Lockheed Martin and California's Limits on Class Treatment for Medical Monitoring Claims

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In Lockheed Martin Corp. v. Superior Court, the California Supreme Court rejected certification for a proposed medical monitoring class, but declined to set a per se bar against class treatment of such claims. The court held that individual issues predominated because the class members had not provided substantial evidence that they could resolve dosage issues with common proof. In rejecting certification, the court improperly focused on the substantive merits of the case and raised a manageability concern for future classes of medical monitoring claimants. Although the decision expressly allows for class treatment of medical monitoring claims under certain circumstances, it limits class-wide adjudication of environmental pollution and chemical exposure claims because it requires excessive scrutiny of the merits for certification.

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INTRODUCTION

According to a study by the U.S. Department of Health and Human Services, eight out of ten Americans live near a hazardous waste site.\(^1\) Exposure to hazardous waste can subject entire communities to significant health risks.\(^2\) In 1980, responding to public concern over potential health risks from exposure, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as Superfund.\(^3\) CERCLA created a federal liability scheme to protect public health and the environment by ensuring prompt cleanup of hazardous wastes.\(^4\) While CERCLA allocates the environmental cleanup costs among the responsible parties,\(^5\) it ignores the social costs imposed by harmful pollution, such as present illnesses, diminution in property value, emotional distress, increased risk of illness, and future medical monitoring costs.\(^6\) Rather, the primary vehicle for

1. See Paul J. Komyatte, Medical Monitoring Damages: An Evolution of Environmental Tort Law, 23 COLO. LAW. 1533, 1533 (1994) ("The widespread nature of chemical pollution means that more and more people are prone to exposure to toxic chemicals. Some 40 million persons—nearly 20 percent of the U.S. population—live within four miles of a hazardous waste site on the EPA's National Priority List, and eight out of ten Americans live near some type of hazardous waste site.") (citing U.S. DEP'T OF HEALTH AND HUMAN SERVS., HAZARDOUS SUBSTANCES AND PUBLIC HEALTH, reported in ATLANTA: AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, Vol 2, No. 2 (May/June 1992) at 1).


4. § 9607.

5. CERCLA imposes strict liability on four sets of defendants. § 9607(a).

6. Some academics argue that CERCLA should cover medical monitoring as a "response cost" to hazardous waste. See generally Carmen E. Sessions, Medical Monitoring Awards Under CERCLA: Statutory Interpretation Versus Fundamental Fairness, 8 S.C. ENVTL. L. J. 81 (1999) (discussing how courts' interpretations of medical monitoring claims under CERCLA fail to fully consider the purposes of the legislation and policy benefits of awarding these costs to plaintiffs). Nonetheless, a majority of jurisdictions reject such an approach. MARGIE SEARCY-ALFORD, GUIDE TO TOXIC TORTS § 3.12(3)(d) (2003); e.g., Daigle v. Shell Oil Co., 972 F.2d 1527, 1533-37 (10th Cir. 1992) (holding medical monitoring not recoverable under CERCLA for plaintiffs exposed to toxic fumes during cleanup of hazardous waste site); Price v. U.S. Navy, 818 F. Supp. 1322, 1322-23 (S.D. Cal. 1992) (holding medical monitoring not recoverable under CERCLA).
dealing with the social costs of hazardous waste has been, and remains, state tort law.\(^7\)

Due to the potential scope of hazardous waste claims, courts need a framework to deal with large groups exposed to harmful chemicals.\(^8\) Class treatment\(^9\) of medical monitoring claims\(^10\) provides one approach for resolving large numbers of claims based on a specific exposure episode. While arguably well suited for class treatment,\(^11\) most courts have refused to certify medical monitoring classes.\(^12\) The California Supreme Court's decision in *Lockheed Martin Corp. v. Superior Court* was no exception.\(^13\) In *Lockheed Martin*, the court considered class certification for individuals seeking medical monitoring damages based on exposure to harmful chemicals in their local water source.\(^14\) The court rejected certification of the proposed class, holding that individual issues made class treatment inappropriate.\(^15\) The court nonetheless noted that there is no categorical bar against class treatment of medical monitoring claims.\(^16\)

This Note focuses on the question of whether or not medical monitoring claims, and more specifically the chemical exposure claims at

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8. See Komyatte, *supra* note 1, at 1533 (describing the widespread affect of chemical pollution).

9. See discussion *infra* Section I.C. (describing the purpose of the class action device and the requirements for class certification.)

10. See discussion *infra* Section I.A. (defining medical monitoring damages as the recovery of long-term medical costs by people exposed to harmful substances who may or may not have already developed a present illness. In California, medical monitoring is a compensable item of damages and not an independent tort claim or cause of action. Nonetheless, consistent with the *Lockheed Martin* decision, this Note refers to medical monitoring both as a claim and item of damages).


14. Id. at 1101-02.

15. Id. at 1106-09, 1111.

16. Id. at 1105, 1111.
issue in *Lockheed Martin*, are suitable for class treatment. Part I traces the development of medical monitoring as an item of tort damages and discusses the viability of class treatment. Part II outlines the California Supreme Court's decision, including the relevant factual background and procedural history. Finally, Part III analyzes the court's holding that individual issues predominated and its consideration of the problem of managing medical monitoring classes. This Note argues that the court improperly decertified the class by prematurely deciding the substantive merits of the plaintiffs' liability theory. This Note also argues that the court's consideration of manageability concerns should not lead to a higher certification standard for future medical monitoring classes. This Note concludes that denying certification in this case ultimately limits California courts' ability to effectively address hazardous waste and its widespread effects.

I. BACKGROUND

The increasing number of medical monitoring claims brought in both state and federal courts raises two questions: (1) whether courts should recognize medical monitoring claims in the first place, and (2) whether medical monitoring claims are appropriate for class treatment. This Note focuses on the latter question. The sections below discuss the development of medical monitoring, recognition of medical monitoring by the courts, the class action device, and class treatment of medical monitoring claims.

