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Stigma Damages and Diminution of Property Claims in Environmental Class Actions

JOHN C. MCMEEKIN II
JOHN EHMANN
AARON S. MAPES*

One of the less documented effects of the 2008 U.S. housing collapse has been the rise in lawsuits seeking to recover damages for diminution of value and stigma to property. Many of these suits involve properties with little to no actual "diminished" value and simply look to collect on homes that are "underwater" or less valuable due to the depressed market, unrelated to perceived, alleged environmental conditions. While some of these claims have come in the form of condemnation, lost rent, and lost rental opportunity actions, this article focuses on a particularly dangerous variety: local and regional class actions based on actual or threatened environmental contamination. The article notes that these mass attacks pose an especially high threat of costly litigation and unjust outcomes for defendants and recommends strategies for effectively defending them in precertification discovery. The article also undertakes an elemental analysis of federal class certification requirements and explores the recoverability of environmental stigma damages.

I. INTRODUCTION

In times of economic crisis and property foreclosures, the free-flowing transaction of real estate is constrained. While this truism can be attributed to a myriad of economic factors unrelated to environmental conditions, litigants are now more frequently using environmental contamination claims to recover excess stigma damages for diminished property values and delayed sales. Unlike plaintiffs who seek environmental restoration through remedial statutes

*John C. McMeekin II is a partner of Rawle & Henderson LLP and concentrates his practice in the defense of environmental, toxic tort, and exposure cases. John Ehmann is of counsel to Rawle & Henderson LLP where he is responsible for developing and implementing defenses in a wide variety of litigation, including environmental, construction, and mass tort. Aaron S. Mapes is an associate for Rawle & Henderson LLP.
Address correspondence to John C. McMeekin II, Rawle & Henderson LLP, 1339 Chestnut Street, The Widener Building, One South Penn Square, Philadelphia, PA 19107. E-mail: JMcMeekin@rawle.com

like the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and their state equivalents, litigants can be motivated by monetary gain and are fueled by presumptions of strict liability and recovery of the costs of litigation for the prevailing party. In many cases, the avarice of the litigants is so predominant that the environmental condition that formed the basis for the claim subsequently goes unaddressed for a lack of additional financial resources. Instead, plaintiffs are using the presence of actual or threatened contamination as a pretext to shift owner's losses to otherwise attractive potentially responsible parties. Rooted in the general negative perception of environmental contamination by the public and judiciary, litigants have taken advantage of both traditional tort theories and statutory presumptions of liability to convert unsubstantiated fears and subjective assessments into financial riches.

The purpose of this article is to further explore environmental stigma damages and to analyze the growing use of class actions for recovery of the same. Section I of the article begins by analyzing stigma damages and recent housing trends. Here we distinguish stigma damages and diminished value, explore established requirements for the recovery of stigma damages, and explain the notable increase in stigma damage suits premised on environmental contamination. The article continues in section II with an analysis of environmental class actions. This section undertakes an elemental analysis of class certification and includes examples of recent environmental contamination suits. Finally, section III concludes the article with a discussion of specific strategies to challenge stigma damage claims in precertification discovery. These include the use of experts, undertaking a targeted investigation, and taking steps to avoid litigation.

II. STIGMA DAMAGES

A. Defining and Quantifying Stigma Damages

What constitutes stigma is necessarily subjective; to quantify it requires defining its parameters. Courts often speak in terms of stigma damages and diminished value interchangeably. But the two are not always the same. Perhaps the best way to understand the difference is to think in terms of a specific physical possession or asset such as a car.

> A vehicle suffers diminished value when it sustains physical damage in an accident, but due to the nature of the damages, it cannot be fully restored to its pre-loss condition. The remaining, irreparable physical damage, such as, for example, weakened metal which cannot be repaired and which results in diminished value. In contrast, stigma damages occur after the vehicle has been fully restored to its pre-loss condition, but it carries an intangible taint due to it having been involved in an accident.[1]

[1] *Moeller v. Farmers Ins. Co. of Washington*, 229 P.3d 857, 861 (Wash. Ct. App. 2010).

In the context of environmental exposures, stigma can also be defined as the subjective potential by a purchaser of a property to either reduce his willingness to purchase the property or to diminish the value of the property due to negative perception rather than environmental contamination.

Although there has been research in an attempt to quantify the affect of stigma, whether it exists on a class level and, if so, to what degree, remains largely subjective and of varying significance based on the level of sophistication of the parties and availability of information. It is often the case that the nature and extent of contamination is unknown or misunderstood and the contamination is not as significant as rumored or perceived. When stigma damages do seem to exist, studies have shown that the damages dissipate over time and as a remediation progresses.[2] Moreover, research has consistently demonstrated that while there may be an adverse affect on the value of an impacted property, the mere presence of an environmental risk does not automatically imply devaluation.[3] A gasoline station with soil contamination, for example, may suffer little to no diminished value.[4]

The stigma that attaches to properties close to contamination has also been studied. In a 1999 study on real estate damages, Randall Bell stated:

> If market value is going to be affected [by a detrimental condition], then this particular attribute has to be given enough weight in the decision process of buyers and sellers to have a material effect on price. The detrimental condition issue has to be important to all the other variables that influence the home purchase decision (public safety, quality of schools, access to employment, church or synagogue, or friends and relatives, special features of the home, affordability, etc.). Like any detrimental condition, an analysis of market data is necessary to determine which of the issues causes a diminution value. . . .[5]

Two groundwater contamination studies illustrate this point. First, in a 1993 study by Page and Rabinowitz, the authors studied groundwater contamination in seven small towns in Wisconsin in which residents relied on private wells.[6] Despite general public disclosure of the contamination and extensive media coverage, no impact on the property values was detected.[7] Second, in a report by Mark Dotzour in 1997, Dotzour examined the effect of groundwater

[2] Albert Wilson, "The Environmental Opinion: Basis for an Impaired Opinion," *Appraisal Journal* 62 (July 1994): 410, 410–411.

[3] *Id.* See also, Larry Dale et al., "Do Property Values Rebound from Environmental Stigmas? Evidence from Dallas," *Land Economics* 75 (May 1999): 311, 312; Janet Kohlhase, "The Impact of Toxic Waste Sites on Housing Values," *Journal of Urban Economics* 30 (1991): 1, 2.

[4] Wilson, "The Environmental Opinion," 419–420.

[5] Randall Bell, *Real Estate Damages: An Analysis of Detrimental Conditions* (Chicago, IL: Appraisal Institute, 1999), 38.

[6] G. William Page and Harvey Rabinowitz, "Groundwater Contamination: Its Effects on Property Values and Cities," *Journal of the American Planning Association* 59 (Autumn 1993): 473, 477.

[7] *Id.*

contamination in Wichita, Kansas.[8] Again, he concluded that the discovery and public announcement in local media of the contamination had no effect on residential sale prices.[9]

The authors' findings have been consistent with these studies. In 2007 they took part in an analysis of fifty-seven Superfund sites and found only eighteen affected nearby property values after the site was placed on the National Priorities List.[10] Thus, even for a wide range of properties around significant contamination, actual economic injury to adjacent properties was the exception, not the norm.

These studies notwithstanding, courts have perpetuated the belief that all environmental exposures cause compensatory damages and all exposures, regardless of proximity or dose, place persons and property at risk for future harm. These beliefs defy rational assessment and run contrary to the core sciences of hydrogeology, geology, and environmental science. They also ignore carefully established regulatory limits for permissible exposures on both the federal and state levels.

B. Recovery of Stigma Damages

Plaintiffs seeking to recover stigma damages typically fall into two general categories: (1) those with property that has been physically contaminated; and (2) those with property that has not been contaminated but that is in proximity to contamination or another adverse environmental condition. Many courts have addressed stigma damages and concluded that recovery of stigma damages must be based on more than just a "proximal fear."[11] Instead, courts generally require some current or former physical contamination or actual interference with the use of the property that is separate from the perceived diminution in market value.[12] "Stigma damages are a facet of permanent damages, and recovery for stigma damages is compensation for a property's diminished market value in the absence of 'permanent physical' harm."[13] Typically, stigma damages are only recoverable when (1) there is a demonstrable temporary physical injury to land and (2) repair of the temporary damage will not return the value of the property to its prior level because of lingering

[8] See Mark Dotzour, "Groundwater Contamination and Residential Property Values," *Appraisal Journal* 65 (July 1997): 279, 283.

[9] *Id.*

[10] Katherine A. Kiel and Michael Williams, "The Impact of Superfund Sites on Local Property Values: Are All Sites the Same?" *Journal of Urban Economics* 61 (2007): 170, 175–176.

[11] See Gail L. Wurtzler, "Proximal Fear," *Daily Journal* (reprinted with permission of *Environmental Law* 1998: 2. http://www.dgslaw.com/documents/articles/291565.pdf (accessed June 4, 2010).

[12] *Burdette v. Vigindustries, Inc.*, 2012 U.S. Dist. LEXIS 15412, *19-36 (D.C. Kan. 2012); *Kemblesville HHMO Center, LLC v. Landhope Realty Company,* 2011 U.S. Dist. LEXIS 83324, *12 (E.D. Pa. 2011); *Smith v. Kansas Gas Serv. Co.*, 169 P.3d 1052, 1061 (Kan. 2007).

