DEFENDING MASS TOXIC TORT CASES: WINNING PRETRIAL STRATEGIES

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INTRODUCTION

In California, as in most jurisdictions across the country, the plaintiffs' tort bar continues to file mass toxic tort lawsuits with increasing frequency. In response, defense counsel including the toxic tort team at Morgan, Lewis & Bockius, LLP, have developed a variety of case management techniques and defense strategies to streamline toxic tort cases and successfully challenge plaintiffs' often thinly-pled complaints. In this article, we explore many of the new developments in California law that assist defense counsel in effectively and efficiently handling and favorably resolving toxic tort cases. First, we discuss the availability of case management orders ("CMOs") and *Cottle* hearings to streamline discovery and challenge plaintiffs' ability to plead and prove a *prima facie* case early in the litigation. Second, we review new case law confirming the "product identification" or "no exposure" defense in toxic tort lawsuits. Third, we explore California's medical causation standards and the options under federal and state law for testing plaintiffs' frequent inability to prove general and/or specific causation. Fourth, we summarize the status of the publicity-based statute of limitations defense under California law and highlight new case law which seemingly jeopardizes this previously powerful tool in defending toxic tort cases. Finally, we address the status of medical monitoring claims and class actions under California law pending a much anticipated decision from the California Supreme Court.

CASE MANAGEMENT ORDERS

Toxic tort cases present unique challenges to the courts and parties. They often involve hundreds, if not thousands, of plaintiffs alleging a variety of personal injuries and property damages arising from claimed exposures to multiple defendants' products. Overburdened with the task of handling such mass tort litigation, courts generally welcome suggestions from the parties as to management strategies. It has been our repeated experience that defendants can gain sizeable advantages by proposing an aggressive CMO to streamline discovery and focus the court's attention early on the fundamental deficiencies of plaintiffs' claims. The authority for courts to issue CMOs in complex cases is firmly established. The California Code of Civil Procedure empowers every court to amend and control its process and orders, and to control its own docket.[1] The Judicial Council of California recently issued its *Deskbook on the Management of Complex Civil Litigation*, wherein the Council expressly advised trial courts regarding the importance of early case management and the adoption of CMOs.[2] In fact, the exercise of a court's inherent managerial powers in complex cases has been described as not only desirable but a "critical necessity."[3]

A carefully drafted CMO should serve to streamline discovery and create a vehicle for defendants to challenge all plaintiffs to actively participate in the litigation. All too often, plaintiffs' counsel enlist hundreds of plaintiffs who hope to obtain a quick windfall without having to participate in discovery, submit to depositions or otherwise become involved in prosecuting their claims. The CMO should set up discovery procedures requiring plaintiffs to timely respond or risk having their claims

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dismissed. Additionally, discovery under the CMO should require individualized responses from plaintiffs and should require them to specify their exposures and their claimed damages. Plaintiffs should not be allowed to hide behind the generic allegations of their complaint.

The motion to implement a CMO should explain to the court that traditional discovery procedures are too tedious and inefficient for mass tort litigation, and that an effective CMO will narrow the issues for trial and ensure that meritless claims are disposed of in an efficient manner. A CMO will benefit all parties in a large case because both sides will then be able to focus their attention and resources on those claims, if any, that will ultimately proceed to trial on their merits.

A proposed CMO may contain a variety of creative procedures for managing the litigation, such as the following:

Discovery questionnaires: A proposed CMO should require each plaintiff to complete and verify a discovery questionnaire in lieu of written interrogatories. The proposed questionnaire should contain questions regarding each plaintiff's background, education, medical history, work history, lifetime exposures to chemicals or toxins, medical conditions and treating physicians, claimed damages, and so forth. Plaintiffs should be ordered to provide substantive responses, without objections, to the questionnaire within a specified time period, subject to dismissals for failure to comply.

Document production: The CMO should require each plaintiff to produce all documents that relate to or are otherwise cited in their questionnaire responses.

Authorizations for the release of documents: The CMO should require plaintiffs to execute authorization forms so that defendants can obtain medical, employment, and military records from third parties without the need for subpoenas to the extent that these documents are related to plaintiffs' claims.

Property inspections: The CMO should allow the defense to conduct a property inspection of each property for which damage is claimed without the need for a discovery request or a subpoena.

Additional discovery: The CMO should allow plaintiffs to propound a fixed number of discovery requests to defendants and should allow defendants to propound a fixed number of follow-up discovery requests to plaintiffs.

Depositions: Depending upon the strategy for the particular case, the CMO should establish a deposition procedure. Under some circumstances, it may be beneficial to conduct "sprint depositions," whereby the defense takes brief, one-hour depositions of each plaintiff for purposes of obtaining initial information regarding each plaintiff's medical condition and statute of limitations issues. Such information can then be used to file summary judgment motions, to begin retaining experts, and to strategically divide the plaintiffs into groups for trial. If sprint deposition procedures are used, the CMO should also reserve the defendants' right to take a more detailed deposition of each plaintiff whose case proceeds to trial.