A. Medical Monitoring Claims

Medical monitoring allows recovery of periodic, long-term medical costs by people exposed to toxic substances who have not yet developed a disease or illness. As a measure of damages, claimants seek compensation for the cost of extra medical testing and surveillance costs that are necessary due to the defendant's actions. Unlike recovery for a

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19. Most courts recognize medical monitoring as a remedy rather than as a cause of action. The majority of jurisdictions recognizing medical monitoring treat it as an element of tort damages that the court may award according to established liability theories, such as negligence, nuisance, strict liability, or negligent and intentional infliction of emotional distress. Badillo v. Am. Brands, Inc., 16 P.3d 435, 440 (Nev. 2001); see infra discussion Section I.B. (describing how different state and federal jurisdictions have accepted and rejected medical monitoring claims).

fear of injury or an increased risk of injury, medical monitoring provides compensation for reasonably necessary medical expenditures.

Most jurisdictions that recognize medical monitoring as a measure of damages do not condition recovery on a current physical harm. These courts acknowledge that latent physical injuries caused by harmful exposure may lead to significant economic harm in the form of substantial, costly medical examinations required from the time of exposure until the physical injury manifests. According to this view, exposure itself is an injury. While a disease or illness may not develop for years after the exposure, substantial medical costs may be immediate and unavoidable.

Courts may award medical monitoring damages as a one-time, lump-sum payment or through participation in a court-supervised monitoring program that reimburses plaintiffs for medical surveillance costs over time. Most courts are reluctant to award lump-sum payments. For

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22. Also referred to as an "enhanced risk," plaintiffs seek compensation based on the potential effect to his or her health and life expectancy, proportionately reduced to reflect the chance that such injury may never actually manifest. Garner, supra note 12, at 10024.


24. Id. at 10028-29; see Jesse R. Lee, Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs, 20 AM. J. L. & MED. 251, 259 (1994). A minority of jurisdictions require a present injury in order to recover. Garner, supra note 12, at 10028-29. For example, the Louisiana legislature amended the Civil Code to provide that "damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease." Id.


27. See Daniel A. Farber, Toxic Causation, 71 MINN. L. REV. 1219, 1228 (1987); Myra Mukahy, Proving Causation in Toxic Torts Litigation, 11 HOFSTRA L. REV. 1299, 1326 (1983); Komyatte, supra note 1, at 1533 (stating that many cancers and diseases caused by hazardous substances have long latency periods, further complicating the plaintiff's ability to rely on common law legal remedies).

28. Venugopal, supra note 11, at 1664; see, e.g., Ayers, 525 A.2d at 314-15 (discussing the benefits of employing a fund mechanism for medical monitoring, but deferring to the jury's award of a lump-sum damages).

29. See Venugopal, supra note 11, at 1663-68 (describing how courts prefer to award specific or equitable relief to those plaintiffs whose injuries have yet to appear). In fact, the Supreme Court suggested that lump-sum medical monitoring damages awards might be
plaintiffs, a coordinated medical monitoring program potentially enables parties to develop a coherent idea of the extent of the exposure, injury, and liability through the group-wide collection and analysis of medical data. For defendants, a monitoring program provides a mechanism for crediting them with payments from a collateral source such as insurance, limits their liability to only medical examinations and tests actually administered, and refunds any unused portion of the fund.

A medical monitoring program nonetheless places certain burdens on the court. For example, a court implementing a medical monitoring program will need to appoint a commission or a special master to determine who is covered, how payments should be made, and the scope of the program. Monitoring programs require an ongoing involvement by the court in the administration of the fund, a level of judicial involvement distinct from traditional models of compensation. In response to these considerations, different jurisdictions have embraced or rejected such medical monitoring claims.

B. Recognition of Medical Monitoring by the Courts

Medical monitoring emerged as a recognized form of damages through a series of decisions in the mid-1980s. In the seminal case of Ayers v. Jackson Township, the New Jersey Supreme Court affirmed the plaintiffs’ medical monitoring award for future medical surveillance costs based on their exposure to water contaminated by toxic pollution from a nearby landfill, even though none of the plaintiffs had present physical injuries. The court reasoned that a defendant could be liable for the reasonable medical examinations of another party, even without an improper without a present physical injury. Buckley, 521 U.S. at 440-44 (considering claims arising under the Federal Employers’ Liability Act (FELA)). Outside of the FELA context, the Court has not resolved whether or not lump-sum payments are appropriate for medical monitoring damages.


31. Garner, supra note 12, at 10029 (citations omitted); see also Abraham, supra note 30, at 1977-78; (describing how medical monitoring can be viewed as a method of mitigation of damages and as an evidentiary tool).

32. Lee, supra note 24, at 267-72 (discussing the various administrative issues raised by managing a medical monitoring fund).

33. Id.


actual injury, because those costs were a consequence of the defendant's actions.\textsuperscript{37} The court therefore affirmed a lump-sum award of medical monitoring damages.\textsuperscript{38}

Since then, courts have responded to medical monitoring claims with varying degrees of enthusiasm. At least thirteen state courts and federal courts in at least four more states, as well as the District of Columbia, the Virgin Islands, and Guam, recognize medical monitoring as a recovery theory.\textsuperscript{39} These courts note the important public policy considerations that favor judicial recognition of medical monitoring claims, including public health objectives, deterrence, mitigation of total social and economic costs, and the possible alleviation of unfair barriers to recovery.\textsuperscript{40} At the same time, at least four state courts and federal courts in six other states have specifically rejected medical monitoring.\textsuperscript{41} They note that monitoring may be redundant if claimants already have medical insurance, may open the floodgates to excessive litigation, may be an inefficient use of limited resources, and may undermine the causation requirement of traditional torts.\textsuperscript{42}

\begin{footnotes}
\begin{enumerate}
\item[37.] See id. at 311-12.
\item[38.] Id. at 313-15.
\item[40.] Maskin, supra note 17, at 525-27.
\item[42.] Maskin, supra note 17, at 528-30; see Redland Soccer Club, Inc. v. Dep't of the Army, 55 F.3d 827, 846 n.8 (3d Cir. 1995) (expressing concern that industry would "become a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life").
\end{enumerate}
\end{footnotes}
California is one of the states that recognizes medical monitoring as a recoverable item of damages, resting on established theories of tort liability.43 Considering harmful exposure claims arising from a polluted water source,44 the California Supreme Court in Potter v. Firestone Tire & Rubber Co. held that "the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable."45 The court outlined five factors relevant to determining the reasonableness of the recommended monitoring: (1) the significance and extent of the plaintiff's exposure to the 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 diagnosis.46 While Potter established medical monitoring as an item of damages, it was not until Lockheed Martin that the California Supreme Court questioned whether or not such claimants may seek medical monitoring damages as a class.

