INTRODUCTION
Environmental litigation, citizen suits, and toxic tort actions have become increasingly pervasive in our society and have become weapons not just to compensate individuals for injuries but also to promote policy agendas of private citizens groups and others. As a result, businesses—large and small—must consider the potential impacts of being a defendant in these types of actions, as well as regulatory enforcement actions, and develop effective strategies, in advance, to deal with these types of actions, which can be time consuming and extremely expensive.

Plaintiffs have available to them and use an ever-expanding array of statutory and common law mechanisms for pursuing environmental claims; especially in states, such as California, where statutes like the Safe Drinking Water and Toxic Enforcement Act (commonly known as Proposition 65) establish a low threshold for plaintiffs to bring lawsuits. Many of the federal environmental statutes (and their state counterparts) provide for private causes of action to prosecute alleged violations of environmental laws.

COMMON LAW CLAIMS
Most toxic tort and environmental actions alleges a coterie of common law claims, such as trespass, nuisance, negligence, negligence per se, and strict liability. Almost every toxic tort complaint includes one or more of these common law claims. These claims are broader than claims provided by federal environmental statutes, and, for that reason, are often preferred by plaintiffs’ attorneys. Oftentimes, the common law claims are coupled with claims under one or more federal or state environmental statutes, such as the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601, et seq.

Increasingly, plaintiffs are alleging strict liability claims, in other words, that the operations or activities of a business were so inherently dangerous that liability should inure, regardless of whether the business was operated in accordance with laws in effect at the time. The concept of strict liability derives from an old the English case which provided for absolute liability of owners or occupiers of land on which nonnatural and hazardous activities were undertaken. Some courts have expanded this doctrine to include ultrahazardous and abnormally dangerous activities of an environmental nature, including the storage of hazardous chemicals on property. Some courts have limited the scope of these actions, in holding that the dangerousness of a hazardous substance depends on the manner in which it is handled, rather than on its inherent characteristics. Plaintiffs typically plead a strict liability claim in environmental cases, to

1 Rylands v. Fletcher, 1 L.R. Exch. 265 (1866).
2 Sterling v. Velsicol Chem. Corp., 647 F Supp. 303, 312–13 (W.D.Tenn.1986) (holding that the disposal or storage of hazardous substances constitutes an abnormally dangerous activity); State Dep’t of Envtl’ Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150, 157 (1983) (“We believe it is time to recognize expressly that the law of liability has evolved so that a landowner is strictly liable to others for harm caused by toxic wastes that are stored on his property and flow onto the property of others”); Cities Serv. Co. v. State, 312 So.2d 799, 801 (Fla.App. 2 Dist.1975) (“Though there are still many hazardous activities which are socially desirable, it now seems reasonable that they pay their own way. It is too much to ask an innocent neighbor to bear the burden thrust upon him as a consequence of an abnormal use of the land next door”); see RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1979).
3 Avemco Ins. Co. v. Rooto Corp., 967 F.2d 1105, 1108 (6th Cir.1992) (holding that the handling of hazardous substances does not necessarily constitute an abnormally dangerous activity, depending upon the ability of the landowner to eliminate the hazards).
provide a powerful jury argument that defendants should be held strictly liable for all resulting harm to the environment, without regard to whether the defendant's conduct caused or contributed to the injury.

**TOXIC TORTS**

Since 1979 (when the term “toxic tort” was first coined), toxic tort litigation has grown so fast that it now stands as a separate area of environmental litigation. Indeed, courts sometimes refer to large toxic tort lawsuits as “mass” torts. Toxic torts may include drug or pharmaceutical litigation, medical device or implant litigation, asbestos litigation, tobacco litigation, and other types of product liability cases.

While generally based on state common law, toxic tort cases sometimes include other federal statutory claims to establish federal question jurisdiction. In the absence of federal claims, of course, toxic tort cases can reach federal courts through diversity jurisdiction.

**Claims and Liability Issues**

Toxic tort litigation primarily involves common law claims for personal injuries and property damage caused by close proximity to hazardous waste sites, industrial plants, or other types of fact patterns involving chemical exposure. As noted above, toxic tort litigation may include claims of trespass, nuisance, negligence, negligence per se, gross negligence, strict liability for abnormally dangerous activities, and claims for punitive damages under certain circumstances. Increasingly, in addition to the “typical” common law claims, plaintiffs are bringing novel claims and theories like assault and battery, civil conspiracy, economic coercion, unjust enrichment, and environmental justice, among others.