Causation procedures: The CMO should outline a procedure whereby each plaintiff is required to make a *prima facie* showing of causation at the outset of the litigation under the threat of dismissal for any plaintiff who fails to do so. Referred to in California as "*Cottle*" orders and in other jurisdictions as "*Lone Pine*" orders,[4] each plaintiff should be required to satisfy a threshold burden of demonstrating causation before the parties and the judicial system expend valuable time and resources litigating their claims. (See below for more details regarding these orders.)

Settlement conference/alternative dispute resolution: In many circumstances, it may be appropriate for the CMO to contain provisions requiring that the parties discuss settlement following the causation hearings. By this time, plaintiffs who have failed to complete questionnaires or participate in depositions and/or could not make a *prima*

facie showing of causation will have been eliminated from the case, giving counsel a more realistic picture of the number of cases and types of claims that may proceed to trial.

Other standard provisions: CMOs often contain a variety of additional provisions designed to streamline the litigation process in light of the number of plaintiffs. Such provisions include those establishing a joint defense privilege (so that defendants can work together without waiving applicable privileges), procedures for adding additional plaintiffs and/or defendants, provisions for handling the inadvertent production of documents, and provisions for requesting modifications to the CMO.

Defense counsel should be creative and thorough in drafting the proposed CMO for the court's consideration. By filing a motion to implement a CMO and offering the court a proposed CMO early in the litigation, counsel can often gain a tremendous head start in developing defenses and eliminating meritless claims.

COTTLE ORDERS AND HEARINGS

Significantly, a proposed CMO should contain procedures to allow the defense to challenge plaintiffs' evidence on critical issues of causation. In toxic exposure cases, establishing a causal connection between a particular injury and an exposure to a certain chemical or product represents perhaps the single largest hurdle that plaintiffs face. Given the frequency with which plaintiffs are unable to prove causation, courts have routinely determined that plaintiffs in mass toxic tort cases should be required to make a *prima facie* showing of causation at the outset of the litigation under the threat of dismissal for any plaintiff who fails to do so. Such a requirement prevents the parties and the court from spending substantial time and money preparing cases for trial only to learn that plaintiffs cannot sustain their causation burdens.

In California, such causation orders are referred to as "*Cottle* Orders" after the seminal case on causation, *Cottle v. Superior Court.*[5] *In Cottle*, the trial court issued a CMO requiring each plaintiff to submit a statement to the court establishing "a *prima facie* claim for personal injury and/or property damage."[6] To satisfy this requirement, the court ordered each personal injury plaintiff to state the chemical or toxic substance to which that plaintiff was exposed; the date or dates and place of exposure; the method of exposure; the nature of plaintiff's injury; and the identity of each medical expert supporting the plaintiff's personal injury claim.[7]

The use of such an order was affirmed on appeal, as was the trial court's order excluding the personal injury claims of those plaintiffs who failed to make the *prima facie* showing of causation to a degree of reasonable medical probability through competent expert testimony as required by the case management order and California law.[8]

The CMO issued by the court in *Cottle* illustrates the "type of creativity courts are permitted to exercise in dealing with complex cases."[9] Consistent with *Cottle*, defendants in toxic tort cases should request that a CMO include provisions requiring each personal injury plaintiff to file a declaration identifying: (1) the chemical or toxic substance to which that plaintiff was exposed, (2) the date and duration of each exposure, (3) the location of the exposure, (4) the route and method of exposure, (5) the nature of the plaintiff's alleged injury or injuries that are claimed to have been caused by each exposure, (6) any and all medical or scientific support for such a claim, and (7) the identify of each medical expert who will support the plaintiff's personal injury claim. Following the filing of such declarations, the CMO should set procedures for briefing and a *Cottle* hearing regarding the sufficiency of the plaintiffs' attempt to make a *prima facie* showing.

PRODUCT IDENTIFICATION AND EXPOSURE DEFENSES

One of the common defenses to toxic tort cases focuses on a plaintiff's inability to prove his or her exposure to a particular defendant's product. The basic premise of the defense is that as a threshold to proving causation and ultimately liability, a toxic tort plaintiff must first identify the product of a particular defendant that is at-issue and establish that he or she was actually exposed to that product. California courts rely heavily on asbestos case law for exposure

and product identification standards. Recent California decisions, both published and unpublished, confirm that plaintiffs cannot skirt these critical elements of their toxic tort claims with generic proof.

As an initial matter, the California Supreme Court recently rejected plaintiffs' common practice of pleading generic allegations against numerous defendants in toxic tort complaints, holding that at least some specificity is required.[10] In *Bockrath v. Aldrich Chemical Co.*, the Supreme Court held that a toxic tort plaintiff's allegations that multiple defendants' products cause cancer, that he was exposed to them, and that they migrated to his internal organs and caused his disease were insufficient pleading allegations.