C. The Class Action Device

The class action device serves various purposes, including fairness and efficiency. Historically, the class action device derived from the courts' equitable powers.47 The class action device also promotes fairness through class-wide remedies that would otherwise be unavailable due to the disproportionate costs and complex structure of litigation.48 It allows representatives to litigate on behalf of a class when the number of

43. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1007-09 (1993) (noting that medical monitoring recovery cannot be based "solely on a showing of an increased but unquantified risk resulting from exposure to toxic chemicals").
44. Id. at 975-976.
45. Id. at 1009.
46. Id.
47. Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999) (recognizing the modern class action device as an equitable device for combining multiple suits). For a discussion of the historical development of the class action device in the United States as a whole and California in particular, see CALIFORNIA CLASS ACTIONS PRACTICE & PROCEDURE § 1.01 (Elizabeth J. Cabraser ed., 2003).
48. Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 686, 691 (1941); see also Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1281 (1976) (arguing that "involvement by the court and judge in public law litigation is workable, and indeed inevitable if justice is to be done in an increasingly regulated society").
interested parties is so large that joinder is impractical. Class treatment also encourages efficiency by allowing for representative litigation.

The tension between efficiency and fairness is central in class certification disputes. In Mejdrech v. Met-Coil Systems Corp., the Seventh Circuit recently noted that the case law regarding the appropriateness of class treatment in pollution cases is "sparse and divided." Nonetheless, the court held that certification of a class of property owners whose property value was diminished by trichloroethylene contamination was proper based on common issues and the value of judicial economy. "[I]t makes good sense, especially when the class is large, to resolve those [common] issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings."

In federal courts, a class seeking certification must meet the requirements of Rule 23 of the Federal Rules of Civil Procedure. First, under Rule 23(a), a class must demonstrate that (1) the class members are so numerous that joinder would be impracticable; (2) common issues of law and fact are raised; (3) the claims of the representatives are typical of the class; and (4) the class representatives will adequately protect the interests of the class. Second, a class must seek certification under at least one of the three class types set out in Rule 23(b): 23(b)(1) deals with the risk of inconsistent judgments, or a limited fund; 23(b)(2) allows for class-wide equitable or injunctive relief; and 23(b)(3) provides for money damages. A class seeking money damages under Rule 23(b)(3) must meet the standards of predominance and superiority. There are no such requirements for equitable relief under 23(b)(2).
California maintains its own procedural rule for certification that incorporates and resembles the federal standard. It authorizes class treatment where there are common issues and the size of the class makes it impracticable to bring everyone before the court. The party seeking certification bears the burden of establishing (1) the existence of an ascertainable class and (2) a well-defined community of interest among the class members. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. Accordingly, California requires common issues to predominate for all types of classes, not just for those seeking money damages. This requirement guarantees that subsequent individual trials do not undermine the effectiveness of class-wide adjudication. In addition to these requirements, a trial court must also weigh the respective benefits and burdens of maintaining a class in order to assure that class treatment would provide substantial benefits to the courts and litigants. While trial courts may have to initially inquire into the merits to evaluate whether the plaintiff class meets the prerequisites of class certification, the question of certification is "essentially a procedural one that does not ask whether an action is legally or factually meritorious."

California’s appellate courts review trial court certification rulings under a deferential standard of review. On appeal, courts look for substantial evidence to support a trial court’s certification ruling, but a trial court’s ruling will generally not be disturbed unless (1) improper

56. CAL. CIV. PROC. CODE § 382 (Deering 2003). California courts look to Rule 23 for guidance absent relevant state law. See Stephen v. Enter. Rent-A-Car, 235 Cal. App. 3d 806, 814 (Cal. Ct. App. 1991); see City of San Jose v. Superior Court, 12 Cal. 3d 447, 453 (1974); Richmond v. Dart Indus., Inc., 29 Cal. 3d 462, 469 (1981). Although section 382 does not provide for divergent standards based on different class types like the federal rule, California courts may and do explicitly certify classes under the 23(b)(1) and 23(b)(2) standards. CABRASER, supra note 47, § 6.08.

57. CAL. CIV. PROC. CODE § 382.
58. Richmond, 29 Cal. 3d at 470; Vasquez v. Superior Court, 4 Cal. 3d 800, 809 (1971); Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 435 (2000).
59. Richmond, 29 Cal. 3d at 470.
60. California’s predominance requirement rests on state law and not the standard put forth in Rule 23(b)(3). The predominance requirement will not be satisfied if the right of each member of the class to recover is based on a separate set of facts applicable only to that individual. See Vasquez, 4 Cal. 3d at 809.
61. See San Jose, 12 Cal. 3d at 460; Vasquez, 4 Cal. 3d at 810 (“whether a class action is appropriate will depend upon whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits”).
62. Linder, 23 Cal. 4th at 435; San Jose, 12 Cal. 3d at 459 (citation omitted); Vasquez, 4 Cal. 3d at 810; Daar v. Yellow Cab Co., 67 Cal. 2d 695, 713 (1967).
63. See Linder, 23 Cal. 4th at 435.
64. Id. at 439-40.
criteria were used or (2) erroneous legal assumptions were made.Absent one of these two errors, appellate courts review certification by a trial court for an abuse of discretion. Accordingly, any valid pertinent reason is generally sufficient to uphold an order granting or denying certification. These established standards for certification and appellate review apply equally to medical monitoring claims brought as a class.

