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Mixed Dust Claims - The Next Asbestos, or Much Ado About Nothing?

Douglas J. Giuliano

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Comments

Mixed Dust Claims—The Next Asbestos, or Much Ado About Nothing?

Douglas J. Giuliano[†]

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I. INTRODUCTION

*What's in a name? That which we call a rose
By any other would smell as sweet.*¹

When William Shakespeare wrote these oft-repeated words around 1595,² he undoubtedly would have been unaware of asbestos and mixed-dust claims, or perhaps even torts, for that matter. Thus, little could he have known that over four centuries later, crafty plaintiffs' attorneys, eager to get around legislation and insurance policies that would purport to limit or altogether restrict asbestos lawsuits, would lend credence to Juliet's soliloquy by disguising or molding asbestos cases as "mixed-dust" claims. Mixed-dust claims are nothing new; indeed, they have been brought with varied success since at least the early 1960s.³ However, because of the parallels between the contraction of mixed-dust pneumoconiosis, which is a form of lung disease, and asbestos exposure, and because current or pending legislation, as well as insurance exclusion policies, can impact whether and how much a person may recover for asbestos-related illnesses, there may be a surge in the number of asbestos-related claims brought under the rubric of mixed-dust disease. This article will address that possibility by analyzing whether this would be possible under both the current and likely future state of the law, and if so, what some of the ensuing ramifications might be.

Part I of this Comment will provide a brief medical background of mixed-dust claims, namely in terms of what they are and how they are brought about. Included in this discussion will be an analysis of how and where mixed-dust diseases are typically contracted, as well as some of the varieties of the affliction and the physical effects that the diseases can have on those affected. Also in this section is an examination of asbestosis, a variation of pneumoconiosis that is caused by inhalation of asbestos particles.

¹ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2. (William Lyon Phelps ed., Yale Univ. Press 1923).

² R. Moore, *Romeo and Juliet: Introduction*, Enotes.com, at <http://www.allshakespeare.com/romeo.php?id=830> (last visited Feb. 17, 2006). The author, being mindful of the finicky nature of the Internet and its too-frequent ephemeral website addresses, has kept on file a copy of this Internet-derived source, along with all other such sources used throughout this paper.

³ *E.g.*, *Groff v. Nat'l Gypsum Co.*, 239 N.Y.S.2d 738 (N.Y. App. Div. 1969).

In Part II, the current state of the law and insurance policies as it pertains to pneumoconiosis is explored. The author begins by examining some workers' compensation claims involving both ordinary pneumoconiosis and mixed-dust pneumoconiosis, with an emphasis on how courts employ similar techniques in resolving such claims, including a highly deferential standard to lower tribunals' factual determinations. The focus then shifts to state and federal statutes dealing with both ordinary and mixed-dust pneumoconiosis, including a discussion of some features mutually shared by these statutes. Also examined in this context is one state's procedures for filing pneumoconiosis-related workers' compensation claims, as well as the federal Black Lung Act, which establishes a compensation scheme for persons suffering from pneumoconiosis derived from inhaling coal dust.

Also in Part II is an exploration of insurance law as it applies to mixed-dust claims, particularly through a dissection of the type of insurance commonly secured by businesses known as a commercial general liability policy. The discussion begins by providing background information on some of the impetuses for insurers' attempts to limit their liability in the context of tort claims through pollution exclusion clauses. The author then introduces some of the key interpretative issues that courts struggle with in dealing with the applicability of these policies to a particular set of circumstances, including what substances qualify as "pollutants" for purposes of pollution exclusion clauses. Following is an analysis of some of the most prevalent doctrines that courts employ in interpreting insurance policies, including a discussion of the similarities between how these and other types of cases involving "ordinary" contract disputes are resolved. This is accomplished largely by examining judicial opinions dealing with the applicability of pollution exclusion clauses in particular contexts, such as environmental pollution.

Finally, Part II concludes by addressing some of Congress' attempts at finding a legislative solution to the asbestos litigation problem in America. Initially, the author examines several bills that never became law, such as the Fairness in Asbestos Compensation Act of 1998 and the Asbestos Compensation Act of 2000. The focus is then shifted to Congress' latest attempt at asbestos reform through the Fairness in Asbestos Resolution Act, or FAIR Act for short. To that end, some of the bill's key aspects that might influence how or whether asbestos claims are filed, specifically as it relates to a possible increase in the number of mixed-dust claims filed. Among these is the Act's suppression of all conflicting state and federal laws, as well as the requirement that claimants be able to exclude substances other than asbestos as having caused their injuries for some types of claims.