In clearly defining the pleading requirements for a toxic tort case, the *Bockrath* Court held that: (1) a plaintiff must allege that he was exposed to each of the toxic materials claimed to have caused his specific illness; an allegation that he was exposed to "most and perhaps all" of the substances listed is inadequate; (2) he must identify each product that allegedly caused the injury; it is insufficient to allege that the toxins in defendants' products caused it; (3) he must allege that as a result of the exposure, the toxins entered his body; (4) he must allege that he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness; and (5) he must allege that each toxin he absorbed was manufactured or supplied by a named defendant.[11]

Although the Court allowed the *Bockrath* plaintiff leave to amend his complaint, the Court's well-articulated pleading standard for toxic tort cases is extremely useful in attacking a poorly pled toxic tort complaint as soon as it is filed and served.

Once past the initial pleading stage, there is some debate as to the proper standard of proof on this critical element of exposure. In *Dumin v. Owens-Corning Fiberglas Corp.*, 28 Cal.App.4th 650, 655 (1994), the Court of Appeal explained that two different approaches have been taken by courts in determining the sort of evidence a plaintiff must adduce in order to establish a defendant's products are a legal cause of his or her injuries. The more stringent approach requires particularized proof that the plaintiff came into contact with the defendant's product. Under the more lenient approach, on the other hand, it is sufficient that the plaintiff prove the defendant's product was at his or her worksite.[12] The *Dumin* Court specifically declined to express favor for one approach over the other, holding that the plaintiff could not prove his case under either standard.

Taking the analysis one step further in the seminal toxic tort case, *Rutherford v. Owens-Illinios, Inc.,* 16 Cal.4th 953, 975-976 (1997), the California Supreme Court held that in establishing causation, the plaintiff must first establish some threshold exposure to a defendant's defective product. That is, he or she must prove to a reasonable medical probability that a particular exposure or series of exposures was a substantial factor in bringing about the injury. The Court held that the plaintiff bears the burden of proof on this issue. The Court stated in a footnote, however, that it was declining to endorse any one particular standard for establishing the requisite exposure because the issue had not been raised or briefed.[13]

Of course, in practice plaintiffs often urge the courts to apply the more lenient of the two exposure standards articulated by the *Dumin* Court. Plaintiffs argue that so long as they present evidence that a particular product is present at their worksite, a jury can infer that they were actually exposed to that product.

There is, however, a growing body of case law that supports the application of the more stringent exposure standard in California. In *Lineaweaver v. Plant Insulation Co.*, 31 Cal.App.4th 1409, 1420 (1995), the Court of Appeal held that a plaintiff must prove exposure *to a particular defendant's product* and must establish to a reasonable medical probability that such an exposure contributed to the plaintiff's injury. Factors relevant to assessing the medical probability that an exposure contributed to the injury include the frequency, regularity, and proximity of the exposure. Depending on the unique circumstances of the case, relevant factors may also include the type of product to which the plaintiff was exposed, the type of injury suffered, and other possible sources of the plaintiff's injury.[14]

Further, in an unpublished decision, *O.C. Patterson v. E.I. Dupont De Nemours & Company, Inc.*, the Second Appellate District expressed its view

that California follows the more stringent exposure standard. The Court explained that "[a] review of the decisional authority reveals that California courts have adopted the more stringent approach."[15] The *Patterson* Court concluded that the mere presence of a product at a plaintiff's worksite was insufficient, and that the jury should have been given an instruction along the lines of the more stringent *Dumin* exposure standard requiring that plaintiffs prove their exposure to the *particular product of a particular defendant*.

Most recently, in *McGonnell v. Kaiser Gypsum Company, Inc.*, 98 Cal.App.4th 1098 (2002), the First Appellate District confirmed that proof of exposure requires more than merely evidence that a defendant's product was present at a plaintiff's workplace. Instead, a plaintiff must present sufficient evidence to establish not only that a defendant's product was present, but also that he or she was actually exposed to that product.

In *McGonnell*, the plaintiffs filed a wrongful death action against Kaiser Gypsum Company, Inc. and numerous other defendants alleging that the decedent James McGonnell died of asbestos-related lung cancer. Plaintiffs alleged that McGonnell had been exposed to asbestos-containing products at various locations over many years in the course of his employment as a plumber and pipefitter at the California Pacific Medical Center. Prior to his death, McGonnell testified in deposition that he regularly cut through walls where he would encounter insulation and fireproofing materials, including asbestos-containing materials. He could not identify having been exposed to Kaiser Gypsum materials containing asbestos, nor could he offer other product identification evidence aside from declarations that Kaiser products were used in construction at the medical center. Records showed that Kaiser sold products that were used in the construction of the medical center, and there was a "possibility" that McGonnell could have encountered such materials. The court held, however, that such a "possibility" was totally insufficient.

The trial court granted Kaiser's summary judgment motion, and the Court of Appeal affirmed that decision, holding that "all that exists in this case is speculation that at some time McGonnell might have cut into a wall that might have contained Kaiser joint compound that might have contained asbestos. The evidence creates a dwindling stream of probabilities that narrow into conjecture."[16]

Consistent with *Lineaweaver, Dumin, Rutherford and McGonnell*, the Morgan Lewis team has had repeated success convincing California courts to apply the more stringent standard for establishing exposure to clients' chemical products. For example, in a recent toxic tort trial, the Los Angeles Superior Court granted a motion for new trial on the ground that all fifteen plaintiffs who obtained verdicts against the chemical distributor defendant failed to present sufficient evidence that they were exposed to the client's product. Although plaintiffs presented evidence that the defendant's product arguably was present at their workplace, none offered any evidence to support any reasonable inference that they were actually exposed to that product. Similarly, in another recent toxic tort trial in Northern California the Santa Clara Superior Court granted a defense nonsuit motion following plaintiff's case in chief on the ground that the plaintiff failed to prove that he was exposed to any of the six represented companies' benzene-containing products at a sufficient dose to have been a substantial factor in causing his alleged benzene-related disease.