D. Class Treatment of Medical Monitoring Claims

State and federal jurisdictions are split, but the majority of courts that have addressed certification for medical monitoring claims have rejected class treatment. The question of whether or not medical monitoring claims are appropriate for class treatment has been subject to considerable debate focused on the presence and extent of individual issues, the legal or equitable nature of the medical monitoring damages, and the suitability of mass torts for class treatment.

First, federal courts are often unwilling to certify a class that would later require resolution of substantial individual issues. The concern is that those individual issues would require subsequent individual trials that would undermine the procedural benefits of certification. Similarly, California courts are unwilling to certify a class action involving numerous individual issues because common issues must predominate in all class actions.

65. Id. at 435-36. Noting that federal law generally bars preliminary merit assessments, the Linder court rejected the proposition that a party must show a likelihood to prevail on the merits of their claims. Id. at 438-39. Nonetheless, the court recognized that trial courts may scrutinize a proposed class cause of action to determine whether, assuming its merit, it is "suitable for resolution on a classwide basis." Id. at 443.

66. Id. at 435 ("Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.").

67. Id. at 436 (citation omitted).


69. Garner, supra note 12, at 10030. Generally, courts have been more willing to certify medical monitoring classes in the contexts of products liability and manufactured drugs than environmental health hazards. See Martens & Getto, supra note 39, at 274. One example of the courts' willingness to employ the class action device for medical monitoring claims is the so-called "fen-phen" diet drugs litigation. Id.


71. See, e.g., Barnes, 161 F.3d at 146 (affirming decertification and summary judgment for the defendants because of the many individual issues relating to medical monitoring). The Federal Advisory Committee's notes for Rule 23 state that individual questions often make it difficult to deal with mass torts as a class. FED. R. CIV. P. 23(b)(3) Advis. Comm. Note (1966 Amend). In contrast, at least one author has argued that medical monitoring claims are well suited for class treatment because "a medical monitoring claim is best characterized as a group-wide, rather than an individual claim." Venugopal, supra note 11, at 1661.

72. In contrast, only Rule 23(b)(3) classes seeking money damages must satisfy a predominance requirement in federal court. Venugopal, supra note 10, at 1661.
Second, some federal courts argue that a medical monitoring fund is essentially money damages, but other courts have concluded that medical monitoring should be considered equitable relief, subject to the less strict certification standard of Rule 23(b)(2). Although California recognizes medical monitoring as equitable relief, such relief does not have a less demanding certification standard than money damages.

And third, there is an ongoing debate in both federal and California courts about whether the courts can deal with mass torts through the class action device. Although none of these concerns categorically preclude medical monitoring claims from class treatment, federal and California courts are reluctant to grant certification in such situations.

Class certification of medical monitoring claims based on exposure to environmental pollution raises complicated scientific and difficult procedural questions. In addition to the issues described above, scientific uncertainty regarding toxic causation creates serious problems.

73. See Boughton v. Cotter Corp., 65 F.3d 823, 827 (10th Cir. 1995).
74. See Day v. NLO, 851 F. Supp. 869, 885-86 (S.D. Ohio 1994) (concluding that the medical monitoring relief sought was injunctive relief under Rule 23(b)(2) because the court can establish, manage and supervise a medical monitoring program of its own); Venugopal, supra note 11, at 1661-62 (arguing that medical monitoring claims are appropriate for class treatment under Rule 23(b)(2)).
76. California law limits class treatment to those cases where common issues predominate, independent of whether the class is seeking legal or equitable relief. See supra notes 56-64 and accompanying text.
77. See Garner, supra note 12, at 10029 (noting that the “debate centers around the long-standing question of whether mass torts of any kind are appropriate for class action treatment”); Martens & Getto, supra note 26, 270-72. Recent Supreme Court decisions impose further restrictions on the ability of judges and litigants to fashion creative settlements for mass tort class actions based on a number of representation concerns. See Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) (holding that the predominance of individual issues among the class members challenged the legitimacy of the named representatives); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (criticizing a Rule 23(b)(1)(B) limited-fund mandatory class settlement for mass torts claims). In addition, the congressional debates over the proposed Class Action Fairness Act emphasize how highly contentious the area of class action litigation is today, both in the courts and the legislature. See Class Action Fairness Act of 2003, S. 1751, 108th Cong. (2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108-cong-bills&docid=f:s1751pcs.txt.pdf. (last visited June 30, 2004). For California courts discussing this issue, see Kennedy v. Baxter Healthcare Corp., 43 Cal. App. 4th 799, 810 (1996) (citing Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1123 (1998)) (recognizing that “[t]he major elements in tort actions for personal injury . . . may vary widely from claim to claim,” creating many disparities in a plaintiff’s claim).
78. A number of courts have considered medical monitoring based on the plaintiff’s exposure to environmental pollution and hazardous waste. See, e.g., Askey, 102 A.D.2d at 131 (considering a claim concerning exposure to toxic substances from the defendant’s landfill); Boggs v. Divested Atomic Corp., 141 F.R.D. 58 (S.D. Ohio 1991) (considering a claim concerning exposure to radioactive materials and non-radioactive hazardous wastes emitted from a nuclear power plant); Day v. NLO, 851 F. Supp. 869 (S.D. Ohio 1994) (considering a claim concerning exposure to hazardous levels of radiation).
for plaintiffs who must establish a defendant's liability by a preponderance of the evidence. In Lockheed Martin, the court not only considered class certification for medical monitoring claims, but did so with environmental pollution claims.

II. CASE REPORT

Ten years after Potter, where the California Supreme Court first recognized medical monitoring as a compensable item of damages, the court had an opportunity to consider class certification for a group of medical monitoring claimants. While the court in Lockheed Martin rejected certification for the proposed class, holding that common issues did not predominate as required by California law, the court stated that medical monitoring claims might be appropriate for class treatment under certain circumstances.