Part III predicts how today's and tomorrow's insurance law, particularly ever-broadening pollution exclusion clauses, as well as possible future legislation dealing with asbestos, namely the FAIR Act, might impact the number of mixed-dust claims filed. In connection with the insurance aspect

of the query, special attention is given to exclusion clauses specifically dealing with asbestos, which are becoming increasingly common, as well as how those and other types of exclusion clauses affect the duties of insurance carriers in terms of defending or indemnifying claims. Also explored is the interesting question of what would occur if only one of the substances comprising a mixed-dust claim were found to be excluded under an applicable insurance policy.

As for the possible ramifications that legislation like the FAIR Act would have on the filing of mixed-dust claims, the author addresses the issue by focusing primarily on certain key aspects of the FAIR Act that might influence whether and how some asbestos plaintiffs might proceed. Among these are that the Act would serve as the only means by which persons suffering from asbestos-related ailments could file claims to receive compensation and that some claimants whose injuries were caused or influenced by substances other than asbestos might not be eligible for recovery under the Act.

Part IV is concerned with the role that causation could play in tort suits or workers' compensation claims involving mixed-dust disease. The section begins by comparing the elements of causation that might be implicated in mixed-dust tort claims to those typically encountered in traditional toxic tort cases. Next is addressed some basic causation hurdles that mixed-dust tort plaintiffs are likely to face, including proving that they were exposed to toxic substances and that the exposure to those substances is what caused their illness. The author then explores, using the Federal Rules of Evidence as background, some of the principal evidentiary issues that mixed-dust plaintiffs might encounter in their attempts to introduce scientific and medical evidence pertinent to their case.

Following is a discussion of some techniques and strategies a plaintiff seeking to make out a mixed-dust claim might rely on. In conjunction with this is an explanation of what is likely the most reliable procedure to identify potential injury-causing substances, which is conducted using a scanning electron microscope. The author then presents examples of how courts grappling with mixed-dust claims, both in workers' compensation and tort, have addressed the issue of causation.

The next portion of Part IV describes ways in which legislatures, through the creation of administrative and other alternative means of compensation, and courts, by relaxing or modifying the traditional methods of proving one's case in a tort claim, have made it possible for certain persons to recover monetary relief for their injuries. An example of how legislatures have acted to facilitate recovery by those who suffer injuries in the workplace is the passage of "presumption" statutes, which serve to either conclusively or rebuttably establish that one or more of an injured worker's employers were responsible for the injuries caused. As for some of the judicial doctrines aimed at helping certain plaintiffs make out a case for re-

covery who otherwise would have lost in court, these include the “substantial factor” test and “burden-shifting” to defendants. This segment finishes by analyzing how and whether existing laws and doctrines originally created to deal with other areas of the law, such as “ordinary” pneumoconiosis (as opposed to the mixed-dust kind) and asbestos cases, would impact mixed-dust claims.

In the last section of Part IV, the author explores the feasibility and desirability of adopting alternatives to litigation as a way of dealing with mixed-dust claims. The first of such methods discussed is the use of settlements, and to that end, the relative advantages and disadvantages of settlements are discussed. Also addressed are no-fault compensation schemes, either statutory or judicially created, that aim to provide injured persons with monetary relief while eliminating the need for lengthy and difficult litigation. Some examples of such schemes employed in the past are the National Childhood Vaccine Program Injury Act and the agreement reached in the Agent Orange litigation.

In Part V, the conclusion, the author begins by providing a brief summary of the major points from each section. He then posits that while insurance law and possible future legislation dealing with asbestos could result in a substantial number of would-be asbestos plaintiffs choosing to file their claims under the rubric of mixed-dust, the exact degree of this occurrence will depend on several factors, including in what direction insurance law goes, if and to what extent the provisions of the FAIR Act or similar legislation are passed, and how or whether courts and legislatures act to ease some of the causation hurdles that mixed-dust claimants would face.