In short, recent California case law and our practical experience indicate the perhaps obvious conclusion that in addition to expert-intensive medical causation challenges, a straightforward product identification and exposure defense should not be overlooked in litigating toxic tort cases.

CHALLENGING MEDICAL CAUSATION

Toxic torts, by their nature, present unique proof problems to plaintiffs as many diseases or illnesses do not manifest themselves for many years after an exposure to a specific chemical. As a result, causation is often the most important defense in a toxic tort case. Under state and federal law, plaintiffs must demonstrate that the exposure to a specific chemical, supported by expert opinion to a reasonable medical probability, caused a certain disease. However, the California state and federal standards diverge when deciding whether to admit or exclude an expert opinion on this key causation issue. In

California state court, the "general acceptance" test established in the case of *Frye v. United States*, 293 F.3d 1013 (D.C. Cir. 2002) applies, while the federal courts are governed by the U.S. Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Thus, whether a case is filed in state or federal court may greatly influence the resolution of the causation issue.

Ninth Circuit

The federal standard governing the admissibility of expert testimony is well established as the U.S. Supreme Court has spoken in a case originating from the Ninth Circuit. In *Daubert*, the Supreme Court rejected the *Frye* test, instead using the *Frye* standard of whether an opinion is "generally accepted in the scientific community" as only one of several indicia of reliability. The Supreme Court interpreted Rule 702 of the Federal Rules of Evidence as requiring "a standard of evidentiary reliability." To evaluate the reliability of proffered scientific testimony under Rule 702, the Court identified the following factors as relevant: (1) the testability of the proffered scientific theory; (2) whether the scientific opinion has been published or subjected to peer review; (3) the error rate of the technique; and (4) whether the opinion is generally accepted in a relevant scientific community.

The federal cases subsequent to *Daubert* have strictly interpreted that case to allow the trial judge, as a "gatekeeper," to exclude speculative expert testimony or "junk science." The court in *General Electric Company v. Joiner*, 522 U.S. 136 (1997) clarified that, despite *Daubert*'s focus on an expert's methodology as opposed to his or her conclusions, "a court may conclude that there is simply too great an analytic gap between the data and the opinion proffered." *Daubert* and *Joiner* are powerful authority for requesting an evidentiary hearing to exclude experts and their methodology where the testimony is not reliable.

Cases interpreting *Daubert* and *Joiner* have focused on the admissibility of epidemiology and whether plaintiffs can show through statistical association that a cause and effect relationship exists. Epidemiology is the study of disease occurring in human populations. It examines the relationship between the disease and a factor suspected of causing the disease, using statistical methods to determine the likelihood of causation. Many plaintiffs' experts attempt to rely upon inadequate epidemiology to support their opinions on causation.

The Ninth Circuit recently evaluated the sufficiency of epidemiology in the case of *In re Hanford Nuclear Reservation Litigation* ("*Hanford*"), 293 F. 3d 1124 (2002). *Hanford* involved claims of multiple plaintiffs exposed to radiation from the Hanford Nuclear Reservation. The District Court granted summary judgment on the ground that plaintiffs could not sufficiently establish the strength of the association between their radiation exposure and their claimed injuries. The District Court held that plaintiffs could not demonstrate that their alleged exposure to radiation doubled the risk of the injuries in question when compared to the risk experienced by the general population.

The Ninth Circuit reversed, holding that the "doubling of the risk" standard used by the District Court was error. The Court, in reversing the summary judgment, reasoned that the District Court had blurred general and specific causation and placed an unfair burden on plaintiffs to demonstrate general causation. The Ninth Circuit emphasized that in order to establish causation, a plaintiff must show that radiation was both capable of causing his or her disease ("general causation") and that it, in fact, caused his or her disease ("specific causation").[17] The admissibility of epidemiology may be different depending upon whether the hearing involves general or specific causation. The Court concluded that epidemiology by itself is not the sole method of establishing general causation. Plaintiffs should have been permitted to establish by other scientific evidence that radiation was capable of causing the types of injuries they allegedly suffered.

One significant factor influencing the Ninth Circuit was that it was undisputed that radiation is capable of causing a broad range of illnesses, even at the lowest doses. Notably, the *Hanford* Court reaffirmed the "doubling of the risk" standard in cases where epidemiology studies are the sole basis of causation.