Toxic torts may involve hundreds or thousands of plaintiffs and many defendants. One reason for the rapid increase in toxic tort cases is the sheer economics of a large plaintiff class, or as one plaintiff's attorney put it, “Five thousand plaintiffs times any number is a big number,” where the primary motivation may be to extract a settlement payment out of the defendants. At a minimum, toxic tort actions are replete with complexity, high costs, multiple theories of liability, long latency periods, expert scientific or medical testimony, causation and science problems, proof problems (of long latency, lost evidence, and background diseases), relative risk, plaintiff indeterminacy, defendant indeterminacy, new and multiple damage remedies, limitations, comparative fault, and punitive damages.

On February 18, 2005, President Bush signed into law the Class Action Fairness Act. This law, which includes many technical and procedural complexities, is intended to substantially reduce the risks of defending multi-state class litigation in “unfriendly” state courts and in multiple jurisdictions. Under the Act, federal courts will have jurisdiction over many class actions where the aggregate amount in controversy exceeds $5 million and any member of the class is a citizen of a state different from any defendant. In cases of limited geographical scope, the Act preserves state court jurisdiction. The Act also will increase judicial scrutiny of class action settlements to ensure that they are fair and reasonable to the settling parties, among other provisions.

Three years ago, the California Supreme Court, in a significant case of first impression, adopted the “sophisticated user defense” to product liability and toxic tort actions. In *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56 (2008), the defendant, a trained heating and air conditioning maintenance worker, alleged that he had contracted pulmonary fibrosis from exposure to phosgene gas. He claimed that the manufacturer of the product should have warned him of its dangers. The California Supreme Court disagreed. The Court held that a manufacturer is not liable to a “sophisticated user” of its product for “failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger.” The Court also ruled that the sophisticated user defense is applicable to both strict
liability and negligence claims.

**Strategy Issues and Concerns**

Toxic tort strategies resemble those in most environmental litigation. Early case evaluation, the search for solvent defendants or co-defendants, and extensive discovery and case management efforts are essential steps in toxic tort cases. Increasingly, companies also are looking for old insurance policies (e.g., pre-1970's comprehensive general liability policies that likely do not have any environmental exclusions) to defray in whole, or in part, the fees and expenses associated with defending toxic tort and complex environmental actions.

1. **Do Not Assume the Plaintiffs’ Expert(s) Are Qualified**

The United States Supreme Court altered the standard for admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1983). The Supreme Court listed the following factors that a trial court should examine to determine whether a scientific expert's testimony rests on a reliable foundation:

- Has the scientific theory or technique been subject to empirical testing?
- Has the scientific theory or technique been subject to peer review and publication?
- What is the known or potential error rate of the particular scientific technique?
- Is the technique generally accepted in the relevant scientific community?

The Court emphasized that the inquiry envisioned by Rule 702 of the Federal Rules of Evidence is a flexible one. In a phrase commonly repeated by courts in the wake of *Daubert*, however, the Supreme Court stated that federal trial courts are to serve as "gatekeepers" to ensure that scientific evidence is relevant and reliable. *Daubert* encourages greater scrutiny of expert testimony, and in some cases, substantially reduces the scope of admissible expert testimony, thereby altering the trial landscape.

2. **New And Creative Damages Theories Are Being Proffered By Plaintiffs**

Toxic tort lawsuits have raised three relatively new and creative damage theories: enhanced risk of disease; "cancerphobia"; and medical monitoring.

Under the "enhanced risk of disease" theory, the plaintiff does not yet have the disease but claims that the exposure to toxic chemicals increases the likelihood that he or she will develop the disease and require future medical treatment. Generally, however, the plaintiff must prove that the toxic exposure more probably than not will lead to the disease. For example, in *Sterling v. Velsicol Chemical Corp.*, the Sixth Circuit refused recovery because the plaintiff only suffered a 25–30% risk of susceptibility to cancer and other diseases. The court ruled that to recover, a plaintiff must show a medically reasonable certainty that the disease in question would develop.