A. A Brief Medical Explanation of Mixed-Dust Claims⁴

As its name implies, mixed-dust claims arise when a plaintiff alleges that he has become ill from coming into contact, i.e., inhaling, two or more types of particles of an airborne nature.⁵ In medical circles, this condition is typically referred to as mixed-dust pneumoconiosis.⁶ One of the factors that

⁴ The primary purpose of this section is to provide the reader with some general medical background of mixed-dust claims. More specific information, particularly how these diseases can be diagnosed, are addressed in greater detail in connection with causation issues that mixed-dust plaintiffs are likely to face in *infra* Part IV.C.

⁵ See DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *Definition of Pneumoconiosis* (W.B. Saunders 2003), http://www.mercksource.com/pp/us/cns/cns_hl_dorlands.jspzQzpgzEzzSzppdocszSzuszSzcommonzSzdorlandzSzdorlandzSzdmd_p_25zPzhtm (last visited Feb. 26, 2006) [hereinafter *Definition of Pneumoconiosis*].

⁶ See Barbara Barron, *Dealing With Alternative Exposures: Mixed Dust Pneumoconioses*, 1 MEALEY'S LITIG. REP.: SILICA, May 2003, at 1, 1 [hereinafter *Alternative Exposures*]. Another name for pneumoconiosis is “interstitial lung disease,” see Lawrence Martin, *Pitfalls in Diagnosis of Occupational Lung Disease for Purposes of Compensation -- One Physician's Perspective*, 13 J.L. & HEALTH 49, 59 (1998-99) (using the terms interchangeably), which one source defines as “an inflammation in

make mixed-dust disease unique from other medical conditions (and why it is hard to prove)⁷ is the varied ways in which someone may develop the condition, particularly in the workplace. Among the afflicted have been shipyard workers (asbestos, silica, fiberglass, and miscellaneous metal-based fumes), crane operators (coal dust, silica, and asbestos), brick layers (silica, asbestos, and cement dusts), and steel mill operators (silica, asbestos, metal fumes, carbon dust, mica, graphite, and clay).⁸ But even though mixed-dust pneumoconiosis is, by definition, caused by the inhalation of two or more substances, the result of the disease (in terms of the impact on the individual's health) in most instances would not necessarily be different from lung ailments caused by inhaling a single substance, as in either case, the afflicted person's diagnosis would be the same—pneumoconiosis—with the main distinguishing factor between the two types of diseases being that mixed-dust pneumoconiosis involves more than one material.⁹ Thus, some background on “ordinary” pneumoconiosis is highly relevant to our discussion.

Pneumoconiosis is defined as a “diagnosable disease[] of the lung produced by the inhalation of dust (dust being understood to be particulate matter in the solid phase, excluding living organisms).”¹⁰ It is a chronic disease,¹¹ and typically “affect[s] the lung parenchyma (the lung tissue itself or the essential parts of the lung that are concerned with its function);”¹² in this regard, pneumoconiosis involves not only the reaction of the lungs due

and around the tiny air sacs of the lung (alveoli) caused by an allergic reaction to inhaled organic dusts or, less commonly, chemicals.” THE MERCK MANUAL OF MEDICAL INFORMATION – SECOND HOME EDITION, CHAPTER 51: ALLERGIC DISEASES OF THE LUNG (2004), http://www.merck.com/mrkshared/mmanual_home2/sec04/ch051/ch051b.jsp (last visited Feb. 26, 2006) [hereinafter MERCK MANUAL]. Labeling all cases of mixed-dust pneumoconiosis as interstitial lung disease may be misleading, however, as interstitial lung disease can have several different causes. See Frank Chung & Elizabeth Dean, *Pathophysiology and Cardiopulmonary Consequences of Interstitial Lung Disease – Review and Clinical Implications: A Special Communication*, 69 PHYSICAL THERAPY 956, 956 (1989) (stating that “[the term i]nterstitial lung disease comprises over 130 diseases”); see generally American Lung Association, *Interstitial Lung Disease and Pulmonary Fibrosis*, available at <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35436> (last visited Feb. 26, 2006) [hereinafter *Pulmonary Fibrosis*] (providing background information on the disease, including various ways in which it can be caused).

⁷ For a general overview of the difficulties inherent in establishing causation, see *infra* Part IV.