At first blush, the *Hanford* case appears to be an adverse one for the defense bar. However, a careful reading of that case indicates that it was only evaluating general causation where there is evidence other than epidemiology to demonstrate that a

chemical has the capacity to cause a particular disease. It does not apply to specific causation, that is, whether a particular exposure actually caused a specific disease in an individual plaintiff. Thus, the *Hanford* case is limited in application and still leaves open the possibility of *Daubert* challenges to specific causation and even general causation in cases where the only evidence supporting the expert opinion is epidemiology studies.[18]

California State Courts

California state courts apply a more liberal standard for plaintiffs, and are reluctant to exclude expert opinions on reliability grounds. In *People v. Kelly*, 17 Cal. 3rd 24 (1976), the California Supreme Court adopted the rule of "general acceptability" set forth in *Frye v. United States*. The rule provides that an expert's opinion is deemed reliable so long as the methodology upon which it is based is generally accepted in the scientific community. After the U.S. Supreme Court ruled in *Daubert*, the California Supreme Court revisited the issue and concluded that the *Kelly/Frye* formulation survived *Daubert* in the State of California.

The rule in *Kelly/Frye* is that expert testimony based on novel scientific techniques is not admissible where the techniques themselves are not generally recognized as valid by the scientific community. In practice, this means that trial courts only exclude an expert opinion if it is based on novel scientific techniques.[19]

The net result is that California state courts will not scrutinize the admissibility of expert testimony, leaving the reliability of experts as an issue to be resolved by the trier of fact, rather than by a pretrial motion. It is often said by California trial court judges that a challenge to expert testimony goes to the weight, not the admissibility of the evidence. Given that the *Kelly/Frye* rule controls in California, sophisticated plaintiffs' attorneys often prefer to litigate in state court where it is less likely that a state trial judge will exclude their expert's opinions.

STATUTES OF LIMITATIONS DEFENSES: THE PUBLICITY TRIGGER

Nearly every toxic exposure case involves the delayed discovery by the plaintiff of his or her injury. In those situations, the statute of limitations in California[20] begins to run when the plaintiff suspects or should have suspected that the injury was caused by wrongdoing or that someone has done something wrong to him or her.[21] Once the plaintiff suspects wrongdoing, he or she must find the facts necessary to sue; it is the discovery of the facts, not their legal significance, that starts the statute running.[22] A question which often arises in highly publicized toxic tort cases is whether a plaintiff's duty to investigate the facts of his or her claim can be triggered by newspapers, magazine articles, and television reports and other publicity evidence.

Two recent California appellate opinions have addressed the validity of this publicity-based statute of limitations defense. In *McKelvey v. Boeing North America, Inc.*, 74 Cal.App.4th 151 (1999), the Second Appellate District held that the deluge of newspaper, radio and television reports concerning the alleged contamination at Boeing's Rocketdyne facilities triggered the plaintiffs' duty to investigate whether their injuries were caused by the alleged contamination.

The *McKelvey* plaintiffs claimed that Boeing and other companies had contaminated the land and water, causing them to suffer various personal injuries and property damages. Plaintiffs alleged that they were unaware of their injuries even though public notices and newspaper articles had been published about the allegedly tortious conduct. In its demurrer to plaintiffs' complaint, Boeing asked the court to take judicial notice of 117 newspaper, radio, and television reports concerning the contamination at its Rocketdyne facilities to "show that anyone living in Los Angeles County . . . would have read or heard about the contamination at and around the Rocketdyne facilities."[23] After having reviewed the publicity evidence, the Court of Appeal concluded that the publicity was sufficient to trigger commencement of the statute of limitations and

affirmed the trial court's order sustaining the defendants' demurrer without leave to amend.

Six months later, in *McGill v. M.J. Brock & Sons, Inc.*, 76 Cal.App.4th 1396 (1999) (*ordered not published*), the Fourth Appellate District reached the opposite conclusion in an unpublished decision. *McGill* involved alleged misrepresentations by a home builder to purchasers concerning the peace and tranquility of a residential subdivision. The court concluded that newspaper articles and other publicity surrounding the passage of a ballot initiative authorizing the expansion of a state highway adjacent to the homes did not trigger the statute of limitations. The court stated it "could not say that the news media reporting on the highway project was so pervasive that any reasonable person would have been aware of the project and would have been under a duty to investigate the project's potential impact on that person's property." The *McGill* Court concluded that the publicity was insufficient to put the plaintiffs on inquiry notice of their claims.

The *McGill* Court discredited the use of constructive or imputed knowledge to trigger the commencement of the statute of limitations. The Court commented that "[r]eal-life plaintiffs are motivated to file suit only by facts of which they have actual knowledge, not by facts as to which they have only constructive or imputed knowledge. Were we to . . . allow the duty to inquire to be triggered by facts of which a plaintiff has only imputed knowledge, we would run the risk of barring legitimate claims by deserving victims of actual fraud."[24] This holding departs from the vast majority of California cases applying the discovery rule, which routinely hold that the statute of limitations may commence to run upon plaintiff's constructive or imputed knowledge of his or her claims as well as upon his or her actual knowledge.