[13] *Walker*, 972 P.2d, 1246; *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *12.

negative public perception.[14] Some courts also recognize that stigma damages may be appropriate under nuisance law where plaintiffs show substantial and unreasonable interference with the use and enjoyment of their property.[15] Absent physical damage or substantial interference, damages based solely on the public's perception or fears are generally not recoverable.[16]

The potential for stigma damages is affected by the nature of the contamination and the availability of information. It is highly unlikely that one or more "representative" plaintiff(s) can adequately represent the summation of the concerns of an entire community. The ability to recover for stigma also depends largely on the state law's jurisprudence on damages. Depending on how a party attempts to define his claim for damages, different jurisdictions allow different recoveries. While the specifics of the law may differ from one state to the next, a number of courts have either explicitly or implicitly acknowledged the ability to recover stigma damages.[17]

[14] *Walker*, 972 P.2d, 1246; *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *12; *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 798 (3d Cir. 1994); see also *In re W.R. Grace & Co.*, 346 B.R. 672, 676 (Bankr. D. Del. 2006) (stigma damages based on fear of potential health hazards too remote and speculative).

[15] *Smith*, 169 P.3d, 1061–1062. See also *Burdette,* 2012 U.S. Dist. LEXIS 15412, *18–19; *Exxon Corp. v. Yarema*, 516 A.2d 990, 1002–1005 (Md. Ct. App. 1986) (allowing stigma damages where property not actually contaminated but where regulators prohibited landowners from using groundwater and constructing improvements thus substantially impairing use and enjoyment of property).

[16] See, e.g., *Adams v. Star Enter.*, 51 F.3d, 417, 422–423 (4th Cir. 1995) (no recovery for stigma when nuisance is not visible or otherwise capable of physical detection from plaintiff's property); *Burdette,* 2012 U.S. Dist. LEXIS 15412, *18–19 (requiring nuisance to each owner's property "separate and distinct" from diminution or stigma for class certification); *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *12 (requiring proof of "real physical damage" to each plaintiffs land as opposed to damage caused by negative publicity alone for class certification); *Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 369 (M.D.N.C. 1997) (need interference substantial enough to reduce market value); *Koll-Irvine Ctr. Prop. Owners Ass'n. v. County of Orange*, 29 Cal. Rptr. 2d, 664, 667–668 (Cal. Ct. App. 1994) (interference of property right needed to support private nuisance claim); *City of Louisville v. Munro*, 475 S.W.2d, 479, 482–483 (Ky. 1971) (a nuisance must disturb physical comfort or be offensive to physical senses); *Leaf River Forest Prod., Inc. v. Ferguson*, 662 So.2d, 648, 663 (Miss. 1995) (no common law recovery for property diminution caused by public perception absent physical harm); *Twitty v. State*, 354 S.E. 2d, 296, 303 (N.C. Ct. App. 1987) (contamination threat must amount to substantial interference with use, mere diminution in value is not enough); *Golen v. Union Corp.*, 718 A.2d, 298, 300 (Pa. Super. Ct. 1998) (diminution in value relevant to damages but not cognizable injury itself); *Walker*, 972 P.2d, 1244 (inability to use property as collateral for loan because of fear of nearby contamination insufficient to support nuisance claim); *Edgcomb v. Lower Valley Power & Light, Inc.*, 922 P.2d, 850, 860 (Wyo. 1996) (diminution in value alone is not interference with the use of property); *Hammond v. City of Warner Robins*, 482 S.E.2d, 422, 428 (Ga. App. 1997) (stigma too remote and speculative to be damage). But see *Lewis v. Gen. Elec. Co.*, 254 F. Supp. 2d, 205, 218 (D. Mass. 2003) (mere proximity to contamination sufficient for recovery); *Allen v. Uni-First Corp.*, 558 A.2d, 961, 963–965 (Vt. 1988) (court erred in limiting jury's consideration to contaminated areas where there was evidence that property values decreased based on public perception).

[17] *In re Paoli*, 113 F.3d, 463 (requiring that a property owner demonstrate physical damages to property to recover stigma damages in addition to "damage caused by negative publicity alone"); *Adams v. Star Enter.*, 51 F.3d, 417, 424 (4th Cir. 1995), (property owners could not recover stigma damages for nearby oil spill under negligence and nuisance theories because their land was not contaminated); *Berry v. Armstrong Rubber Co.*, 989 F.2d, 822, 829 (5th Cir. 1993) (affirming district court's dismissal

C. The Effect of the Recent Housing Collapse on Stigma Damage Suits

Claims to recover stigma damages are not a new phenomenon. Ever since there have been property rights, claims have been brought by landowners to recover for stigma damages as result of direct damage to their property.[18] However, stigma cases where the offending condition is undetectable and not causing real physical damage to the property are a relatively recent and dangerous trend.[19] This movement seems to have taken hold in the 1990s, likely caused by the real estate crash that accompanied the savings and loan crash of 1989.[20]

History is now repeating itself. As has been well documented, the United States housing market crashed once again in 2008 after over fifteen years of steady increases. As a result, the authors have noted an influx of stigma damage suits in the past four years, many individual cases, and several regional or local class actions premised on actual or threatened environmental contamination.[21]

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of claim for stigma damages because property owner failed to demonstrate that defendant's hazardous substances physically damaged his property); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d, 735, 744–745 (W.D. Ky. 1998) (defendant's release of PCBs onto plaintiff's property must have caused a health risk for plaintiff to recover stigma damages); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d, 715, 725 (Mich. 1992) (denying property owner's claim for property depreciation because neighboring waste site did not contaminate owner's land); *Chance v. BP Chem., Inc.*, 670 N.E.2d, 985, 993 (Ohio 1996) (affirming trial court's ruling that stigma alone is insufficient grounds for trespass claim); *Golen v. Union Corp.*, 718 A.2d, 298, 300 (Pa. Super. Ct. 1998) (denying property owner's claim for property depreciation because neighboring waste site did not contaminate owner's land); *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d, 1238, 1246 (Utah 1998) (property owners must prove that hazardous substance migrated to property and caused physical injury to recover stigma damages). But see *Lewis*, 37 F. Supp. 2d, 61 (property owners had cognizable nuisance claims because of diminished property value even though property was not contaminated); *Rudd v. Electrolux Corp.*, 982 F. Supp., 355, 372 (M.D.N.C. 1997) (North Carolina law permits recover of stigma damages for permanent nuisance, not abatable or temporary nuisance); *Santa Fe Partnership v. ARCO Products Co.*, 54 Cal. Rptr. 2d, 214, 224 (Cal. Ct. App. 1996) (landowner could not recover damages for stigma because oil contamination was "abatable and temporary, rather than permanent"); *Terra-Prod., Inc. v. Kraft Gen. Foods, Inc*, 653 N.E. 2d, 89, 91–92 (Ind. Ct. App. 1995) (property owner may recover for diminished property value if PCB contamination permanently damaged owner's land).

18 See e.g. *Berger v. Smith*, 160 N.C. 205 (1912).

19 James M. Sabovich and Heather D. Hearne, "Diminished Property Value Claims in a Diminished Real Estate Market," *Toxics Law Reporter* 24 (2009): 250.

20 *Id.*

21 See *Kemblesville*, 2011 U.S. Dist. LEXIS 83324 (stigma damage case denied in a groundwater contamination case); *Burdette*, 2012 U.S. Dist. LEXIS 15412 (stigma damage class denied in a lateral support case); See also *Hanna v. Motiva Enters., LLC*, 2012 U.S. Dist. LEXIS 36807 (S.D. N.Y. 2012) (Summary judgment motion denied in part because of potential stigma damages); *Murphy v. Both*, 84 A.D.3d, 761 (N.Y. App. Div. 2011) (Summary judgment denied in part due to potential stigma damages); *Battle Ground Plaza, LLC v. Ray*, 2010 Wash. App. LEXIS 2190 (Wash. Ct. App. 2010)(Evidence did not sufficiently show a permanent stigma would remain after remediation); *Baker v. Chevron USA, Inc*., 2011 U.S. Dist. LEXIS 95653 (S.D. Ohio 2011)(Defense motion for summary judgment granted because no actual environmental damage could be shown and stigma damages are not recoverable under Ohio law); *Lewis v. Kinder Morgan Souteast Terminals LLC*, Case No. 2:07cv48KS-MTP, 2008 U.S. Dist. LEXIS 61060 (S.D. Miss. 2008) (Summary judgment motion denied in post remediation stigma case).

While this influx may have been predictable,[22] the potential for abuse and double recoveries remains frighteningly high. For this reason, the rest of this article focuses on legal requirements and defense strategies for environmental contamination class actions with a special focus on stigma damage suits.

III. CLASS CERTIFICATION IN ENVIRONMENTAL CASES

While the vast majority of courts have denied class treatment in environmental cases,[23] other courts have been more willing to permit such claims.[24] Class

[22] Sabovich, "Diminished Property Value Claims," 250.