A. Background

In the 1950s, California weapons manufacturers began discarding spent rocket fuel in outdoor pits and trenches, releasing various chemicals into local water sources. Due to such disposals by Lockheed Martin and others in the defense industry, the Redlands area in Southern California is considered one of the most toxic areas in the state. One particular chemical used in rocket fuel, ammonium perchlorate, is of special concern to environmentalists, local officials, and citizens. Some claim that perchlorate exposure stunts brain development in newborns and causes thyroid cancer. The concern has resulted in legislative debate and recent litigation. Though Lockheed Martin contributed more than $60

79. Farber, supra note 27, at 1226-38.
82. Id. at 1105-06, 1111.
86. Calvan, supra note 83, at A20.
87. Id.; Mozingo, supra note 84, at B1.
million toward the cleaning of the Redlands's community drinking water,\textsuperscript{88} multiple lawsuits are moving through the California courts.\textsuperscript{89}

In 1996, the \textit{Lockheed Martin} plaintiffs filed a class action suit in the San Bernardino County Superior Court seeking damages in the form of a court-supervised medical monitoring program.\textsuperscript{90} They alleged that the defendant corporations\textsuperscript{91} discharged toxic chemicals into the local water source and caused widespread, harmful exposure.\textsuperscript{92} The plaintiffs claimed an increased risk of disease based on the exposure.\textsuperscript{93} The plaintiffs sought to certify a class of people exposed to certain chemicals at unsafe levels "for greater than 50 percent of a year, for one or more years from 1955 to the present" within the Redlands area.\textsuperscript{94}

The plaintiffs proposed a liability theory that reduced the importance of individual exposure.\textsuperscript{95} The theory subjected exposure to common proof, arguing that every member of the class had a medically significant level of exposure.\textsuperscript{96} The class definition relied on a threshold of

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\item \textsuperscript{89} Filed around the same time as the \textit{Lockheed Martin} class action, approximately 800 personal-injury plaintiffs brought individual suits against Lockheed Martin. \textit{See} \textit{Lockheed Martin Corp. v. Superior Court}, 134 Cal. Rptr. 2d 304 (2003); \textit{Lockheed Martin Corp. v. Superior Court}, 2003 WL 22133183 (Cal. App. 4th Dist Sept. 16, 2003). The litigation is collectively referred to as the \textit{In re Redlands Tort Litigation}. The trial court consolidated these claims and is trying them as a set of test cases pursuant to a case management order. \textit{Lockheed Martin Corp. v. Superior Court}, 134 Cal. Rptr. 2d at 305.
\item \textsuperscript{90} \textit{Lockheed Martin Corp. v. Superior Court}, 29 Cal. 4th 1096, 1101-02 (2003). The plaintiffs also sought punitive damages. \textit{Id}. Both the medical monitoring and punitive damages rested on a general negligence claim.
\item \textsuperscript{91} On appeal in \textit{Lockheed Martin}, the represented defendants were Lockheed Martin Corp. and Highland Supply Co., Baumac Corp., Petro-Tex Chemical Corp., and El Paso Tennessee Pipeline Co.
\item \textsuperscript{92} \textit{Id}. at 1101. The plaintiffs listed fourteen chemicals that increased the class risk of developing the following: 1) cancer of all types; 2) respiratory illnesses; 3) neurological deficits; 4) reproductive damage including sperm damage, miscarriages, infertility and birth defects; 5) immunologic problems; 6) neuroendocrine dysregulation; 7) psychiatric problems; 8) skin problems; 9) cardiac effects; and 10) hematologic damage. \textit{Id}. at 1113 n.1 (Brown, J., concurring).
\item \textsuperscript{93} \textit{Id}; see discussion \textit{supra} Sections I.C. and I.D. discussing how individual issues can undermine class certification.
\item \textsuperscript{94} \textit{Id}. at 1107-08. The plaintiffs defined the class as "[p]eople who were exposed to water contaminated with any of the following chemicals: TCE, PCE, TCA, other solvents, Ammonium Perchlorate, Perchlorate, other unknown rocket fuel components and rocket fuel decomposition products, Beryllium, Carbon Tetrachloride, Vinyl Chloride, Hydrazine (and Hydrazine derivatives), Nitrosamines (and Nitrosamine derivatives), Epoxides (and Epoxide derivatives), Triazines (and Triazine derivatives), 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 30 percent of a year, for one or more years from 1955 to the present" within specified geographical limits. \textit{Id}. at 1102.
\item \textsuperscript{95} \textit{Id}; \textit{see discussion supra} Sections I.C. and I.D. discussing how individual issues can undermine class certification.
\item \textsuperscript{96} \textit{Id}. at 1107-08. Contrast this theory with a theory under which each plaintiff would need to establish his or her level of exposure individually, making class treatment practically inefficient and legally improper.
\end{itemize}
\end{footnotesize}
chemical exposure based on a designated time period—namely, six months or more.\textsuperscript{97}

The trial court certified the class based on the proposed theory of liability.\textsuperscript{98} The trial court found that the plaintiffs had met the procedural requirements for certification under California's Code of Civil Procedure section 382 and that the plaintiffs also met the prerequisites of Federal Rule 23.\textsuperscript{99} The trial court noted that medical monitoring damages satisfied the requirements of Rule 23(b)(1)(A) and 23(b)(2), risking inconsistent adjudication and seeking class-wide injunctive relief, respectively.\textsuperscript{100}

On interlocutory appeal, the California Court of Appeal for the Fourth District directed the trial court to vacate its order certifying the class.\textsuperscript{101} The Court of Appeal held that the class’s community of interest was insufficient to support class certification because the numerous inquiries necessary to establish each individual’s claim to medical monitoring made individual issues predominate.\textsuperscript{102} Rejecting the plaintiffs' reliance on federal classes certified under Rule 23(b)(2),\textsuperscript{103} the Court of Appeal noted that common issues must predominate in all California class action lawsuits and concluded that medical monitoring claims are poorly situated for class treatment because each member must demonstrate a need based on his or her individual circumstances.\textsuperscript{104}