Notably, the California Supreme Court denied the petitions for review filed in both *McKelvey* and *McGill*. In *McKelvey*, the Court denied the petition for review and allowed the appellate court decision to stand. In *McGill*, however, the Court denied the petition for review and specifically directed the reporter of decisions not to publish the opinion in the California appellate reports. Under California's Rules of Court, *McKelvey* therefore remains good law and can be cited as precedent; whereas the *McGill* appellate decision cannot be cited by any party or relied upon by any court.

Interestingly, notwithstanding the *McKelvey* decision, the Ninth Circuit Court of Appeal recently cast some doubt on the ability of defendants to rely on publicity evidence to trigger commencement of the statute of limitations in *O'Connor v. Boeing North American, Inc.*, No. 00-56141, 2002 U.S. App. LEXIS 24253 (9th Cir. Nov. 27, 2002). The Ninth Circuit held that the federal CERCLA commencement date for determining when the statute of limitations begins to accrue governs environmental litigation cases, effectively preempting the California discovery rule.

In *O'Connor*, the District Court for the Central District of California granted summary judgment in favor of defendants against claims alleging that hazardous radioactive substances released from defendants' nuclear and rocket testing facilities caused plaintiffs' latent illnesses.[25] The District Court determined that plaintiffs' action was barred by California's one-year statute of limitations, as all plaintiffs knew, or should have known ("suspected"), of their diagnoses more than one year before they filed suit due to wide-spread media coverage. In so holding, the District Court declined to apply CERCLA's delayed discovery rule (42 U.S.C § 9658(a)),[26] concluding that the standard for commencement of the statute of limitations under California law is the same as that under CERCLA and, therefore, there was no preemption. *Id.* at 1036, n.19.

On appeal, the Ninth Circuit Court of Appeal reversed this portion of the District Court's holding.[27] The Court determined that CERCLA's discovery standard was different from the California standard and preempted California's "reasonably should have suspected" standard because it resulted in an earlier commencement date. CERCLA's discovery standard required that a plaintiff knew, or reasonably should have known, *both* the existence and *cause* of his or her injury, rather than merely requiring that a plaintiff suspect, or should suspect, that his or her injury was caused by some wrongdoing as under California's discovery standard. Because factual issues remained as to whether some plaintiffs could have gained the requisite knowledge required by CERCLA's

discovery standard based on media coverage alone, the Court remanded the case.

Significantly, the Court also held that the absence of a CERCLA cause of action did not preclude the application of the CERCLA discovery standard. The Court stated that the CERCLA commencement date for accrual of the statute of limitations applies to all "claims 'under State law' for personal injury relating to environmental contaminants."[28]

In a dissenting opinion, Circuit Judge Diarmuid O'Scannlain stated that there is no difference between the federal discovery standard under CERCLA and California's state discovery rule standard for determining when the statute of limitations commences to run. Moreover, Judge O'Scannlain wrote that even under the federal discovery rule, summary judgment should have been affirmed because even federal cases have imputed constructive knowledge to plaintiffs based on extensive and widespread publicity. Judge O'Scannlain concluded that summary judgment should have been affirmed because the plaintiffs failed to adequately explain how a reasonable person lacked constructive knowledge of his or her claims in light of the extensive news coverage about the contamination.

Clearly, given the differing opinions in *McKelvey* and *McGill* as well as the recent Ninth Circuit opinion in *O'Connor*, the issue of whether publicity evidence is sufficient to trigger commencement of the statute of limitations and bar plaintiffs' untimely filed complaints is hotly contested. It remains to be seen how the California Supreme Court and/or the U.S. Supreme Court may handle this issue.

MEDICAL MONITORING CLAIMS UNDER CALIFORNIA LAW

Following the California Supreme Court's decision in *Potter v. Firestone Tire and Rubber Company* that medical monitoring is a compensable item of damages, plaintiffs now routinely pursue claims for "medical monitoring" damages in their toxic tort cases.[29]

A medical monitoring claim seeks to recover the anticipated costs of future, periodic medical examinations intended to detect latent diseases that could develop as a result of an exposure to toxic substances. Medical monitoring claims are unique in that they typically involve asymptomatic plaintiffs seeking costs for future medical monitoring despite the absence of any current manifestation of disease.

Prior to *Potter*, debate existed as to whether medical monitoring damages were permissible as a result of a defendant's tortious conduct despite the absence of an actual present, physical injury. In *Potter*, the Supreme Court answered the debate, holding that medical monitoring damages absent physical manifestation of disease were available in certain circumstances. The Court held that the "reasonably certain need for medical monitoring is an item of damage for which compensation should be allowed."[30]

The Court instructed that in determining the reasonableness and necessity of medical monitoring, the following factors should be considered: (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnoses.[31]

The five factors were intended to provide "substantial evidentiary burdens" for toxic exposure plaintiffs.[32] Moreover, the five factors "do not allow medical monitoring damages based solely upon a showing of an increased but unquantified risk resulting from exposure to toxic chemicals."[33] Toxic exposure plaintiffs may only recover medical monitoring damages if the evidence establishes the necessity, as a direct consequence of the exposure at issue, for specific monitoring beyond that which the individual should pursue as a matter of general good sense and foresight. Plaintiffs cannot recover for preventative medical care and checkups to which members of the public at large should prudently submit.[34]