[23] *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 603 (D. Colo. 1990) (class defined by geographical boundaries insufficient where plaintiffs "failed to identify any logical reason relating to the defendants' activities . . . for drawing the boundaries where they did"); see also *Vickers v. Gen. Motors Corp.*, 204 F.R.D., 476, 478 (D. Kan. 2001) (denying certification of class alleging property damage from sulfuric acid where expert testimony failed to sufficiently support the proposed 1,000-meter radius around the plant as a reasonable demarcation); *Cole v. Asarco Inc.*, 256 F.R.D., 690, 697 n.3 (N.D. Okla. 2009) (denying certification of medical monitoring, nuisance, and property damage claims regarding lead contamination where plaintiffs' expert relied on "circle[s] of arbitrary radius" drawn around the mine shafts, "offered no scientific basis for the size or uniform shape of his circles, and did not link the sites replied [*sic*] upon to the actual activities of defendants or the prevailing winds"). See, e.g., *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 209 F.R.D., 323, 349–351 (S.D.N.Y. 2002) (denying class certification under Rule 23(b)(3)); *Millet v. Atl. Richfield Co.*, No. Civ. A. 98-555, 2000 WL 359979, *13 (Me. Super. Mar. 2, 2000) (issue of causation prevented certification of a class under state court rule 23(b)(3) where cause of contamination of each plaintiff's well will have to be addressed on an individual basis); *Lipinski v. Beazer East, Inc.*, 76 Pa. D.&C. 4th 479, 511–513 (Pa. Com. Pl. 2005), *aff'd*, 909 A.2d 896 (Pa. Super. Ct. 2006) (refusing to certify property valuation diminution class because of individual issues varying from property to property). See also *LaBauve v. Olin Corp.*, 231 F.R.D., 632, 678–680 (S.D. Ala. 2005) (refusing to certify a rule 23(b)(3) class alleging mercury contamination lowered property values); *Church v. Gen. Elec. Co.*, 138 F. Supp. 2d, 169, 182 (D. Mass. 2001) (landowners who sought to recover damages for alleged PCB contamination of their properties did not satisfy rule 23(b)(3) as the claims would require expert measurement of the contamination of each individual property, considering the characteristics of each property, and each property's contamination level would differ—"[t]hese differences pertain not just to damages, as plaintiffs argue, but to the threshold question of whether the contamination constitutes a nuisance or trespass"); *Martin v. Shell Oil Co.*, 198 F.R.D., 580, 592 (D. Conn. 2000) (individual issues predominated over class issues where individualized proof of causation would be necessary for each plaintiff to show that defendants' MTBE leakage reached that plaintiff's property and, if so, to what degree); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (individual issues predominated in case involving TCE groundwater contamination, where diminution in property value and other issues required individualized proof).

[24] See, e.g., *In re Three Mile Island Litig.*, 87 F.R.D., 433, 440 (M.D. Pa. 1980); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d, 1188, 1197 (6th Cir. 1988) ("In complex, mass, toxic tort accident, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy. However, where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy"); Heather M. Johnson, "Resolution of Mass Product Liability Litigation within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions," *Fordham Law Review* 44 (1996): 2329, 2365–2368; Richard O. Faulk and Kevin L. Colbert, "Reforming

certification may be sought under federal or state law.[25] Due to limitations of this article and the fact that state class action rules frequently mirror federal law, we focus primarily, but not exclusively, on situations in which plaintiffs seek class certification under federal law.

A. Rule 23

Federal Rule of Civil Procedure 23 governs class actions under federal law. While the decision to certify a class is ultimately within the sound discretion of the trial judge,[26] most courts have found that class action treatment is only appropriate where it "serves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."[27] Certification is generally, therefore, granted only where plaintiffs demonstrate a compelling need to depart from the norm.[28] Courts exercise caution in evaluating class certification motions, given the "common abuse in state court class actions . . . of [using] the class device as 'judicial blackmail' in cases that border on frivolous."[29] As explained by Judge Posner, certification of a class action, even one lacking merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[30]

For these reasons, the court must conduct a "rigorous analysis" into whether the rule 23 requirements are met.[31] While plaintiffs may argue that a

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an Abusive System: Curtailing Class Certification in Toxic Tort and Environmental Litigation," *Toxics Law Reporter* 11 (July 24, 1996): 241, 243–245 ; Jack B. Weinstein and Eileen B. Hershenov, "The Effect of Equity on Mass Tort Law," *University of Illinois Law Review* 1991: 269, 289 ("[f]aced with innovative district court solutions to seemingly intractable problems, the appellate court have begun to be more sympathetic to class actions in mass tort cases"); Pankaj Venugopal, "The Class Certification of Medical Monitoring Claims," *Columbia Law Review* 102 (2002): 1659, 1661–1663.

25 See, e.g., *LaBauve v. Olin Corp.*, 231 F.R.D., 632, 661–662 (S.D. Ala. 2005); *Church*, 138 F. Supp. 2d, 175–176; *Martin v. Shell Oil Co.*, 198 F.R.D., 580, 585 (D. Conn. 2000); *St. Joe Co. v. Leslie*, 912 So.2d, 21, 25 (Fla. Dist. Ct. App. 2005).

26 *Cross v. National Trust Life Ins. Co.*, 553 F.2d, 1026, 1029 (6th Cir. 1977); *In re Welding Fume Prod. Liab. Litig.*, 245 F.R.D., 279, 303 (N.D. Ohio 2007).

27 *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S., 147, 155 (1982).

28 See *Reilly v. Gould, Inc.*, 965 F. Supp., 588, 596 (M.D. Pa. 1997) (class action rules are "designed to test whether . . . from a practical standpoint, there are any particular compelling circumstances which make representative litigation appropriate") (internal quotation marks and citation omitted).

29 *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d, 1328, 1334 n.12 (M.D. Fla. 2008) (quoting S. Rep. No. 109–114, 20 (Feb. 28, 2005), as reprinted in 2005 USCCAN 3, 21 (Senate Judicial Committee Comments on the Class Action Fairness Act of 2005)).

30 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d, 1293, 1299 (7th Cir. 1995); see also *Castano v. Am. Tobacco Co.*, 84 F.3d, 734, 740 (5th Cir. 1996) ("[H]istorically, certification of mass tort litigation classes has been disfavored").

31 *Falcon*, 457 U.S., 161; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d, 305, 309 (3d Cir. 2008); *Smilow v. Sw Bell Mobile Sys., Inc.*, 323 F.3d, 32, 38 (1st Cir. 2003); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d, 1227, 1233 (9th Cir. 1996).

full inquiry into the merits of the claims is inappropriate when reaching the decision whether the action should be certified under, courts often need to look beyond the pleadings to the substantive claims to determine if all the rule 23 elements are satisfied.[32]

Before beginning the rule 23 analysis, the judge must be satisfied that the class is sufficiently defined and the named plaintiffs are members of the proposed class.[33] The factors to consider to determine definiteness include: (1) whether there is "a particular group that was harmed during a particular time frame, in a particular location, in a particular way"; and (2) whether class membership has been defined "in some objective manner."[34] "Generally, a class will satisfy the definiteness requirement as long as it is defined in terms of objective criteria, such as the defendants' conduct as opposed to the state of mind of the parties."[35] This is not to say that definiteness is a mere pleading requirement. In *Kemblesvlle,* a district court ruled that a plaintiff class was indefinite in a groundwater contamination case where plaintiffs sought to define their class by an arbitrary geographical boundary.[36] The court reasoned that while definitive evidence of contamination was not needed, there needed to be a "reasonable relationship" between the proposed class area and contamination, and that some evidence had to be produced to show that the contamination "may have traveled, or will ever travel" to the proposed geographic radius.[37]

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[32] 7A Wright, Miller. and Kane § 1759, 120–122; *Falcon*, 457 U.S., 160; *Coopers & Lybrand v. Livesay*, 437 U.S., 463, 469 (1978) (determining class certification "generally involves considerations that are 'enmeshed in the factual and legal issues compromising the plaintiff's cause of action.'"); *In re Hydrogen Peroxide*, 552 F.3d, 307 (court must "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits"); *Hanon v. Dataproducts Corp.*, 976 F.2d, 497, 509 (9th Cir. 1992) (court may consider evidence to ascertain whether rule 23 is met even though evidence relates to the merits).

[33] *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S., 395, 403 (1977); *In re Sch. Asbestos Litig.*, 56 F.3d, 515, 519 (3d Cir. 1995) ("class must be clearly defined") (citations omitted); *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D., 437, 478 (D.N.J. 2009) ("It has long been held that rule 23 implicitly requests that prospective plaintiffs propose a class definition that is readily ascertainable based on objective criteria") (citations omitted); *Rink v. Cheminova, Inc.*, 203 F.R.D., 648, 659–660 (M.D. Fla. 2001) (overboard and ill-defined class of verdicts allegedly exposed to pesticide spray could not be certified). See also *Manual for Complex Litigation*, 4th ed. (Washington, DC: Federal Judicial Center, 2004), § 21.222, 270 (it is necessary to have "the definition [of a class] that is precise, objective, and presently ascertainable").

[34] *Rowe*, 262 F.R.D., 455 (D.N.J. 2009).

[35] *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D., 471, 477 (S.D. Ohio 2004) (internal citations omitted).