**B. Majority Opinion**

In *Lockheed Martin*, the California Supreme Court held that the trial court abused its discretion by certifying the proposed class.\textsuperscript{105} The court found certification inappropriate based on the presence of individual issues, the inadequacy of the proposed theory of liability, and the tentative medical testimony.\textsuperscript{106} Nonetheless, the court stated that medical monitoring classes may be appropriate where common issues predominate and individual issues are manageable.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id. at 1102.
\item \textsuperscript{99} Id. The trial court also noted that the plaintiffs demonstrated a realistic chance of success on the merits. Id. at 1102, 1121.
\item \textsuperscript{100} Lockheed Martin Corp. v. Superior Court, 79 Cal. App. 4th 1019, 1024 (2000).
\item \textsuperscript{101} Id. at 1032.
\item \textsuperscript{102} Id. at 1025-26, 1028.
\item \textsuperscript{105} Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096, 1111 (2003).
\item \textsuperscript{106} Id. at 1108-11.
\item \textsuperscript{107} Id. at 1105-06.
\end{itemize}
The court concluded that common issues did not predominate as required under California law.\textsuperscript{108} The court noted some common issues, including legal questions of duty and breach,\textsuperscript{109} as well as factual issues concerning disposal of chemicals and the applicable safety levels.\textsuperscript{110} However, the court found that the questions of causation and harm were only partly subject to common proof.\textsuperscript{111} The court found that the actual duration of exposure and quantity of use varied among individuals, depending on how long the individual lived in the area and the amount of water used during that time period.\textsuperscript{112} Such wide variation among class members required individual inquiries that made class certification inappropriate.\textsuperscript{113}

The court also concluded that the proposed exposure threshold did not necessarily translate into a significant dosage.\textsuperscript{114} According to Potter, evidence of exposure alone will not support a claim for medical monitoring;\textsuperscript{115} the dosage, or actual amount of exposure, remains relevant to finding medical monitoring reasonably necessary.\textsuperscript{116} The Lockheed Martin court admitted that under “particularly egregious circumstances” dosage may be susceptible of common proof.\textsuperscript{117} Under the presented facts, however, “plaintiffs have not provided substantial evidence that they are in a position to resolve possible dosage issues with common proof.”\textsuperscript{118} For the class in question, the duration and amount of exposure remained relevant to determining whether or not each class member received a medically significant dosage.\textsuperscript{119}

Finally, the court found plaintiffs’ expert testimony “too qualified, tentative and conclusionary to constitute substantial evidence that

\textsuperscript{108} Id. at 1108-11. See discussion supra Section I.C.
\textsuperscript{109} Id. at 1106-07. The questions of law included whether or not the defendants had a duty to class members who lived in the Redlands area for greater than six months from 1955 to present and whether or not defendants breached that duty by negligently disposing of spent rocket fuel.
\textsuperscript{110} Id. Common questions of fact included the defendants’ practices for disposing rocket fuel, the relevant contamination levels in the local water source, the toxicity of the chemicals, the seriousness of the diseases for which the plaintiffs are at risk, and the applicable safety levels. Id. at 1107.
\textsuperscript{111} Id. at 1107.
\textsuperscript{112} Id. at 1108-09. Class members had lived in the Redlands area for different lengths of time and had used different amounts of water. Id. at 1109.
\textsuperscript{113} Id. at 1109, 1111.
\textsuperscript{114} Id. at 1109.
\textsuperscript{115} Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1009 (1993).
\textsuperscript{116} Lockheed Martin Corp. v. Superior Court, 29 Cal. 4th 1096, 1108-09 (2003).
\textsuperscript{117} Id. at 1108 (“That a class of water consumers could, under particularly egregious circumstances, demonstrate that everyone who drank from a polluted municipal water system over a specified period is at significant risk for having received a dose sufficient to cause serious disease and, therefore, needs special monitoring, is not inconceivable.”).
\textsuperscript{118} Id. at 1109.
\textsuperscript{119} Id.
plaintiffs, by adopting a liability theory that makes actual dosages and variations in individual response irrelevant, will be able to prove causation and damages by common evidence.”

One of the plaintiffs’ medical experts testified that “all persons who are at risk... should be in [a] monitoring program,” but acknowledged that “the precise dose of exposure experienced by each person cannot be determined exactly because of variability in the delivery of water.” The court concluded that no medical expert categorically stated that qualification for class membership demonstrates a need for medical monitoring irrespective of the actual chemical dosages received, and found the given testimony insufficient to support certification.

Nonetheless, the court noted that “no per se or categorical bar exists to a court’s finding medical monitoring claims appropriate for class treatment.” The court rejected the defendants’ argument that the five Potter factors used to determine whether medical monitoring damages are appropriate created a higher class certification standard with novel proof requirements. Rather, the court affirmed that medical monitoring is a compensable item of damages under traditional tort theories and that the established class certification standard applies to such claims. Accordingly, the court concluded that although the Court of Appeal “erred to the extent it stated or implied that no action in which plaintiffs seek medical monitoring as a remedy may ever appropriately be certified for class treatment, we agree with the court that the trial court abused its discretion in granting the instant certification motion.” The court therefore rejected certification for the proposed class, but held that medical monitoring claims may be appropriate for class treatment in the future.