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4 855 F.2d 1188 (6th Cir.1988) (applying Tennessee law).
5 Id. at 1205.
Many courts permit plaintiffs to recover for fear of contracting cancer, or "cancerphobia." Fear of cancer represents a type of mental anguish. To recover, courts often require a plaintiff to show a higher probability of developing a disease in an enhanced-risk-of-disease claim than for a fear-of-cancer claim. Numerous federal courts have permitted recovery for mental anguish based on cancerphobia.

Plaintiffs also are increasingly seeking damages for medical monitoring, which encompasses the funding of diagnostic tests or periodic medical examinations. The plaintiff claims these tests or examinations are necessary in order to monitor plaintiff’s health and permit early diagnosis and treatment of future diseases allegedly caused by exposure to toxic products. Plaintiffs often assert that medical monitoring is reasonably necessary and consistent with the recommendations of physicians experienced in the diagnosis and treatment of chemically induced injuries. While the current trend is toward allowing recovery of medical monitoring damages, there has been little explanation of what is required to satisfy the individual elements for medical monitoring.

Increasingly, plaintiffs in toxic tort cases seek to recover property damages based on the "stigma" caused by the contamination on or near the property and the alleged resulting drop in the property's market value. Some courts indicate that such claims may be a proper element of property damages under either trespass or nuisance claims where substantial evidence shows that the property suffered permanent physical damage despite remediation efforts. The amorphous nature of public fears of contaminated land and the inherent speculativeness of the damage caused by the alleged stigma makes courts cautious of stigma claims. Most courts conclude that stigma damages are not recoverable absent evidence that the plaintiff’s own property suffered physical injury from the contamination.

3. **Do Consider The Availability Of Old Insurance Policies**

As noted above, old insurance policies (even policies that may be held by predecessor companies) can be an untapped "gold mine" in defending environmental and toxic tort litigation matters. However, to mine these policies, companies generally either must have excellent records or they must hire insurance "archivists" to ferret-out the old policies from all available information. Hiring an insurance archivist can be money well-spent.

4. **Consider Plaintiff and Defendant Indeterminacy**

The indeterminate plaintiff situation arises in toxic tort cases in two ways. First, ill persons previously exposed to a particular substance may actually have contracted the illness from another cause. The precise cause of their illness may never be known. Second, indeterminacy exists because latency periods for the development of disease may not be the same from person to person. The indeterminate plaintiff problem is particularly thorny when global settlements attempt to combine the interests of currently injured class members with future class claimants whose injuries are not yet known or manifested.

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7 See, e.g., Gilliam v. Roche Biomedical Labs., Inc., 989 F.2d 278, 280 (8th Cir.1993) ("Federal courts have held that injured parties may recover for future mental anguish" (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1206 (6th Cir.1988))).

8 See, e.g., Anderson v. W.R. Grace & Co., 628 F.Supp.1219, 1231 (D.Mass.1986) (recognizing the right to recover for fear of cancer); Cantrell v. GAF Corp., 999 F.2d 1007, 1012 (6th Cir.1993) (approving of the lower court's instruction "that the jury may award, as an element of compensatory or actual damages, damages proved for emotional distress suffered as a result of demonstrated fear of developing an asbestos-related cancer").
In certain toxic tort cases, plaintiffs cannot identify the precise defendant or defendants that caused their injuries. While most jurisdictions continue to reject indeterminate claims for the failure to identify the defendant, several novel theories have appeared and warrant mention: alternative liability, concert of action, civil conspiracy, enterprise liability, and market share liability.

CONCLUSION
The increasingly pervasive nature of toxic tort and environmental litigation, especially for operations and activities that may have occurred decades ago, means that businesses today must be vigilant in ferreting out and addressing issues that could lead to these types of actions—before they lead to a lawsuit.

If an environmental or toxic tort action is filed, companies must develop a strategy or overall game plan for defending the actions. Any such strategy must take into account a complete and honest evaluation of the facts and risk factors. In addition, companies should consider whether it is appropriate to engage the expertise of a public relations firm, whether and how to involve local elected officials (especially where the company’s internal investigation establishes that the claims are bogus). Companies (or predecessors) that have been in business prior to the mid-1970’s also should consider the potential availability of old insurance policies that may provide defense or indemnity coverage.

Please call Chris Amantea or Belynda Reck at Hunton & Williams for more information. We are happy to discuss these issues with your company in more detail.

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