[36] *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *13–25.

[37] *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *17–18; see also *Agnostino v. Quest Diagnostics Inc.*, 256 F.R.D., 437, 478 (D.N.J. 2009) (denying certification for definiteness when a class asserting violations of the Telephone Consumer Protection Act of 1991 defined their proposed class as "all residents and businesses who have received unsolicited facsimile advertisements"); *Benefield v. Int'l Paper Co.*, 270 F.R.D., 640, 644–645 (denying certification for definiteness where "plaintiff's expert evidence did not support a determination of class-wide contamination," and there was a lack of facial evidence of unique diminution in property value).

Once this preliminary threshold has been met, plaintiffs seeking class certification bear the burden of proving four statutory requirements.[38] Rule 23(a) requires:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defense of the representative parties are typical of the claims or defense of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.[39]

Additionally, putative plaintiffs must satisfy one of following rule 23(b) requirements:

1. There is a risk that prosecution of separate actions would result in incompatible standards of conduct for the party opposing certification or create risk of prejudice to individual claim members not parties to the actions;
2. Injunctive or declaratory relief would benefit the class as a whole; or
3. Common questions of law or fact predominate over questions affecting individual members and the class is the superior method for a fair and efficient adjudication of the case.[40]

The 23(a) requirements are known as numerosity, commonality, typicality, and adequacy. The 23(b) requirements are generally referred to by their statutory citation: 23(b)(1), 23(b)(2), and 23(b)(3). We will briefly address each of these requirements in turn.

1. Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder is impracticable. In evaluating the practicality of joinder, courts typically consider: (1) the size of the potential class; (2) the geographic locale of the members of the class; and (3) the relative ease or difficulty in identifying members of the class for purposes of joinder.[41] "[A] plaintiff or defendant with a small but geographically diverse class may meet the requirement of Rule 23(a)(1), whereas a centrally located class of similar size might not."[42] A class is only sufficiently numerous if "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary

[38] *Amchem Prod., Inc. v. Windsor*, 521 U.S., 591, 614 (1997); 7A Charles A. Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § *1753* (St. Paul, MN: West, 2005), 45, § 1759, 117 ("Wright, Miller, and Kane").
[39] Fed. R. Civ. P. 23(a).
[40] Fed. R. Civ. P. 23(b).
[41] *Ardrey v. Fed. Kemper Ins. Co.*, 142 F.R.D., 105, 110 (E.D. Pa. 1992).
[42] 1 Newberg § 3:6, 255–256.

drain on the energies and resources of the litigants should [plaintiffs] sue individually."[43]

Rule 23 is designed to preclude "overbroad class definitions."[44] "The class must be sufficiently identifiable without being overly broad."[45] Consequently, "[t]he definition of a class should not be so broad so as to include individuals who are without standing to maintain the action on their own behalf."[46] Moreover, "[t]o determine if an individual is a class member, a court must be able to do so by reference to the class definition and without inquiry into any sort of fact-finding on the merits of the case. If determining class membership requires a mini-hearing on the merits of each class member's case, the proposed class definition and class action are untenable."[47]

Once the court determines that a potential class actually exists that is precise, objective, and presently ascertainable, it will consider the size of the proposed class. The courts, however, have not prescribed an exact numerical cutoff. Thus, whether the numerosity requirement is met depends on the facts of each case.[48] Without some "reasonable and supported estimates" of class size beyond mere speculation, courts are reluctant to conclude that the proposed class members are too numerous to join as individually named parties.[49] While plaintiffs need not establish an exact number of putative class members, a mere allegation of numerosity does not meet rule 23's dictates.[50]

"Courts and commentators have found it easy to slip into the pattern of referring to Rule 23(a)(1) simply as a test of numerosity, because large classes are common, and the Rule 23(a)(1) prerequisite is satisfied in such cases solely on the basis of the number of class members. Number, however, is only one of several considerations."[51] In fact, by its express language, rule 23(a)(1) is not a numerosity requirement in isolation. Instead, it requires that the class be so numerous "that joinder of all members is impracticable." Courts must

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[43] *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d, 451, 456 (Pa. Super. Ct. 1982).

[44] *Amchem Prod. Inc. v. Windsor*, 521 U.S., 591, 620 (1997).

[45] *Sanneman v. Chrysler Corp.*, 191 F.R.D., 441, 445 (E.D. Pa. 2000); *In re Sch. Asbestos Litig.*, 56 F.3d 515, 519 (3d Cir. 1995) ("class must be clearly defined") (citations omitted); *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437, 478 (D.N.J. 2009) (Class definition must be "readily ascertainable based on an objective criteria.") (citations omitted). See also *Manual for Complex Litigation*, 4th ed., § 21.222, 270 (class definition must be "precise, objective, and presently ascertainable").

[46] *Clay v. Am. Tobacco Co.*, 188 F.R.D., 483, 490 (S.D. Ill. 1999).

[47] *Kondratick v. Beneficial Consumer Disc. Co.*, No. Civ. A. 04-4895, 2006 WL 305399, *7 (E.D. Pa. Feb. 8, 2006).

[48] See, e.g., *Gen. Tel. Co. of Nw, Inc. v. EEOC*, 446 U.S., 318, 330 (1980); *Perez-Funez v. Dist. Dir., INS.*, 611 F. Supp., 990, 995 (C.D. Cal. 1984).

[49] *Rink v. Cheminova, Inc.*, 203 F.R.D., 648, 657 (M.D. Fla. 2001).

[50] See *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d, 925, 930 (11th Cir. 1983); *Vergara v. Hampton*, 581 F.2d, 1281, 1284 (7th Cir. 1978).

[51] Herbert B. Newberg and Alba Conte, *Newberg On Class Actions,* 4th ed. (St. Paul, MN: West, 2002) § 3:6, 250.

therefore analyze the numerosity requirement not simply as a numbers game but rather with an eye towards whether joinder is not practical.[52]

Plaintiffs in environmental contamination cases frequently attempt to define a class with reference to some geographic boundaries. Some courts have allowed such class definitions.[53] Other courts, however, have emphasized that plaintiffs' class definition must have some relationship to the defendants' activities.[54]

2. Commonality

Rule 23(a)(2) requires that plaintiffs demonstrate that there "are questions of law or fact common to the class." This threshold is generally low.[55] However, it is not sufficient simply to have been exposed to the same event or similar conditions.

The District of New Jersey was recently presented with a question of whether to certify a significant groundwater contamination case involving both impacted and nonimpacted properties.[56] The case, *Rowe*, involved a request to certify a class of individuals owning wells or receiving water from facilities within two miles of the DuPont Chambers Works plant and whose water was allegedly contaminated. The potential class at the time of the request for certification exceeded 14,000 persons. The trial court held that proofs necessary for certain common law causes of action such as public and private nuisance and strict liability would be common to all or a subclass of affected residents and as such entered an order granting class certification in part, establishing a subclass and denying certain other aspects of the requested class certification. In effect, the court accepted that the proof necessary for these causes of action would be common but left for another day whether the

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[52] See *Daffin v. Ford Motor Co.*, 458 F.3d, 549, 552 (6th Cir. 2006) (numerosity not strict numerical test); *Burdette,* 2012 U.S. Dist. LEXIS 15412, *37 (subclass of fifty-four property owners within a confined area not necessarily so large as to make joinder impractical).

[53] See, e.g., *Yslava v. Hughes Aircraft Co.*, 845 F. Supp., 705, 712 (D. Ariz. 1993) (certifying geographic class geographic when plaintiffs lived and went to school where defendant supplied contaminated drinking water); *Cook v. Rockwell Int'l Corp.*, 151 F.R.D., 378, 382 (D. Col. 1993) (certifying geographic class based on dose or exposure contours of radioactive and nonradioactive materials); *Reilly v. Gould, Inc.*, 965 F. Supp., 588, 596 (M.D. Pa. 1997) (finding definable class existed based on geographic boundaries, but ultimately granting defendant's motion to dismiss).

[54] See *Kemblesville*, 2011 U.S. Dist. LEXIS 83324, *25–27 (plaintiffs failed numerosity requirement because the geographic estimate for contamination was "purely speculative, and conclusory allegations do not satisfy *Rule 23(a)(1)'s* numerosity requirement"); *Daigle*, 133 F.R.D., 602–603 (plaintiffs failed to identify geographic class because they "failed to identify any logical reason relating to defendants' activities"); *Alliance to End Repression v. Rochford*, 565 F.2d, 975, 978 (7th Cir. 1977) ("[t]he important distinguishing characteristics of [a class] . . . is that . . . [its] scope is defined by the activities of the defendants").

[55] *Gates v. Rohm and Haas Co.* 265 F.R.D., 208, 215 (E.D. Pa., 2010), citing *Georgine v. Amchem Prod., Inc.*, 83 F.3d, 610, 627 (3d Cir. 1996), aff'd, 521 U.S. 519 (1997).

[56] *Rowe,* 262 F.R.D., 462, 467–468 (D.N.J. 2009).

proof existed on a common class basis or was predominately individualized in nature.