120. Id. at 1111.
121. Id. at 1110 (emphasis omitted).
122. Id.
123. Id. at 1105-06.
124. Id. at 1105. Defendants argued that the Potter factors comprised "substantial evidentiary burdens" and novel proof requirements for plaintiffs. See discussion supra Section I.B. (discussing the debate among courts in how to treat medical monitoring classes and what burdens such plaintiffs must carry in these cases).
125. Id.
126. Id. at 1111.
127. The concurrence and dissent divided sharply based on their predictions about the implications of the majority's decision. The concurrence strongly opposed certification of the proposed class, predicting that that certification would "open the floodgates of litigation" and "make all medical monitoring claims subject to class treatment." Id. at 1118 (Brown, J., concurring) (quoting Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1009 (1993)) (emphasis in original). Judge Brown, joined by two others, also focused on the scope and "extraordinary complexity" of the plaintiffs' claim in her concurrence, arguing that common issues did not predominate and that the case was unmanageable. Id. at 1114, 1116 (Brown, J., concurring). Judge Moreno, joined by Chief Judge George, dissented and found that this case was "ideally suited" for class treatment. Id. at 1129 (Moreno, J., dissenting). The dissent argued
III. ANALYSIS

The *Lockheed Martin* plaintiffs sought to certify a medical monitoring class based on their common exposure to toxic chemicals. This note focuses on the question of whether or not the plaintiffs' medical monitoring claims were appropriate for class treatment considering two aspects of the California Supreme Court's decision: predominance and manageability. First, the court's holding that common issues did not predominate rested on an improper consideration of the substantive merits of the plaintiffs' claims. Second, manageability concerns should not lead to a higher certification standard for medical monitoring classes. Therefore, the court should have upheld certification. The court's refusal to do so will limit California trial courts' ability to effectively deal with large toxic exposure scenarios in the future by setting a higher class certification standard and effectively forcing plaintiffs and the courts to deal with medical monitoring claims individually where they are based on exposure to hazardous chemicals.

A. Predominance: The Court's Holding that Common Issues Did Not Predominate Rested on an Improper Consideration of the Merits of the Case

In *Lockheed Martin*, the court criticized the plaintiffs' medical testimony as too qualified and therefore found the plaintiffs' liability theory unsupported by substantial evidence. On this basis, the court ultimately concluded that common issues did not predominate. In so holding, the court improperly reached beyond the procedural questions of the case and effectively decided the case on its merits. As the dissent noted, by rejecting the plaintiffs' liability theory at this early stage in the litigation, the majority effectively decided "the substantive merits of the plaintiffs' claims in the context of a procedural motion for certification."

Class certification is a procedural question that does not ask whether an action is substantively meritorious. Rather, the question is whether the requirements of Rule 23 or Section 382 are met. Courts nonetheless struggle with this distinction. In *In re West Virginia Rezulin Litigation*, the
West Virginia Supreme Court held that a trial court abused its discretion in denying certification of a medical monitoring class, based on the trial court’s improper consideration of the case’s substantive merits. The trial court denied certification because it found that there was no medical evidence that the oral diabetes drug Rezulin caused liver damage in the plaintiffs. It went so far as to state that “the evidence shows that Rezulin was not a defective product.” Thus, the trial court rejected the plaintiffs’ liability theory on the merits. The West Virginia Supreme Court reversed the trial court, stating that class certification should not involve a mini-trial on the merits and that inquiry into the substantive merits of a party’s claim in the context of a class certification motion deprives the parties their right to a jury trial.

Likewise, in Lockheed Martin, the court conducted its own evaluation of the plaintiffs’ expert testimony and found it insufficient. By rejecting the medical testimony during a motion for class certification, the court ultimately rejected the plaintiffs’ proposed liability theory on its merits. This evaluation of the merits was improper. Courts should resolve merit-based challenges in the context of a formal pleading or motion that affords the parties proper notice, clear standards, a right to make a meaningful presentation on the merits, and the opportunity to conduct discovery. As a practical matter, absent a liability theory minimizing the importance of individual proof, individual issues will always “prove fatal to a certification motion... [because] no claim for medical monitoring damages can be treated on a class-wide basis.” Ultimately, the court’s unwillingness to allow certification based on a liability theory that minimizes individual issues undermines the future possibility of medical monitoring classes exposure to hazardous materials.

In addition, the Lockheed Martin court’s heightened scrutiny reached beyond the deferential standard of review appropriate on appeal. The trial court neither used improper criteria nor made erroneous legal assumptions, and, therefore, an abuse of the discretion standard applied to the certification decision. As pointed out by the dissent, this deference alone should have been sufficient to uphold the trial court’s

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134. Id. at 60 & n.6.
135. Id.
136. Id. at 63.
138. See Eisen, 417 U.S. at 177; West Virginia Rezulin Litigation, 585 S.E.2d at 63; Linder, 23 Cal. 4th at 443 (2000).
140. Lockheed Martin, 29 Cal. 4th at 1128 (Moreno, J., dissenting).
141. Id. at 1119 (Moreno, J., dissenting); see discussion supra Section I.C. (describing California’s standard of review); Linder, 23 Cal. 4th at 435-36.
While an appellate court reviews the trial court's reasons for granting certification, generally "[a]ny valid pertinent reason [] will be sufficient to uphold the order." Contrary to this deferential standard, the court rejected the trial court's reasoning as an abuse of discretion and decertified the class. In this case, the trial court had a valid reason to certify the class based on the proposed liability theory and presence of substantial common issues. The California Supreme Court should have given greater deference to that decision.

In the end, the decision brought complicated scientific questions of causation and harm to the forefront. One commentator suggests that the decision "highlights the importance of sound expert evidence at the class certification stage." Yet an excessively critical review of expert testimony undermines a process that allows for development of factual issues through discovery and trial. Evaluation of the merits of expert testimony and rejection of plaintiffs' liability theory denied full development of the facts through discovery and final consideration by a jury. This premature evaluation effectively changed the certification procedure into one for summary judgment.

**B. Manageability: The Trial Court Should Have Discretion to Decide Manageability Issues**

Although federal courts expressly consider class management difficulties under Rule 23(b)(3), *Lockheed Martin* did not clarify what role manageability will play in future California medical monitoring class certification motions. The court in *Lockheed Martin* specifically allowed for future medical monitoring classes, "so long as any individual...

