Transit Auth.*, 198 F.R.D. 495, 500 (N.D. Ill. 2001).

[39] *See In re Grand Jury Proceedings*, 861 F. Supp. 386, 388 (D. Md. 1994) (citing *The Privilege of Self-Critical Analysis,* 96 HARV. L. REV. 1083, 1086 (1983)) (quotations omitted).

[40] *United States ex rel. Sanders v. Allison Engine Co., Inc.*, 196 F.R.D. 310, 312 (S.D. Ohio 2000).

[41] *United States v. Nixon*, 418 U.S. 683, 710 (1974).

[42] *See In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000); *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980); *In re Grand Proceedings*, 861 F. Supp. 386 (D. Md. 1994).

[43] *See In re Sandridge Energy, Inc. S'holder Derivative Litig.*, 2014 WL 4715914, at *9 n.23 (W.D. Okla. Sept. 22, 2014) (ordering the production of an internal investigation report that had been shared with the board of directors where the audit committee of that board was the client for investigation purposes).

[44] 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of [diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

[45] *See*, e.g., *Brown v. Cottrell, Inc.*, 871 N.E.2d 63, 66-67 (Ill. App. Ct. 2007); *Campbell v. Parker-Hannifin Corp.*, 69 Cal. App. 4th 1534, 1540-41 (1999); *see also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (describing factors for applying federal common law *forum non conveniens* doctrine).

[46] *See* 28 U.S.C. § 1332(a).

[47] 28 U.S.C. § 1332(c); *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010).

[48] 28 U.S.C. § 1332(d)(2).

[49] 28 U.S.C. § 1332(d)(4).

[50] 28 U.S.C. § 1332(d)(11)(A).

[51] 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

[52] 28 U.S.C. § 1369(a).

[53] 28 U.S.C. § 1369(b).

[54] *Compare Sullivan v. Novartis Pharm.*, 575 F. Supp. 2d 640, 645-47 (D.N.J. 2008) ("contention that removability should depend on the timing of service of process is absurd on its face") *with Regal Stone Ltd. v. Longs Drug Stores Cal., L.L.C.*, 881 F. Supp. 2d 1123, 1127-29 (N.D. Cal. 2012) ("clear and unambiguous language of the statute only prohibits removal after a properly joined forum defendant has been served").

[55] *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (citation omitted).

[56] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

[57] 133 S. Ct. 1216 (2013).

[58] *Id.* at 1222.

[59] *Id.* at 1223 (quoting *Adams v. Woods*, 2 Cranch 336 (1805) (Marshall, J.)).

[60] 720 F.3d 644, 646 (7th Cir. 2013) (Easterbrook, J.).

[61] *Id.* at 648 (emphasis added). Even before *Gabelli* and *Midwest Generation*, at least two courts had drawn a distinction between punitive and compensatory damages for statute of limitations purposes. In one case, a landowner sought punitive damages against an adjoining property owner, alleging that the defendant had channeled surface waters onto his property, causing the property to be flooded and littered with debris. *Fisher v. Space of Pensacola, Inc.*, 483 So. 2d 392 (Ala. 1986). In support of his punitive damages claim, the plaintiff pointed to evidence that the defendant had deliberately graded its property so that storm-water would flow toward the plaintiff's land. The Alabama Supreme Court held that, even though the plaintiff continued to suffer injuries as a result of this conduct, the plaintiff could not recover punitive damages, because the wanton conduct itself had taken place outside the one-year limitations period. *Id*. at 395-96. The other case involved acidic water runoff from a long-since closed mine. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999). The Eleventh Circuit held that, for purposes of punitive damages, "[t]he relevant conduct . . . involves only the four years preceding the filing of the property owners' complaint in August of 1992." *Id*. at 1336.