⁸ See Mark Love & Scott Goldberg, *Mixed-Dust Claims Could Be the Next Wave; Asbestos Exclusions May Not Work in New Context*, 25 NAT'L L.J., Sept. 8, 2003, at 17, 18-19; see *Alternative Exposures*, *supra* note 6, at 2-9 (collecting pneumoconiosis cases and organizing them by substances and places of occupational exposure).

⁹ See ATTORNEY'S TEXTBOOK OF MEDICINE § 14-205 (3d. ed. 2003) [hereinafter ATTORNEY'S TEXTBOOK] (stating that symptoms “are not specifically diagnostic of the particular disease”); see also *Alternative Exposures*, *supra* note 6, at 1 (differentiating mixed-dust pneumoconiosis from ordinary pneumoconiosis by the number of substances each consists of).

¹⁰ *Alternative Exposures*, *supra* note 6, at 1 (borrowing from PULMONARY MED. 638 (Clarence A. Guenter ed., J.B. Lippincott Co. 2d ed. 1982)).

¹¹ See ATTORNEY'S TEXTBOOK, *supra* note 9.

¹² *Id.*

to particle inhalation, but also the subsequent alteration of the lung structure and function.¹³ It should be noted that although the symptoms manifesting from this disease can approximate ones caused by other lung diseases, pneumoconiosis is a unique diagnosis and is to be distinguished from more commonly known diseases like asthma, bronchitis, and emphysema.¹⁴ Pneumoconiosis is most often contracted in occupational settings,¹⁵ since

¹³ See *id.*

¹⁴ See Ira Madan, *Occupational Asthma and Other Respiratory Diseases; ABC of Work Related Disorders*, 313 BRITISH MED. JOURNAL 291, 292 (1996) (stating that pneumoconiosis is a “generic term for the lodgement of any inhaled dusts in the lungs irrespective of the effects (excluding asthma and [other lung diseases])”); Medical Centre for Occupational and Environmental Health, Occupational and Environmental Lung Disease, available at <http://www.medicine.manchester.ac.uk/coeh/teachinglearning/resources/lung> (last visited Feb. 26, 2006) (noting that a diagnosis of pneumoconiosis “excludes diseases mainly of the airways like asthma, bronchitis and emphysema”); see MERCK MANUAL, *supra* note 6, INTRODUCTION: OCCUPATIONAL LUNG DISEASES, <http://www.merck.com/mmhe/sec04/ch049/ch049a.html> (last visited Feb. 26, 2006) (grouping pneumoconiosis apart from other diseases).

¹⁵ See *infra* note 38; *infra* note 40 and accompanying text. One interesting instance of occupational exposure to toxic substances that has already resulted in a plethora of mixed-dust claims is the tragic events that occurred in Ground Zero on September 11, 2001, especially the collapsing of the World Trade Center Towers and some nearby buildings. See generally MICHEL BRUNEAU ET AL., OVERVIEW OF DAMAGE TO BUILDINGS NEAR GROUND ZERO (2002), <http://mceer.buffalo.edu/publications/wtc/02-SP02Screen.pdf> (last visited Feb. 26, 2006; on file with author) (surveying damage caused by the terrorist attacks, particularly to the area in and surrounding Ground Zero). Not only did almost 3,000 people die in the ensuing carnage, see *Final Designs Unveiled for WTC Memorial* (Nov. 19, 2003), at <http://www.cnn.com/2003/US/Northeast/11/19/attacks.memorial.ap/> (last visited Feb. 26, 2006), but the collapse of the buildings also released a great deal of pollution and toxic materials into the air, including particles of asbestos, cement, glass, jet fuel, and other products, see *Ground Zero Workers’ Health Cloudy* (Sept. 11, 2003), at <http://www.cbsnews.com/stories/2003/09/10/earlyshow/contributors/emilysenay/main572586.shtml> (last visited Feb. 26, 2006), and thousands of people, particularly rescue workers who persisted near Ground Zero for periods of weeks or even months after the terrorist attacks, have developed, or are at risk of developing, several ailments ranging from “World Trade Center cough” to acid reflux disease to emphysema to asthma and even cancer. See *Health Problems Plague Ground Zero Workers* (Mar. 2, 2003), at http://www.usatoday.com/money/industries/health/2003-03-02-wtc-workers_x.htm (last visited Feb. 26, 2006).