Similarly, in *Gates*, the court recently concluded that a proposed class in an alleged contamination of water and air case had satisfied the commonality requirement simply where "for each claim the plaintiffs assert . . . there is at least one question of fact relating solely to [the defendants] conduct, the nature and risks of vinyl chloride, and/or questions of law that are common to all class members."[57] Notwithstanding a finding of commonality, the *Gates* court ultimately denied certification in large part on plaintiffs' failure to satisfy the much more stringent rule 23(b) predominance requirement.[58]

While easily met, the commonality standard is not without limitations. In *Reilly v. Gould, Inc.*,[59] the court denied class certification even though all putative class members had been exposed to lead contamination from defendants' plant. The court wrote:

> True, all plaintiffs are said to have been exposed to lead emissions from the site, but whether and to what extent the emissions are said to have affected each class member is not common to all involved. Furthermore, assuming *arguendo* that the plaintiffs possess common claims which contain common issues of law or fact, such issues are altered or changed by the individual facts and situations of each plaintiff. This destroys anything common to the class.[60]

If defendants' conduct affects potential members in a divergent way, aggrieving each plaintiff differently, commonality may not exist.[61]

3. Typicality

Rule 23(a)(3) permits a court to certify a class only where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement is not satisfied if "the named plaintiffs' individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the class members will per force be based."[62] Where a named plaintiff could be adversely affected by facts that could be helpful to another plaintiff, the typicality requirement is lacking.[63] Nor may a class representative have an interest antagonistic to that of another class member.[64] Where any proposed class representative is subject

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[57] *Gates*, 265 F.R.D., 216.
[58] *Id.,* 233–234.
[59] *Reilly,* 965 F. Supp., 597–598.
[60] *Id.*, 598.
[61] See *William Goldman Theatres, Inc. v. Paramount Film Distrib. Corp.*, 49 F.R.D., 35, 39 (E.D. Pa. 1969).
[62] *Eisenberg v. Gagnon*, 766 F.2d, 770, 786 (3d Cir. 1985).
[63] *Reilly*, 965 F. Supp., 600.
[64] *Rodger v. Elec. Data Sys. Corp.*, 160 F.R.D., 532, 538 (E.D.N.C. 1995).

to a defense that "could skew the focus of the litigation, district courts properly exercise their discretion in denying class certification.[65]

The typicality requirement was recently addressed in *Burdette.* In *Burdette*, the district court denied class certification for both nuisance and negligence causes of action due to a lack of typicality.[66] The defendants in this case were alleged to have caused sinkholes through salt mining operations that damaged a group of neighboring properties.[67] In denying the certification, the court argued that joint allegations of nuisance and negligence were insufficient to establish typicality because the amount of physical damage and interference varied significantly from property to property.[68]

Typicality was also found to be lacking in *Pohl*, a Pennsylvania beryllium-exposure case. In *Pohl*, certification was denied because putative class representatives who were not beryllium-sensitive were found to be "atypical" of potential class members who are.[69] The authors note that this rationale could easily apply in an environmental contamination case as well, particularly one where contamination could be from various sources and the types of properties in the proposed class(es) vary greatly.

4. Adequacy of Representation

The final rule 23(a) requirement is that "the representative parties will fairly and adequately protect the interests of the class." This requirement serves to identify any conflicts of interest between the named parties and the class they seek to represent.[70] A proposed class representative is deemed not adequate if her claims conflict with those of other class members.[71] Whether the class representatives will adequately represent the class depends on the circumstances of each case.[72]

The adequacy and typicality requirements of rule 23(a) are often said to overlap because "in the absence of typical claims, the class representative has

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[65] *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d, 1317, 1321 (9th Cir. 1997); *Chinchilla v. Star Cas. Ins. Co.*, 833 So. 2d, 804, 805 (Fla. Dist. Ct. App. 2002) (proposed class representative "was an inadequate representative because unique and individualized defenses were available against her which were inapplicable to the class").

[66] *Burdette,* 2012 U.S. Dist. LEXIS 15412, *39–43.

[67] *Id.,* *3–12.

[68] *Id.,* *39–43.

[69] *Pohl v. NGK Metals Corp.*, No. 733 July Term 200, 2003 WL 24207633, *11 (Pa. Com. Pl. July 9, 2003), aff'd, 863 A.2d, 1239 (Pa. Super. Ct. 2004).

[70] *Amchem Prod., Inc. v. Windsor*, 521 U.S., 591, 625 (1997).

[71] *Id.,* 625–626 ("The adequacy inquiry"—which requires the class representative to "possess the same interest and suffer the same injury as class members"—"serves to uncover conflicts of interest between named parties and the class they seek to represent") (internal quotation marks and citations omitted); *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d, 1181, 1189 (11th Cir. 2003) (vacating class certification because class representatives' interests were different from and potentially antagonistic to those of other class members).

[72] *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d, 554, 559 (5th Cir. 1981).

no incentives to pursue the claims of the other class members."[73] In addition, the adequacy requirement has constitutional due process implications because a class judgment may bind absent class members and because a judgment based on inadequate representatives could be subject to collateral attack.[74]

Though it is unusual that a successful challenge can be made based on this 23(a) requirement, it is worth considering that the representative plaintiffs often tend to be the most fervent and zealous believers in their damage claims. Competing interests are not uncommon in a community and it may be the case that the representative plaintiff(s) is merely the vanguard of the impacted class or an outlier not representative of anything more than their own subjective beliefs. In the latter case, the class cannot be certified or subclasses will be required.

5. Rule 23(b)(1)

In addition to establishing all four requirements set forth in rule 23(a), plaintiffs must also demonstrate that the action satisfies one of the requirements of rule 23(b). It is the experience of the authors that plaintiffs in environmental contamination cases generally seek to satisfy rule 23(b)(2) or (3), as 23(b)(1) was designed primarily for limited fund cases when putative class members have no option to opt-out.[75]

6. Rule 23(b)(2)

A rule 23(b)(2) can be certified only where injunctive or declaratory relief is appropriate for the class as a whole. Such claims are frequently seen where plaintiffs seek medical monitoring.[76] The rule 23(b)(2) class action "was designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons."[77] Although rule 23(b)(2) is at times used outside the civil rights context, it "may only be applied where class treatment is '*clearly called for*,' that is, in situations where a court, through a single injunction or declaration can redress 'group, as opposed to individual injuries."'[78] Section (b)(2) does

[73] *In re Am. Med. Sys.*, 75 F.3d, 1069, 1083 (6th Cir. 1996); see also *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, *41 (Fla. Cir. Ct. Nov. 6, 2002) ("The adequacy and typicality requirements are similar in that they evaluate the sufficiency of the named plaintiffs and look to the potential for conflicts among members in the proposed class").

[74] See *Gates v. Rohm and Haas Co.*, 265 F.R.D., 208, 217–218 (E.D. Pa. 2010) (class numbers without current injuries could be barred in single recovery states from later pursuing claims for injuries).

[75] See *Ortiz v. Fibreboard Corp.*, 527 U.S., 815, 842 ("The prudent course . . . is to presume that when subdivision b(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model").

[76] See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142 (3d Cir. 1998); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp., 705, 708 (D. Ariz. 1993).

[77] *Barnes*, 161 F.3d, 142.

[78] *Hoyte v. Stauffer Chem. Co.*, No. 98-3024-CI-7, 2002 WL 31892830, *45 (Fla. Cir. Ct. Nov. 6, 2002) (quoting *Holmes v. Continental Can Co.*, 706 F.2d, 1144, 1155 (11th Cir. 1983)) (emphasis added).

not apply where individualized issues of fact or law must be resolved.[79] Where there are multiple defendants with presumably differing liability scenarios "there is no 'single course of conduct'," if any.[80]

Fed. R. Civ. P. 23(b)(2) also requires that the class be cohesive and homogenous. This requirement is more demanding than the commonality requirement of rule 23(a). It is even more stringent than the predominance requirement of rule 23(b)(3), and for good reason: members of a rule 23(b)(2) class will be bound by the outcome of the case without an opportunity to opt out.[81] "While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive."[82] "[T]he district court has the discretion to deny certification in Rule 23(b)(2) cases in the presence of disparate factual circumstances."[83] "The determination of whether a class involves individualized issues is important for two reasons: (1) 'unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by a negative judgment in the class action[;]' and (2) 'the suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently.'"[84] "At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness. . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries. The members of a (b)(2) class are generally bound together through preexisting or continuing legal relationships or by some significant common threat such as race or gender."[85] "Indeed, a 'court should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it should under subsection 23(b)(3).'"[86] Following the Third Circuit's seminal decision in *Barnes*, "the overwhelming majority of state and federal courts have concluded that a (b)(2) class cannot be certified if significant individual issues *merely exist*. The presence of disparate factual circumstances alone precluded (b)(2) certification."[87]

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79 *Id.; s*ee also *Barnes*, 161 F.3d, 142–143.

80 *Ball v. Union Carbide Corp.*, 385 F.3d, 713, 728 (6th Cir. 2004) (citation omitted); see also *In re Welding Fume Prod. Liab. Litig.*, 245 F.R.D., 279, 311 (N.D. Ohio 2007) (in case with multiple defendants, whose conduct varied over time and with respect to difference class members, plaintiffs could not demonstrate a "single course of conduct" by all defendants).