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142. See *Lockheed Martin*, 29 Cal. 4th at 1118-19 (Moreno, J., dissenting).
143. Id. (Moreno, J., dissenting) (citing *Linder*, 23 Cal. 4th at 435-36).
144. *Martens & Getto*, supra note 39, at 274.
145. Expert testimony is particularly important in toxic tort litigation where causation is difficult to establish. *Pizzirusso*, supra note 21, at 186-91.
146. See *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52, 63 (2003) (stating that Rule 23 requires a circuit court to rule on the class issue “as soon as possible,” which makes consideration of the merits of the plaintiff’s claims inappropriate because the parties will not have had adequate time for discovery).
147. FED. R. Civ. P. 23(b)(3) (One factor to consider in determining if class treatment is superior is the “difficulties likely to be encountered in the management of a class action.”); *NEWBERG*, supra note 70, § 4.32 (“Manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular [federal] case. Other factors [include] conserving time, effort and expense; providing a forum for small claimants; and deterring illegal activities.”).
148. Outside the context of multi-state class actions, the California Supreme Court has not previously given much attention to managing individual issues at trial. *Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 922-27 (2001) (discussing Rule 23(b)(3) and the importance of proving manageability for multi-state class action with choice of law questions).
issues the claims present are manageable." Unfortunately, the majority provided no additional guidance as to what sort of medical monitoring claims will be manageable. Thus it is no surprise that the concurrence and dissent divided sharply on the issue of manageability. The dissent found the case "ideally suited" for class treatment and that, based on the evidence, the trial court was well within its discretion in concluding that individual issues of causation and harm were manageable. In contrast, the concurrence noted the "extraordinary complexity" of the case and found that the number of individual issues made the case unmanageable. Considering that the potential number of plaintiffs in medical monitoring classes could be quite high, these classes are ripe for concern over judicial management. Yet this manageability concerns should not lead to a higher certification standard.

Effective management occurs at the trial court level. Trial courts have a variety of options available to manage classes and deal with individual issues. For example, they may structure bifurcated trials, use subclasses, try test cases with selected class members, develop detailed trial plans, or even decertify a class if it becomes impractical or after liability is determined. Courts can also use special masters to resolve individual claims and issues. Each of these procedural options are consistent with class certification, and there is nothing unique about a class seeking medical monitoring damages that would undermine a court's ability to employ these options at trial.

Although an unwieldy class undermines the benefits of a class action, concerns over effective management should not lead to a higher

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150. Id. at 1129-32 (Moreno, J., dissenting). The dissent agreed with the trial court that the case involved significant common legal and factual issues and that plaintiffs' liability theory minimized the importance of individual exposure and dosage issues. Id. at 1122, 1124 (Moreno, J., dissenting).
151. Id. at 1114, 1116 (Brown, J., concurring). The concurrence noted that there were twelve toxic substances, exposure from 1955 to the present, a large geographic area, 50,000 to 100,000 class members, over 40 medical conditions, seven defendants, and various dump sites. Id. at 1113-14 (Brown, J., concurring). The concurrence suggested that the trial court could better manage such claims through consolidation and coordination. Id. at 1118 (Brown, J., concurring).
152. See supra Introduction; Komyatte, supra note 1, at 1533.
153. See NEWBERG, supra note 70, § 9 (discussing pretrial and trial considerations for managing class actions); see Wash. Mutual Bank, 24 Cal. 4th at 922-27 (discussing the complications that may arise in multi-state class action and how proponents of a class action must make a sufficient demonstration to the trial court so, at the time of certification, it can adequately assess how the case can be efficiently and fairly managed).
154. CABRASER, supra note 47, § 2.02 (discussing California Rules of Court allowing courts to certify subclasses, amend or modify a class certification order, and bifurcate trial).
155. Venugopal, supra note 11, at 1690.
156. See CABRASER, supra note 47, § 2.02.
In *Lockheed Martin*, the trial court recognized the importance of maintaining a manageable class. Yet, the trial court refused to reject class certification merely on this basis. Instead the trial court preferred to presume manageability, stating that certification “may be rescinded or modified as the changed circumstances . . . require.” Nonetheless, the *Lockheed Martin* majority refused to defer to that determination. By decertifying the class, the California Supreme Court denied the trial court any meaningful opportunity to manage these claims using available procedural tools. Appellate courts should not deny class certification simply because a class is large or disperse, but only because the class does not meet the standards of certification. With class-wide medical monitoring claims, effective management at trial is essential. A premature ruling on certification, however, denies plaintiffs the opportunity for an efficient resolution of their claims.

CONCLUSION

In *Lockheed Martin*, the California Supreme Court rejected class certification for a group of medical monitoring claimants exposed to harmful chemicals in the local water source. The court’s critical review of the substantive merits of the plaintiffs’ claims and its emphasis on manageability concerns raised unnecessary barriers to class treatment. While articulating a standard that will likely limit future class-wide adjudication of medical monitoring claims, the court specifically held that no categorical bar exists against medical monitoring classes. Unfortunately, the court’s unwillingness to certify the proposed class limits the feasibility of future medical monitoring classes based on exposure to environmental toxins.

Harmful exposure claims arising from chemical pollution remain problematic for modern courts. While CERCLA attempts to address environmental cleanup costs, remedying the social costs of pollution are left to tort law. Establishing the tort elements of causation and harm for a class seeking medical monitoring damages is difficult and complicated. The stakes are increased dramatically by the potential for life-threatening illness and costs that can reach into the millions or billions of dollars.

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157. Venugopal, supra note 11, at 1691 (“trial courts ought to be able to decide whether a Rule 23(b)(2) class is manageable without a heightened certification standard”).
159. See discussion supra Sections I.C. & I.D. (describing class certification standards).
161. See Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technology, Risk, Uncertainty and Emotional Distress*, 1984 Wis. L. Rev. 83 (1984) (arguing that 20th Century technologies have brought about new concerns that place huge burdens on the traditional common law framework and that courts could attain an optimal level of deterrence by forcing modern technologies to bear some of the costs of the stress and risks they create).
Yet trial courts are equipped to manage complex cases and juries can judge complex facts. In *Lockheed Martin*, the California Supreme Court struck at the established roles of judge and jury, displacing the trial court's discretion and the jury's fact-finding by an overly critical and premature review on the merits. With a severe pollution problem and the largest court system in the nation, it is unfortunate that the California Supreme Court avoided the responsibility of providing a forum for deciding liability in these chemical exposure cases.

162. *See supra* Section I.C. (discussing class action device).