[62] Medical monitoring claims are only permitted in some states. *See Henry v. Dow Chemical Comp.*, 701 N.W.2d 684, 688-89 (Mich. 2005) (medical monitoring claims not permitted); *see generally* D. Scott Aberson, Note, *A Fifty-state Survey of Medical Monitoring and the Approach the Minnesota*

Supreme Court Should Take When Confronted with the Issue, 32 Wm. Mitchell L. Rev. 1095, 1114-15 (2006).

[63] The New Jersey landmark case of *Ayers v. Twp of Jackson*, 525 A.2d 287, 312 (N.J. 1987), specifically refers to medical surveillance as a "compensable item of damages" rather than a cause of action. *See also Coffman v. Keene Corp.*, 133 N.J. 581 (1993) (recognizing medical surveillance damages for breach of duty to warn); *Fayer v. Keene Corp.*, 311 N.J. Super. 200 (App. Div. 1998) (allowing medical surveillance damages in a products liability suit); *but see Theer v. Philip Carey Co.*, 133 N.J. 610 (1993) (alternatively referring to a medical surveillance claim as both "a special compensatory remedy" and a "cause of action"). The California Supreme Court held in *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1009 (1993), that "the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." Courts in other states similarly treat medical monitoring as a compensable item of damages rather than a cause of action. *See*, e.g., *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 566, 694 S.E.2d 815, 899 (2010) ("[T]he cost of medical surveillance is a compensable item of damages."); *but see Arch v. Am. Tobacco Co. Inc.*, 175 F.R.D. 469, 484 (E.D. Pa. 1997) ("In Pennsylvania, . . . medical monitoring is an independent cause of action, not a compensable item of damages.").

[64] *See* Restatement (Second) of Torts § 158 (1965).

[65] "A person commits a trespass if he or she intentionally (a) enters land in the possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Clover Leaf Plaza, Inc. v. Shell Oil Co.*, 1998 WL 35288754, at *7 (D.N.J. Aug. 13, 1998); *see also Texas-New Mexico Pipeline Co. v. Allstate Constr. Inc.*, 70 N.M. 15, 369 P.2d 401 (1962) (the act must be more than voluntary—it must be intentional to make one liable for trespass); *Kite v. Hamblen*, 241 S.W.2d 601 (Tenn. 1951) (trespass requires intentional act); *City of Townsend v. Damico*, 2014 WL 2194453, at *2 (Tenn. Ct. App. May 27, 2014) ("[T]respass must be an intentional harm. If there is no intentional act—in the sense of an act voluntarily done—there is no trespass.") (quoting *Kite*, 241 S.W.2d at 603).

[66] *Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prods.*, 82 S.W.3d 849, 851-52 (Ky. 2002).

[67] *Leaf River Forest Prods., Inc. v. Ferguson*, 662 So. 2d 648, 657-60 (Miss. 1995). That court has since held, "There is no tort cause of action in Mississippi without some identifiable injury, either physical or emotional." *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 5 (Miss. 2007).

[68] *See*, e.g., *Sabra ex rel. Waechter v. Iskander*, 2008 WL 4889681, at *2 (N.D. Ga. Nov. 10, 2008) ("Because the Plaintiffs do not allege any physical injuries relating to exposure . . ., they fail to state a plausible claim for relief under Georgia tort law."); *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1364 (S.D. W. Va. 1990) ("In essence, is the exposure to toxic chemicals an injury under the common law of West Virginia or Virginia. It is the opinion of this Court that under the common law of the States of West Virginia and Virginia, such an exposure is not an actionable injury."), *aff'd sub nom. Ball v. Joy Tech., Inc.*, 958 F.2d 36 (4th Cir. 1991); *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846, 870 (Fla. 2007) (Cantero, J., dissenting) (citing cases). Notably, some jurisdictions have held that claims of "subcellular damage" increasing the risk of cancer are sufficient allegations of an actual injury. *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17 (D. Colo. 1984); *see also Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1468 (N.D. Cal. 1987) (denying motion to dismiss where complaint alleged an injury to plaintiff's immune system that rendered him "more susceptible to developing various forms of cancer.").