81 See *Barnes*, 161 F.3d, 142–143.

82 *Id.,* 143.

83 *Id.* (internal quotation omitted); see *Henry v. St. Croix Alumina, LLC*, No. 99-0036, 2008 U.S. Dist. LEXIS 43755, *29 (D.V.I. June 3, 2008).

84 *Rowe v. E.I. DuPont de Nemours & Co*., No. 06-1810, 2008 U.S. Dist. LEXIS 103528, *30 (D.N.J. Dec. 23, 2008) (quoting *Barnes*, 161 F.3d, 143) (alterations in original).

85 *Barnes*, 161 F.3d, 143 n. 18 (internal quotations omitted, alterations in original).

86 *Henry*, 2008 U.S. Dist. LEXIS 43755, *29 (quoting *Santiago v. City of Phila.*, 72 F.R.D., 619, 628 (E.D.Pa. 1976)).

87 *Hoyte,* 2002 WL 31892830, *47 (Fla. Cir. Ct. Nov. 6, 2002).

7. Rule 23(b)(3)

Rule 23(b)(3) requires that common issues predominate over individual issues and that class action be superior to other methods of adjudicating the controversy. Establishing commonality under rule 23(a) does not establish predominance for purposes of rule 23(b)(3). The predominance inquiry is far more demanding than the commonality analysis.[88]

"While the existence of individual questions essential to a class member's recovery (e.g., the amount of damages) are not necessary fatal to class certification, common questions of law or fact must *predominate* over individual questions."[89] "If proof of the essential elements of the cause of action requires individual treatment, the class certification is unsuitable."[90] Consequently, mass tort class actions are "ordinarily not appropriate for a class action [under Rule 23(b)(3)] because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."[91] Similarly, courts routinely deny class certification where plaintiffs seek to recover for alleged property devaluation.[92]

In *Gates*, for example, the court refused to certify both a medical monitoring class as well as property damage class, holding that the medical monitoring class lacked cohesiveness and that the property damage class issues

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[88] *In re Hydrogen Peroxide*, 552 F.3d, 311; *Barabin v. Aramark Corp.*, 210 F.R.D., 152, 161 (E.D. Pa. 2002), aff'd, No. 02-8057, 2003 WL 355417 (3d Cir. Jan. 24, 2003) ("even if Rule 23(a)'s commonality requirement is satisfied, predominance may not be as it is more demanding").

[89] *Cook v. Highland Water & Sewer Auth.*, 530 A.2d, 499, 504 (Pa. Commw. Ct. 1987) (emphasis in original); *Amchem Prod. v. Windsor*, 521 U.S., 591, 615 (1997).

[90] *In re Hydrogen Peroxide*, 552 F.3d, 311 (citations omitted).

[91] See Fed. R. Civ. P. 23 Advisory Committee's note to 1966 amendment.

[92] See, e.g., *In re Methyl Tertiary Butyl Ether Prod. Liab. Litig.*, 209 F.R.D., 323, 349–351 (S.D.N.Y. 2002) (denying class certification under rule 23(b)(3)); *Millet v. Atl. Richfield Co.*, No. Civ. A. 98-555, 2000 WL 359979, *13 (Me. Super. Mar. 2, 2000) (issue of causation prevented certification of a class under state court rule 23(b)(3) where cause of contamination of each plaintiff's well will have to be addressed on an individual basis); *Lipinski v. Beazer East, Inc.*, 76 Pa. D.&C. 4th 479, 511–513 (Pa. Com. Pl. 2005), aff'd 909 A.2d 896 (Pa. Super. Ct. 2006) (refusing to certify property valuation diminution class because of individual issues varying from property to property). See also *LaBauve*, 231 F.R.D., 678–680 (refusing to certify a rule 23(b)(3) class alleging mercury contamination lowered property values); *Church*, 138 F. Supp. 2d, 182 (landowners who sought to recover damages for alleged PCB contamination of their properties did not satisfy rule 23(b)(3) as the claims would require expert measurement of the contamination of each individual property, considering the characteristics of each property, and each property's contamination level would differ—"[t]hese differences pertain not just to damages, as plaintiffs argue, but to the threshold question of whether the contamination constitutes a nuisance or trespass"); *Martin v. Shell Oil Co.*, 198 F.R.D., 580, 592 (D. Conn. 2000) (individual issues predominated over class issues where individualized proof of causation would be necessary for each plaintiff to show that defendants' MTBE leakage reached that plaintiff's property and, if so, to what degree); *Thomas v. FAG Bearings Corp.*, 846 F. Supp., 1400, 1404 (W.D. Mo. 1994) (individual issues predominated in case involving TCE groundwater contamination, where diminution in property value and other issues required individualized proof).

did not predominate over individual issues.[93] In *Gates*, plaintiffs sought to certify a property damage class resulting from alleged water and air contamination. In analyzing rule 23(b)(3)'s predominance requirement the court essentially agreed with defendants' position that while questions relating to its conduct may be common, the "effect, if any, of its contamination on the property values claimed to be lost here will vary by property."[94] The court noted that "[B]oth the fact of, and amount of damage may vary for individual homes."[95] And while "'[c]ommon evidence may offer one potential source of [contamination] . . . many other explanations may exist that are specific to a particular property."[96] The *Gates* court also noted that these individualized concerns could be even greater where there are differing levels of potential contamination.[97] Ultimately, while acknowledging that common issues and proofs existed, the *Gates* court found "the extent of such contamination, the cause and timing of harm, and the resulting damage (measured in diminution of property value) are all questions that will require plaintiff-by-plaintiff scrutiny" and would remain unanswered in a class proceeding.[98]

Finally, plaintiffs must not only establish predominance but also superiority under rule 23(b)(3). In establishing this element, the rule directs courts to consider:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[99]

The "superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication."[100] Where plaintiffs cannot establish superiority, a class will not be certified under rule 23(b)(3).

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93 *Gates*, 265 F.R.D., 231, 233.
94 *Id.*, 232.
95 *Id.*
96 *Id.*, quoting *Fisher v. Ciba Specialty Chem. Corp.*, 238 F.R.D., 273, 307 (S.D. Ala. 2006) and citing *Thomas v. FAG Bearings Corp.*, 846 F. Supp., 1400, 1404 (W.D. Mo. 1994) (individual issues as to causation and damages with respect to each class member and each property "overshadow[ed]" the "undoubtedly common issues of law and fact" relating to whether defendant released TCE into the groundwater).
97 *Gates*, 265 F.R.D., 233.
98 *Id.* quoting *LaBauve v. Olin Corp.*, 231 F.R.D., 632, 673 (S.D. Ala. 2005).
99 Fed. R. Civ. P. 23(b)(3)(A)–(D).
100 *Gates*, 265 F.R.D., 234 quoting *In re Prudential Ins. Co. Am Sales Practice Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998) (internal quotations omitted).

B. Special Considerations

1. Stigma Damage Class Actions

The potential for stigma damages significantly increases the likelihood that a plaintiff will seek to bring claims on behalf of an entire class. This requires defense counsel to be familiar with not only the substantive law of property damage, but also with defending against such claims at the class certification stage. How the courts treat this theory of recovery and whether a class is certified often depends on the factual questions of whether the properties have in fact been impacted by contamination, are in fact adjacent to an impacted property, are in fact down gradient, or are in fact served by the same aquifer. The further removed from the actual source in terms of both time and distance, the less practical effect, if any, there will be for any adverse stigma.

In stigma damage cases, plaintiffs often attempt to define a class based on arbitrary geographic boundaries, an effort that frequently proves difficult. Courts regularly reject geographically defined classes in chemical release cases where "plaintiffs arbitrarily have drawn lines on a map, and declared that certain persons within those geographic boundaries constitute a class."[101] In *Cochran v. Oxy Vinyls LP,*[102] for example, plaintiffs sought to certify a class arising from alleged emissions of particulate matter and noxious odors from the defendant's manufacturing facility. Plaintiffs in *Cochran* defined their proposed class to include all owners and residents living within two miles of the defendant's facility. Although the *Cochran* plaintiffs attempted to justify the geographic scope of their class with an expert report, the court found that the report "utterly fails to substantiate any sort of evidentiary relationship between the proposed class members that would justify certification of the proposed class."[103] The court explained that "Plaintiffs offer no meaningful evidence that airborne contaminants from [defendant's facility] spread in a uniform fashion in all directions from [the] facility for a distance of up to two miles, or really that they spread from [the facility] at all.[104] Finding the

[101] *Daigle,* 133 F.R.D., 603 (class defined by geographical boundaries insufficient where plaintiffs "failed to identify any logical reason relating to the defendants' activities . . . for drawing the boundaries where they did"); see also *Vickers,* 204 F.R.D., 478 (denying certification of class alleging property damage from sulfuric acid where expert testimony failed to sufficiently support the proposed 1,000-meter radius around the plant as a reasonable demarcation); *Cole v. Asarco Inc.*, 256 F.R.D., 690, 697 n.3 (N.D. Okla. 2009) (denying certification of medical monitoring, nuisance, and property damage claims regarding lead contamination where plaintiffs' expert relied on "circle[s] of arbitrary radius" drawn around the mine shafts, "offered no scientific basis for the size or uniform shape of his circles, and did not link the sites replied [*sic*] upon to the actual activities of defendants or the prevailing winds").