Based on *Potter*, mass toxic tort plaintiffs now almost always include claims for medical monitoring on behalf of all asymptomatic plaintiffs named in the particular action. Notwithstanding the *Potter* Court's recognition of medical monitoring as a compensable item of damages, however, the scope of the remedy is limited to those cases where plaintiffs can overcome their "substantial evidentiary burdens" of proving the necessity for medical monitoring as a direct result of exposure to a particular defendant's toxic chemical. Defendants can defeat claims for medical monitoring by focusing on a plaintiff's lack of evidence supporting the five factors espoused by the *Potter* Court for the recovery of such damages. A plaintiff's proof is insufficient unless he or she can 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 itself reasonable.[35]

Additionally, even where a plaintiff has demonstrated that the *Potter* factors weigh in favor of the recovery of medical monitoring damages, defendants may argue in many cases that a plaintiff's *preexisting medical condition* precludes the recovery of medical monitoring damages. The requested medical monitoring due to an alleged toxic exposure must be in addition to, or different from, the type of monitoring a plaintiff may require due to a preexisting condition.

In *Gutierrez v. Cassiar Mining Corporation*, 64 Cal.App.4th 148 (1998), the Court reversed the jury's award of medical monitoring damages on the ground that the trial court failed to properly instruct the jury that a defendant should not be liable for medical monitoring where monitoring is already required by a plaintiff's preexisting medical condition. So, for example, even if a defendant negligently exposes a smoker to toxins that significantly increase his risk of cancer, that defendant is not liable for reasonably certain future medical monitoring costs unless the recommended monitoring calls for tests or examinations that are in addition to or different from the type of monitoring the smoker should prudently undertake regardless of the toxic exposure.[36] The plaintiff alone must bear any amount of the medical monitoring costs which his or her preexisting conditions would already require, and recoverable amounts must be new or different.

MEDICAL MONITORING CLASS ACTIONS

In light of fairly stringent class certification requirements, California courts have not certified class actions in the toxic tort context. However, with the increase of medical monitoring claims following Potter, the issue has arisen as to whether the court can properly certify a "medical monitoring" class action. The Court of Appeal addressed this issue in *Lockheed Martin Corporation v. Superior Court*, 79 Cal.App.4th 1019 (2000) (superseded by grant of review), and the issue is now pending in the California Supreme Court.

The *Lockheed* action involved a putative class action which had been consolidated for pretrial proceedings with several individual actions under the caption *In re Redlands Tort Litigation*. The plaintiffs alleged that various manufacturing defendants discharged chemicals which contaminated the city's groundwater. The plaintiffs sought, among other damages, a court-supervised medical monitoring program funded by defendants. Plaintiffs moved for class certification of a medical monitoring class, defined as "People who were exposed to water contaminated with any of the following chemicals . . . at levels at or in excess of the dose equivalent of the MCL (Maximum Contaminant Level), or in excess of the safe dose where there is no MCL, for some part of a day, for greater than 50% of a year, for one or more years from 1955 to the present" within specified geographical limits.[37]

The trial court certified the medical monitoring class, finding that the plaintiffs had met their burden of proof under California law. In a defense-favorable opinion, the Court of Appeal reversed, holding that the trial court abused its discretion by certifying the class because there was an insufficient community of interest among the class members.

The Court of Appeal found that although significant common issues of fact existed among class members, the common issues would be overwhelmed by the numerous inquiries necessary to establish each individual's claim for medical monitoring. Consistent

with California's trend against class certification in toxic tort cases, the Court stated that "Many courts, both California and federal, have found that mass tort actions for personal injuries are not appropriate for class treatment due to the plethora of individual factual issues regarding liability, causation, and damages. This predominance of such individual issues is even more apparent in the present claim for medical monitoring."[38]

In arguing in favor of class certification, the plaintiffs in *Lockheed* relied on several federal decisions that certified classes for medical monitoring where there had been toxic exposure. The Court of Appeal rejected the federal decisions in light of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 138 L.Ed.2d 689 (1997), that class certification which sought to achieve a global settlement of asbestos claims was inappropriate where different class members were exposed to different products for different amounts of time, in different ways, and over different periods. The *Lockheed* Court explained that in light of *Amchem* and the numerous California cases directly on point, plaintiffs' reliance on federal decisions was unpersuasive.

Significantly, in July 2000, the California Supreme Court granted review of the *Lockheed* decision. Although briefing and oral argument have been completed, the parties and the community of toxic tort lawyers anxiously await an opinion from California's highest court.

CONCLUSION

As demonstrated above, there is a growing and evolving body of California case law in the field of toxic tort litigation. To combat plaintiffs counsels' continued filing of poorly-pled, generic complaints involving hundreds if not thousands of plaintiffs, defendants should look to the favorable case law supporting the use of CMOs and *Cottle* orders to streamline discovery and require plaintiffs to prove a *prima facie* case of causation early in the litigation. Additionally, defendants should look to causation challenges, statute of limitations defenses, product identification and exposure defenses, and related case law establishing evidentiary prerequisites for plaintiffs to satisfy before proceeding to a jury with their claims.