[69] *See*, e.g., *Williams v. Manchester*, 888 N.E.2d 1, 13 (Ill. 2008) ("[A]s a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is *not* the injury itself.").

[70] *See*, e.g., *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204 (6th Cir. 1988) ("Tennessee law requires that the plaintiff prove there is a reasonable medical certainty that the anticipated harm will result in order to recover for a future injury."); *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315, 320 (5th Cir. 1986) ("Because he does not alleged [sic] that he has cancer or will probably develop it in the future, Hagerty does not state a claim for this possible effect of his dousing."); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 815 (Cal. 1993); *Mauro v. Raymark Indus., Inc.*, 561 A.2d 257, 264 (N.J. 1989) ("[P]laintiff must prove that the prospective disease is at least reasonably probable to occur.").

[71] *See*, e.g., *Day v. NLO*, 851 F. Supp. 869, 878 (S.D. Ohio 1994) ("[I]f the Plaintiffs can prove that they were exposed to sufficiently high doses of radiation, this in itself will constitute a physical injury.").

[72] 801 F.3d 921 (8th Cir. 2015).

[73] *Id.* at 926–27.

[74] *Id.* at 926–27.

[75] *Adkins v. Thomas Solvent Co*., 487 N.W.2d 715, 721 (Mich. 1992) (disallowing nuisance claims despite "negative publicity resulting in unfounded fear about dangers in the vicinity of the property"); *Smith v. Kansas City Gas Serv. Co*., 169 P.3d 1052 (Kan. 2007) (disallowing nuisance claims where leaked pollutants had not physically interfered with plaintiffs' land); *Walker Drug Co., Inc. v. La*

Sal Oil Co., 972 P.2d 1238, 1244 (Utah 1998) (disallowing nuisance claims where plaintiff feared contamination of its property based on contamination of adjacent property); *Chance v. BP Chem., Inc*., 670 N.E.2d 985, 990 (Ohio 1996) (disallowing nuisance claims where there was a concern about future contamination related to nearby deepwell waste disposal).

[76] *See Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 61 (D. Mass. 1999) (citing "the basic tenets of nuisance law requiring merely an interference with use and enjoyment of land" for allowing a claim for nuisance based on plaintiffs' fears of contamination); *In re Tutu Wells Contamination Litig.*, 909 F. Supp. 991, 997-98 (D.V.I. 1995) (describing cases disallowing fear of contamination nuisance claims as "unpersuasive" and "work[ing] an injustice"); *Allen v. Uni-First Corp.*, 558 A.2d 961, 963 (Vt. 1988) (permitting recovery on a nuisance claim for contamination-related property value decreases caused by "public perception of widespread contamination").

[77] *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592 (3d Cir. 2012).

[78] Fed. R. Civ. P. 23(c)(1)(B) & (2)(B); *see Marcus*, 687 F.3d at 591-92.

[79] Manual for Complex Litigation (Fourth) § 21.222 (2004); *see also Marcus*, 687 F.3d at 592–93.

[80] *See Marcus*, 687 F.3d at 593; *see also Carrera v. Bayer Corp.*, 727 F.3d 300, 305-08 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354-55 (3d Cir. 2013).

[81] 727 F.3d at 308–12 (rejecting proposed use of retailer loyalty card records, affidavits, and a claims processing agent as incomplete and unreliable).

[82] *Id.* at 307.

[83] 795 F.3d 654 (7th Cir. 2015).

[84] KRS 413.120(4).

[85] *See Com., Dep't of Highways v. Ratliff*, 392 S.W.2d 913, 914 (Ky. 1965); *Ky. W. Va. Gas Co. v. Matny*, 279 S.W.2d 805, 806-07 (Ky. 1955) ("a recovery must be had for the permanent nuisance once and for all, and the action must be brought within five years.").

[86] *Ky. W. Va. Gas Co.*, 279 S.W.2d at 806-07.