[102] Civ. No. 3:06CV-364-H, 2008 WL 4146383, *1 (W.D. Ky. Sept. 2, 2008).

[103] *Id.*, *6.

[104] *Id.*

class definition to be based on "generalized and unsupported assumptions," the court denied certification.[105]

Variations in properties within a proposed class may also greatly affect putative member's claims for stigma damages. For example, in cases involving gasoline leaks each class member may be impacted differently, if at all. Some may be on private wells with contamination above regulatory limits. Others may have detections at de minimus levels. Some may be nondetect. Some class members may be on public water. Others may have soil contamination or vapor intrusion only. All of these factors and more distinguish potential class members from each other.

The types of properties among a proposed class also effect potential stigma in varying ways. Neighborhoods often have many various property types: commercial, residential, farm, vacant, utilities. Even within residential properties, homes may be single family, mobile, multifamily, rentals, etc. The potential impact on each category of property from nearby contamination likely affects each category differently. A potential buyer of commercial real estate may have little or no concern for nearby contamination. On the other hand, a potential buyer of a day care center may claim otherwise.

2. Minimum Exposure Requirements

In evaluating class certification in an environmental contamination case, courts often require that each plaintiff in the proposed class was exposed to a level greater than the normal background level.[106] The rationale is simple: a defendant will not be held responsible for causing an exposure that is comparable to "what ordinarily entered a person's body in every day life, elsewhere in the . . . area."[107] The *Rowe* case illustrates this point.[108] In *Rowe*, the court rejected a request for certification for a medical monitoring class under rules 23(b)(2) and 23(b)(3) based on allegations that perfluorooctanoic acid released from a nearby plant had contaminated the public water supply.[109] The court reasoned that plaintiffs could not show a "common significant exposure among the class," or that "all class members are at a distinctive increased risk of disease" as a result of this common exposure.[110]

3. Medical Monitoring Cases

Medical monitoring classes can be difficult to certify for a number of reasons. The Ohio Supreme Court has denied class treatment in a beryllium

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105 *Id.*, *13.
106 *In re Paoli*, 113 F.3d, 459.
107 *Id.*
108 *Rowe*, 2008 U.S. Dist. LEXIS 103528, *1–2.
109 *Id.,* 60, 66.
110 *Id.,* *50, 58–59; see also *Rhodes v. E.I. Du Pont de Nemours & Co.*, 253 F.R.D., 365, 373, 375–376 (S.D. W. Va. 2008).

medical monitoring case, finding that the proposed class "fails for lack of cohesiveness."[111] The *Wilson* court cited "multiple individual questions of fact" pertaining to each class member, including "whether [Defendant] owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applies, and questions of contributory negligence."[112] Similarly, the court in *Pohl* found that "individual questions of susceptibility, negligence, causation, dose and possibly the statute of limitations arise that cannot be resolved by class treatment."[113]

IV. DEFENDING STIGMA DAMAGE CLASS ACTIONS

A. Use of Experts

Defending against environmental contamination-based stigma damage suits requires more than a strictly legal analysis. Experts are vital to any defense—even at the class certification stage. Use of experts at this stage not only buttresses a defendant's legal argument but oftentimes is the lynch-pin of the certification defense.

Recent case law holds that "[w]eighing conflicting expert testimony at the certification state is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."[114] Indeed, the Third Circuit has been adamant about the trial court's role in considering the merits of the case when evaluating class certification. In *In re Hydrogen Peroxide,*[115] the district court had granted certification based on only threshold showings under rule 23, and

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111 *Wilson v. Brush Wellman, Inc.*, 817 N.E.2d, 59, 65 (Ohio 2004).

112 *Id.,* 66.

113 *Pohl*, 2003 WL 24207633, *10–11; See also *Fowler v. Ohio Edison Co.*, No. 07-JE-21, 2008 WL 5233476, *11 (Ohio Ct. App. Dec. 11, 2008) (finding class not cohesive due to individualized issues, including that plaintiffs "were exposed to [defendant's] emissions for different amounts of time, in different ways, and over different periods"); *Rowe,* 2008 U.S. Dist. LEXIS 103528, *59–60 (class not cohesive because elements of significant exposure, increased risk of disease, and need for medical monitoring differing from ordinary monitoring were too individualized); *Paige v. Philadelphia Hous. Auth.*, No. 99-0497, 2003 U.S. Dist. LEXIS 15563, *11–12 (E.D. Pa. Aug. 18, 2003) (cohesiveness requirement precludes certification of a medical monitoring class because of individualized issues); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1122 (8th Cir. 2005) ("Proposed medical monitoring classes suffer from cohesion difficulties and numerous courts around the country have denied certification of such classes"); *Sanders v. Johnson & Johnson, Inc.*, No. 03-2663(GEB), 2006) WL 1541033, *10 (D.N.J. June 2, 2006 (denying certification of medical monitoring class due to "numerous individualized questions of act that undercut Plaintiff's claim of cohesiveness" including the type and extent of individual class members' injuries).

114 *In re Hydrogen Peroxide*, 552 F.3d, 323; *Jackson v. Unocal Corp.*, No. 09CA0610, 2009 WL 2182603, *1 (Colo. Ct. App. July 23, 2009), *cert. granted*, No. 09SC668, 2010 WL 1843434 (Colo. May 10, 2010) (not released for publication in permanent law reports) (court abused discretion by declining to resolve expert opinions at class certification stage and by not performing rigorous analysis of affirmative defenses because it erroneously concluded that to do so would be impermissible inquiry into the merits).

115 *Id.,* 307.

had failed to resolve significant disputes between expert witnesses that bore on the class certification decision. Finding that this was improper, the court of appeals stated that "the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met." "[P]roper analysis under Rule 23 requires rigorous consideration of all the evidence and arguments offered by the parties,"[116] and district courts must "consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class,"[117] District courts must "resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits."[118] "[A] district court may find it unnecessary to consider certain expert opinion with respect to a certification requirement, but it may not decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits." "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence."[119]

Several types of experts may be useful. Retaining a hydrogeologist or industrial hygienist to address theories of contamination could help resolve uncertainty that may lead to stigma damages. Similarly, a toxicologist can be used to educate the court on the true nature of the alleged contaminate to dispel "the sky is falling" arguments often raised in environmental cases. A local real estate expert could be used to address case-specific market conditions and local disclosure requirements. Finally, a national real estate expert or economist may be needed to directly address the issue of stigma damages. Each is explored in more detail below.

1. Hydrogeologists

Demonstrating to the court that a particular contaminate is not a health concern at the levels in question may make it more palatable for the court to appreciate that plaintiffs' professed fears or claims of market devaluation are unreasonable and scientifically unfounded. Experts such as hydrogeologists are critical in setting the analytical homework for the court. In a groundwater contamination case, the hydrogeologist can generally define the extent of the plume. He can analyze contamination in individual wells and provide the court with an understanding of groundwater flow and how various constituents are transported. The hydrogeologist can address issues of remediation and causation. Issues of up-gradient versus down-gradient contamination may be critical to causation and potential alternative sources. Hydrogeologists can demonstrate how the impacts to individual properties vary greatly and bear

116 *Id.,* 321.
117 *Id.*, 320.
118 *Id.,* 307.
119 *Id.*, 320.

little or no commonality.

Absent some form of statutory presumption, if plaintiffs do not identify the extent of contamination they may be left only with an argument for pure proximate stigma damages. Without a readily identifiable plume from which plaintiffs hydrogeologist can show impacted properties, it becomes difficult to allege an ascertainable class.

2. Toxicologists

Use of a toxicologist should not be limited to personal injury or medical monitoring classes. Toxicologists can also play a key role in property damages cases, particularly those for stigma. When plaintiffs seek stigma damages based on marketplace aversion, they are essentially alleging some continuing fear in the marketplace over hazards to human health.[120] A toxicologist can provide the court with a thorough understanding of the de minimus nature of the health risks of various contamination, particularly as it applies to a specific set of circumstances. Whether a contaminant is toxic to humans and at what levels are key issues in evaluating a claim for stigma damages. At the class certification stage answers to these questions may demonstrate a lack of commonality or a predominance of individual issues.

Where the amount of contamination varies from plaintiff to plaintiff, concern for the toxicity varies. Where specific levels of a contaminant are not a health hazard, a defendant can argue that claims are based on market aversion or not based on science, but rather unsupported public opinion. Scientific literature relating to environmental hazards such as radon, lead, asbestos, electromagnetic fields, and abandoned Superfund waste sites show that the level of environmental regulation and media attention is highly disproportionate to the actual probable health risks.[121] Fear and risk should not be identified as the same factor in evaluating environmental conditions impacting real estate.[122] While market value includes a subjective or perceptual element, it also precludes irrational fear. And an appraiser hoping to satisfy standards for expert witnesses must separate those risks that are true and high from those that are simply highly discussed.[123]

3. Local Real Estate Experts

A local real estate expert can establish local market conditions. Many factors other than contamination may cause a property's value to decrease. Are plaintiffs seeking compensation for damages related to a change in neighborhood conditions such as crime or schooling issues and trying to use nearby

[120] *In re W.R. Grace & Co.*, 346 B.R., 672, 673 (Bankr. D. Del. 2006).
[121] See Wayne C. Lusvardi, "The Dose Makes the Poison: Environmental Phobia or Regulatory Stigma?," *Appraisal Journal* 68 (April 2000): 184, 193.
[122] *Id.*
[123] *Id.*, 193–194.

contamination as a way out? Local real estate experts can ensure that the court has a complete picture of the relevant real estate market and not just an isolated view of alleged values pre- and postcontamination.