ENDNOTES

1. *See, e.g.*, California Code of Civil Procedure § 128.

2. The federal *Manual for Complex Litigation* similarly endorses the use of CMOs. *See* §§ 33.2 and 33.22 (3d ed. 1995).

3. *Asbestos Claims Facility v. Berry & Berry*, 219 Cal.App.3d 9, 23 (1990). The Court in *Berry & Berry* also noted that courts "face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants." *Id.* at 24-25.

4. *See Cottle v. Superior Court*, 3 Cal.App.4th 1367 (1992); s*ee also, Lore v. Lone Pine Corp.*, NL-33606-85 (J.J. Super. Ct. 1986) appeal dismissed, No. A-2502-86T8 (N.J. App. Div. 1987).

5. *Cottle, supra*, 3 Cal.App.4th 1367.

6. *Id.* at 1373.

7. *Id.*

8. *Id.* at 1387-88; *See also, Jones v. Ortho Pharmaceutical Co.*, 163 Cal.App.3d 396 (1985) ("In a personal injury action, causation must be proven within a reasonable medical probability based upon competent expert testimony").

9. *Lu v. Superior Court*, 55 Cal.App.4th 1264 (1997).

10. *Bockrath v. Aldrich Chemical Co.,* 21 Cal.App.4th 71 (9th Cir. 1999).

11. *Id.* at 80-81.

12. *Dumin v. Owens-Corning Fiberglas*, 28 Cal.App.4th 650, 655 (1994) (citing *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 816-817; *Lockwood v. AC&S, Inc.* (1987) 109 Wn.2d 235, 744 P.2d 605).

13. *Id.* at 982, fn. 12.

14. *Id.* at 1416-1417.

15. *O.C. Patterson, et al. v. E.I. Dupont De Nemours & Company, Inc.* (Case No. B113317) (February 25, 1999, unpublished), at p. 54 (relying on *Lineaweaver, supra*, 31 Cal.App.4th at 1416; *Hunter v. Pacific Mechanical Corp.*, 37 Cal.App.4th 1282, 1289 (1995) (holding "the mere fact that [the defendant asbestos contractor] was potentially present at Hunter's worksite was insufficient to create a triable issue of fact regarding the causal link between Hunter's asbestos-related disease and [defendant's] activities.").)

16. *McGonnell, supra,* 98 Cal.App.4th at 1105.

17. *See Bonner v. ISP Technologies, Inc.*, 259 F. 3rd 924 (8th Cir. 2001)(holding to prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like that suffered by the plaintiff and human beings subjected to the same level of exposure as the plaintiff, and that the toxin was the cause, or among the causes, of plaintiff's injury).

18. On October 29, 2002, the Ninth Circuit Court of Appeal unanimously denied a defense motion for reconsideration of the *Hanford* decision.

19. *See e.g., Wilson v. Phillips*, 73 Cal.App.4th 250 (1999) (applying *Kelly/Frye* rule and excluding psychiatric opinion based upon novel and unproven repressed memory technique because "the *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that

is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate . . . in most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them"); *People v. Ward*, 71 Cal. App 4th 368 (1999) (finding that California distinguishes between expert medical opinion and scientific evidence, the former is not subject to the special admissibility rule of *Kelly/Frye* . . . *Kelly/Frye* applies only to cases involving novel devices or processes, not to expert testimony. . . .").

20. California has a three year statute of limitations for property damage claims and, until 2003, has had a one year statute of limitations for personal injury claims. Significantly, the Legislature changed the personal injury statute of limitations to *two years* effective January 2003.

21. *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109 (1988).

22. *Id.* at 663; *see also, Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125 (1991) ("[i]f a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with the knowledge of matters which would have been revealed by such an investigation").

23. *McKelvey, supra,* 74 Cal.App.4th at 162.

24. *McGill*, 76 Cal.App.4th at 1396.

25. *O'Connor v. Boeing North American, Inc.*, 92 F. Supp. 2d 1026 (2000).

26. CERCLA's discovery rule states in relevant part: "In the case of any action brought under State law for personal injury . . . which [is] caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute." 42 U.S.C § 9658(a)(1).

27. *O'Connor, supra*, 2002 U.S. App. LEXIS 24253.

28. *Id*. at 2002 U.S. App. LEXIS 24253, *18-*20.

29. *Potter v. Firestone Tire and Rubber Co.*, 6 Cal.4th 965 (1993).

30. *Id.* at 1006-1007.

31. *Id.* at 1009.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id*.

36. *Gutierrez v. Cassiar Mining Corporation*, 64 Cal.App.4th 148, 156 (1998).

37. *Lockheed Martin Corporation v. The Superior Court*, 79 Cal.App.4th 1019, 1022-1023 (superseded by grant of review).

38. *Id.* at 1025-1026 (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1123 (1988); *see also, Kennedy v. Baxter Healthcare Corp.*, 43 Cal.App.4th 799 (1996) (holding class treatment of claims of allergic reactions to latex gloves inappropriate given the "variable quagmire" of individual questions of causation and damages affecting each plaintiff)).