[87] 42 U.S.C. §§ 9607(a), 9613(f)(1).

[88] *See* 42 U.S.C. § 9613(f)(2).

[89] *See* 42 U.S.C. § 9607(a)(2).

[90] *See* 42 U.S.C. § 9607(d)(2).

[91] *See* Cynthia A. Sharo, Note, *Knowledge by the Jury of a Settlement Where a Plaintiff Has Settled with One or More Defendants who are Jointly and Severally Liable*, 32 Vill. L. Rev. 541, 541-42 (1987) (discussing different approaches adopted by different jurisdictions).

[92] Restatement (Third) of Torts: Apportionment Liab. § 17 (2000), reporter's note (contains 50-state survey of who can be submitted for assignment of comparative negligence).

[93] *See Far East Conference v. United States*, 342 U.S. 570, 575 (1952).

[94] *See United States v. Gen. Dynamics Corp.*, 828 F. 2d 1356, 1362 (9th Cir. 1987).

[95] *Manual for Complex Litigation*, § 21.14, at 256 (4th ed. 2004).

[96] *See*, e.g., *Am. Nurses Assoc. v. State of Illinois*, 1986 WL 10382, at *3 (N.D. Ill. Sept. 12, 1986) ("If class certification is denied, the scope of permissible discovery may be significantly narrowed; if a class is certified, defining that class should help determine the limits of discovery on the merits."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 208 F.R.D. 1, 6 (D.D.C. 2002) (staying proceedings on the merits pending resolution by court of appeals of a pending Rule 23(f) petition for interlocutory review of class certification decision, "because two significant issues are currently pending before the Court of Appeals, one of which could dispose of this litigation while the other could substantially reshape it.").

[97] *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 n.2 (5th Cir. 2006). These orders derive their name from the case believed to have originated the concept. *See Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

[98] *See*, e.g., *Trujillo v. Ametek Inc.*, 2016 WL 3552029 (S.D. Cal. June 28, 2016); *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591-92 (Tex. Ct. App. 2001).

[99] 347 P.3d 149, 158-59 (Colo. 2015).

[100] *Manning v. Arch Wood Prot., Inc.*, 40 F. Supp. 3d 861 (E.D. Ky. 2014); *see also Smith v. Atrium Med. Corp.*, 2014 WL 5364823 at*2 (E.D. La. Oct. 21, 2014) (denying *Lone Pine* request in products liability case between a single plaintiff and single defendant "when adherence to the Federal Rules of Civil Procedure can ensure that this case proceeds in an efficient manner.").

[101] *See generally* ANNOTATED MANUAL FOR COMPLEX LITIGATION §§ 13.15, 22.315 (2016); MAYERBROWN.COM, Legal Update, Bellwether Trials: A Defense Perspective (Apr. 15, 2016), https://www.mayerbrown.com/files/Publication/5d10107c-e84b-4563-bdd8-b920fccab532/Presentation/PublicationAttachment/c861659c-6740-4e84-a131-bdcbfb616433/160415-UPDATE-Environmental.pdf.

[102] *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020-21 (5th Cir. 1997) (holding that, "before a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must, prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected").

[103] Fed. R. Civ. P. 23(a)(1).

[104] *See*, e.g., *Turnage v. Norfolk So. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (holding that "the speculative nature of the class size" in case involving derailment and chemical leak "weigh[ed] strongly" against class treatment).

[105] Fed. R. Civ. P. 23(a)(2).

[106] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

[107] *Id*.

[108] *See*, e.g., *Smith v. ConocoPhilips Pipe Line Co.*, 801 F.3d 921 (8th Cir. 2015) (reversing class certification in case arising from alleged petroleum contamination where there was no proof that all class members' properties were affected); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085-86 (7th Cir. 2014) (class certification improper where "class members could well have experienced different levels of contamination . . . caused by different polluters" and it could not "be assumed that every class member has experienced the same diminution in the value of his property even if every one has experienced the same level of contamination").