The real estate expert can also address disclosure requirements. Such requirements may be critical to how a class is defined or whether one can be certified. In some jurisdictions a duty to disclose is limited to material defects on the owners property and does not extend to disclosing contamination on a nearby property.[124] Other jurisdictions may have broad obligations. Many states now have codified disclosure requirements, particularly as it relates to commercial or industrial properties.[125] A local real estate expert can address how such disclosure laws are satisfied in the relevant community.

What constitutes a material defect such that disclosure is necessary also often depends on the varying circumstances of each property. Factors such as the source of contamination, the toxicity of the contamination, the level of investigation and testing at the property, the notoriety of the event, the timeframe between the contamination event and the date of offering, and the method of remediation must be weighed in defining what is material.

4. Appraisal Experts/Economists

Finally, but perhaps most critically, a more generalized appraisal expert or economist is necessary in cases alleging stigma damages. This expert can address whether there are issues of commonality with respect to economic injury, whether any actual economic injury is sufficiently material to be reflected in market value, and whether the class representatives are typical of the proposed class members as a whole.

There are many reasons why similar properties command different prices and identifying the causes for such alleged differences is essential to claims for stigma damages.[126] To prove economic loss due to stigma, a plaintiff's appraisal expert must demonstrate a link between the lost property value and the defendant's alleged contamination.

B. Challenging Survey Studies

Frequently, plaintiffs will seek to show stigma in a particular case by providing a survey study. When a plaintiff submits such a survey, it is critical that the defense challenge its validity and methodology as there is substantial room for

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[124] See *Colaizzi v. Beck*, 895 A.2d, 36, 39 (Pa. Super. Ct. 2006). See also *City of Cle Elum v. Owens & Sons, Inc.*, No. 25761-4-III, 2008 WL 934080, *9, 143 Wash. App. 1057 (Wash. Ct. App. Apr. 8, 2008) (no duty to disclose one-time spill that was cleaned up, where there was no evidence that claimant suffered damages).

[125] Ralph W. Holmen, "Current Legal Issues Raised by Environmental Hazards Affecting Real Estate," *Real Estate Issues* 16 (Fall/Winter 1991): 37, 40.

[126] See James Flynn et al., "A Survey Approach for Demonstrating Stigma Effects in Property Value Litigation," *Appraisal Journal* 72 (Winter 2004): 35, 36.

error throughout the process. The defense should consider: (1) was the survey properly designed; (2) was the universal population properly chosen and defined; (3) was a representative sample of that universe selected; (4) were the questions asked presented in a clear, precise, and nonleading manner; (5) were the interviewers competent and knowledgeable of the issues in the litigation; (6) was the gathered data accurately reported; (7) was the data analyzed with accepted statistical principals; and (8) was the process conducted to ensure objectivity.[127] The defense should also note the specific legal requirements for the admissibility and reliability of such surveys in their jurisdiction, as there is a slight variation among jurisdictions.

C. Referencing Case Studies and Relevant Literature

Case studies and relevant literature may also be of particular help to the defense. As discussed in section II(A), supra, studies show that even actual contamination on a property may not cause stigma.

D. A Targeted Investigation

In the course of defending several stigma damage class actions and challenging both class certification and the subsequent merits of individual diminished value claims, the authors have compiled the following list of sources of information to be considered in the defense of an environmental class action alleging stigma damages. The information found may either establish or refute the subjective belief of diminished value and in some cases may provide fertile grounds for cross-examination and impeachment.

1. **Real Estate Sales Listings.** Does the listing disclose the presence of the alleged contamination? When was the property first listed and at what price? How was the asking price determined and was there an independent estimate by the real estate agent? What were the comparable properties? What information was provided to the real estate agent or broker in advance of listing the property? Has the property, in the case of industrial or commercial properties, been included in any brownfields listings?
2. **School District**. In the case of residential properties, the strength and reputation of the local school system often impacts property value and may attract a younger, family demographic if the schools are highly rated.
3. **Property Tax Assessment**. How is the local property tax established and when was the most recent assessment on a local, county, or statewide basis? Did the complaining homeowner appeal the assessment and if so on what basis? Did other property owners in the immediate vicinity appeal the assessment? How does this property compare to other similarly

[127] *Id.*, 42–43.

assessed properties? In many cases the taxing authority may challenge an assessment appeal and in doing so commission its own appraisal report based on either comparable sales or in the case of commercial properties the occupancy rates and future lease trends. Finally, tax assessments can also be on a county or state level, each possessing records related to the estimated value of the property and a formula for relating estimated value of the property (but not necessarily highest and best use) to the taxable rating.

4. **Local Municipal Property Records**. These records can be a valuable source of information on the permitted use of the property and the community or neighborhood in which it exists as well as for purposes of differentiating class representatives from other putative class members properties.
5. **Zoning Restrictions**. While there may be a claimed diminished value of a property, the proposed future use of the property may not be permissible.
6. **Property and Homeowners Insurance**. Has the property been appraised or inspected for replacement value by the property insurer? If so, obtain the appraisal. Is there a requirement that the property owner self-appraise the value of the property on any regular basis? Has a first-party claim been made for damage to the property or contents? If so, what was the result?
7. **Mortgage and Refinancing**. Does the property have a mortgage? Was there an independent appraisal of the property value before and/or after the contamination? Was the contamination disclosed to the mortgage company?
8. **Health Department Records**. In many cases, individuals who are concerned about contamination and the potential effects on their persons or property will communicate with the local, county, or state board of health about those concerns. Many states provide for transparency of communications with citizens such that records of such communications should be readily available. It is also possible that the health department performed independent testing, the results of which may be available for review.
9. **State and Local Legislators**. Similar to the previous category, all politics is local so it is not uncommon to see significant involvement by local elected officials addressing the effect of the contamination.
10. **State and Federal Environmental Departments**. It goes without saying that the agencies charged with protecting the environment will have records and potential testimonial evidence relevant to the potential for impact to a property, the zone of contamination, and in some cases even records of communication with the plaintiff/class representatives.
11. **Community/Homeowner Organizations**. Often the presence of and potential effect of contamination will be a topic discussed at community and homeowners meetings. In some cases, the contamination itself

will serve as a catalyst for the formation of a special interest group related to the effects and dissemination of information related to the contamination.

12. **Local Water Department or Private Water Provider**. In cases where the property is served by a municipal or private water authority, there will be regular testing of water quality for the presence of designated contaminants. In cases where the property is served by well water, the owner may be required to test water quality, including for fecal coliform and other bacterial agents, and report the results to the appropriate local or state authority. It is possible that in some circumstances the ability to use groundwater for potable use may be restricted or prohibited by ordinance, deed restriction, or covenant.
13. **Uniform Environmental Covenant**. Is there a covenant restricting the use of the property in any way?

E. Avoiding Litigation

Based on numerous studies and in the experience of the authors, the key to avoiding or minimizing future claims for stigma damages is a fine balance between proactive responses to contamination events, dissemination of relevant information, and publicizing the successes of remedial efforts. Specifically, studies show that stigma damages are minimized or eliminated when property owners and potential buyers are well informed as to the characterization of the contamination and the plans for remediation.[128] Further, it goes without saying that there is an emotional component to environmental contamination cases that needs to be recognized and addressed. It is imperative that the party responsible for the contamination be perceived in the community, either through public forums or other forms of communication, to be sensitive and responsive to the concerns of potentially impacted residents. Consider whether it is appropriate to purchase impacted properties early on or even to offer property value protection plans whereby the owner is guaranteed that she can sell the property without a loss attributable to the contamination. Consider whether the information, although typically available as a public record, should be provided to community residents directly or even to local news organizations. Finally, bear in mind that all contamination diminishes with time and that with the inclusion of active remedial measures that time cycle is accelerated. When managed properly you can get out ahead of a contamination event, ease tensions, and establish a level of trust and respect with the community, which may avoid class action litigation in the future by distrusting and disassociated community members.

[128] Bill Mundy, "The Impact of Hazardous Materials on Property Value," *Appraisal Journal* 60 (April 1992): 155, 158–159, 162.

V. CONCLUSION

It is the considered experience of the authors that stigma damages, while widely presumed to exist for all environmental impairment cases, are subjective in nature and simply too speculative and individualized to form a basis for class certification. It is up to the defendant(s) to focus on the merits of the case and avoid the intellectually lazy but simple conclusion that stigma damages must exist and thus the claims are susceptible to class certification. The failure to do so may well result in significantly larger exposure, damage to the perception and reputation of the defendant, and precedents indicating there can be more blood in the water than contamination.