[109] Fed. R. Civ. P. 23(a)(3).

[110] *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

[111] Fed. R. Civ. P. 23(a)(4).

[112] *Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997).

[113] *Id*. at 626.

[114] *Wal-Mart*, 131 S. Ct. at 2557.

[115] *Id.* at 2557 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

[116] *Amchem*, 521 U.S. at 623.

[117] *Newton v. Merrill Lynch*, 259 F.3d 154, 172 (3d Cir. 2001).

[118] *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 604 (3d Cir. 2012).

[119] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Since the Supreme Court's *Comcast* decision, however, some federal circuit courts have

indicated that, where the individualized issues relate only to damages, it may be appropriate to bifurcate the proceedings by granting class certification on the limited issue of liability, leaving damages to be proven in subsequent, individual actions. *See*, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) ("Where determinations on liability and damages have been bifurcated … the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application.").

[120] *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) (affirming denial of class certification in suit alleging exposure to smoke after explosion at chemical plant).

[121] *Gates v. Rohm and Haas Co.*, 655 F.3d 255 (3d Cir. 2011).

[122] Fed. R. Civ. P. 23(b)(3).

[123] *See Steering Comm.*, 461 F.3d at 605 (determining that class action was not superior "where the district court has been careful to manage the litigation efficiently through the judicious use of consolidated summary judgments and other tools such as *Lone Pine* orders").

[124] Most states have adopted a heightened standard of proof for punitive damages, requiring that the requisite mental state be proven by clear and convincing evidence, and at least one state—Colorado—requires proof beyond a reasonable doubt. *See generally* KIRCHER & WISEMAN, 1 PUNITIVE DAMAGES: LAW AND PRACTICE § 9:10 (2d ed. 2016); Colo. Rev. Stat. § 13-25-127(2). In those states, Alpha should argue that the punitive damages claim cannot survive its summary judgment motion, because the evidence is not sufficient for a jury to find the requisite mental state by clear and convincing evidence (or, in Colorado, beyond a reasonable doubt). In the few states that have not adopted a heightened standard of proof (or where the issue is unsettled), Alpha should urge the court to do so as a matter of state common law.

[125] *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 584 (W.D. Okla. 1979), *rev'd on other grounds*, 769 F.2d 1451 (10th Cir. 1985) ("Good faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages."); Richard C. Ausness, *et al.*, *Providing a Safe Harbor for Those Who Play By the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 Utah L. Rev. 115, 155-57 (2008).

[126] *See*, e.g., *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998).

[127] *N.Y. State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 224 (2d Cir. 2014).

[128] *Id.*; *see also Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378-79 (7th Cir. 2008) (similar multifactor test applies under Illinois law).

[129] *Bestfoods*, 524 U.S. at 61.

[130] *Id*. at 64.

[131] *Id.* at 66-67.

[132] *Id.* at 72 (emphasis added).

[133] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. Ltd., v. Carmichael*, 526 U.S. 137, 147-49 (1999).

[134] *Daubert*, 509 U.S. at. at 593-94.

[135] *See*, e.g., *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996) ("Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiff's burden in a toxic tort case."); *accord Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 252-53 (6th Cir. 2001); *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999); *Wintz By and Through Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir. 1997); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1106-07 (8th Cir. 1996); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 504 (9th Cir. 1994); *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 332-34 (9th Cir. 1993).

[136] *Daubert*, 509 U.S. at 592; *see* Fed. R. Evid. 703.

[137] *See*, e.g., *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1304 (11th Cir. 2014) (because expert's theory was not generally accepted, trial court properly conducted "a thorough hearing and consideration of 'thousands of pages of filings by the parties, including the experts' reports and depositions, and scientific literature'").

[138] *See*, e.g., *Chapman*, 766 F.3d at 1299, 1304 (even though it was generally accepted that exposure to zinc can cause injury of the type plaintiff alleged, expert's theory that the particular zinc-containing compound at issue could cause that injury was novel).

[139] *Chapman*, 766 F.3d at 1307.

[140] *See*, e.g., *Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 813-14 (6th Cir. 1994); *accord Barrett v. Rhodia, Inc.*, 606 F.3d 975, 984-85 (8th Cir. 2010); *McClain v. Metabolife Int'l*, 401 F.3d 1233, 1243 (11th Cir. 2005).

[141] *Chapman*, 766 F.3d at 1308-10.

[142] *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010); *see also*, e.g., *Chapman*, 766 F.3d at 1309-11; *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 645 (7th Cir. 2010); *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 156 (3d Cir. 1999).

[143] *See*, e.g., *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (*en banc*) (trial court committed reversible error by failing to ensure and

enter findings on the relevance and reliability of each expert, theory, and methodology challenged under Rule 702; trial court may not avoid difficult or complex issues "by giving each side leeway to present its expert testimony to the jury"); *Chapman*, 766 F.3d at 1311 ("Hypotheses are verified by testing, not by submitting them to lay juries for a vote.").

[144] *Barabin*, 740 F.3d at 466-67.

[145] Fed. R. Civ. P. 26, advisory committee's note to 2010 amendment.

[146] Fed. R. Civ. P. 26(b)(4)(B).

[147] Fed. R. Civ. P. 26(a)(2)(B)(ii).

[148] Fed. R. Civ. P. 26, advisory committee's note to 2015 amendment.

[149] Fed. R. Civ. P. 26(b)(4)(C).

[150] *Id*.

[151] *See Republic of Ecuador v. For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a) (In re Republic of Ecuador)*, 735 F.3d 1179, 1187 (10th Cir. 2013); *Republic of Ecuador v. Hinchee*, 741 F.3d 1185 (11th Cir. 2013); *Republic of Ecuador v. Mackay*, 742 F.3d 860 (9th Cir. 2014).

[152] *Mackay*, 742 F.3d at 870.

[153] Fed. R. Civ. P. 26(b)(4)(A).

[154] Fed. R. Civ. P. 26(b)(4)(D).

[155] Cal. Code Civ. Proc. § 2034.280(c).

[156] *See*, e.g., *BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 355 (Md. 2013) (citing Maryland law that "empowers parents to terminate litigation on behalf of their minor children").

[157] *See*, e.g., Or. Rev. Stat. § 126.725 (permitting a parent to enter into a settlement agreement for a minor if the total amount of the claim, minus certain expenses, is $25,000 or less).

[158] *See*, e.g., *Scott By & Through Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 11 (Wash. 1992) ("Under Washington law parents may not settle or release a child's claim without prior court approval."); *White v. Allied Mut. Ins. Co.*, 31 P.3d 328, 330 (Kan. Ct. App. 2001) ("Thus there is ample authority in Kansas for the idea that a minor is not bound by a settlement agreement such as the one in this case until court approval has been obtained.").

[159] *Colfer v. Royal Globe Ins. Co.*, 519 A.2d 893, 894 (N.J. Super. Ct. App. Div. 1986). New Jersey court rules strictly require that a court determine whether the terms of any settlement with a minor is "fair and reasonable." N.J. R. 4:44-3.

Even the appointment of a guardian *ad litem* by a court will not eliminate the need for judicial review of minor settlements in New Jersey. *See Moscatello ex rel. Moscatello v. Univ. of Med. & Dentistry of N. J.*, 776 A.2d 874, 879 (N.J. Super. Ct. App. Div. 2001); *see also Y.W. By & Through Smith v. Nat'l Super Markets, Inc.*, 876 S.W.2d 785, 789 (Mo. Ct. App. 1994) (holding that, under Missouri law, a minor may settle with the approval of a guardian *ad litem* but only with court approval).

[160] *Colfer*, 519 A.2d at 895.

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