In what was likely a prelude of things to come, in September of 2004 a class action lawsuit against the construction companies charged with overseeing the removal of debris at Ground Zero was filed in federal court in the Southern District of New York. The lawsuit purported to represent thousands of rescue and clean-up workers who lingered for days or weeks in Ground Zero in the aftermath of the terrorist attacks. See generally Complaint, *Divirgilio v. Silverstein Properties* (No. 21-MC100), available at <http://www.877wtchero.com/complaint.pdf> (last visited Feb. 26, 2006; on file with author). The workers claim to be suffering from an array of health problems, including constant coughing, dizzy spells, shortness of breath, loss of hearing, development of tumors, acid reflux disease, and asthma. See *id.* at 14-17. In addition to seeking compensatory damages, the class also seeks to establish a medical monitoring program. See *id.* at 13.

Interestingly, the complaint is replete with references to what undoubtedly would fall within the scope of mixed dust: “The catastrophe created an immense cloud of caustic dust...”; “Residential ... and other public buildings were coated with the toxic mix of chemical dust”; “Contaminated dust from the towers is trapped in air conditioning, heating and ventilation systems...”; “[S]afety precautions were needed to protect the rescue workers ... and anyone else exposed to the caustic dust...”; “The high alkalinity of the WTC dust produced bronchial hyper-reactivity, persistent cough, and increased risk of

that is where high and frequent doses of pollutants are more likely to occur, but the disease may also be found with some regularity in residents of areas with excessive amounts of particulate matter in the air.¹⁶ It must be stressed that in order for the disease to develop, there must be exposure to *high* concentrations of airborne dusts, which can be either inorganic, i.e., non-living, such as iron, tin, barium, asbestos, coal, and, silica,¹⁷ or organic, which would typically involve some kind of mold.¹⁸ Furthermore, not everyone that inhales particles into their lungs, even if done with significant frequency or in a heavy amount, will develop pneumoconiosis, for the human lungs are able to rid the body of certain substances, depending on the size and nature of the particles.¹⁹

As one can imagine, there are many recognized forms of pneumoconioses (plural of pneumoconiosis)—at least two-dozen in all,²⁰ and expectedly, they are classified according to the materials that are responsible for their development.²¹ Thus, among the numerous types are silicosis (silica-based), asbestosis (asbestos-based), talcosis (talc-based), graphitosis (graphite-based), berylliosis (beryllium-based), tabacosis (tobacco-based),

asthma.”; “240 New York City firefighters ... received treatment of acute respiratory symptoms caused by inhalation of airborne smoke and dust....” *Id.* at 3-4. Recently, the United States Second Circuit Court of Appeals ruled that at least certain of plaintiffs’ claims could proceed. *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005).

Similar lawsuits stemming from the World Trade Center disaster have been filed against other entities, including the Environmental Protection Agency, or EPA. *See, e.g.*, http://www.911ea.org/Current_Lawsuits.htm (last visited Feb. 26, 2006) (describing such a lawsuit).

The tragic World Trade Center situation also illustrates the potential causation problems mixed-dust plaintiffs might face, given that it would most likely be impossible to know exactly which substances might have caused which injuries, and from where the substances originated. *See* New York Committee for Occupational Safety and Health, NYCOSH Testimony at the EPA Ombudsman Investigative Hearing on the Environmental and Public Health Impact of the World Trade Center Attack, *available at* <http://www.nycosh.org/WTCcatastrophe/EPAOmbudsHearingFeb23.html> (last modified Jan. 19, 2006; last visited Feb. 26, 2006) (“The variability of the contents of the World Trade Center and the massive scale and intensity of destruction make it virtually impossible to anticipate, let alone sample, all possible resulting contaminants.”); *see generally infra* Part IV.A-C (addressing some of the causation burdens mixed-dust plaintiffs might face, including identifying and linking the alleged injury-causing substances to a defendant).

¹⁶ *See Definition of Pneumoconiosis, supra* note 5.

¹⁷ *See ATTORNEY’S TEXTBOOK, supra* note 9.

¹⁸ *See Love & Goldberg, supra* note 8, at 17.

¹⁹ *See id.* at 18:

Particles . . . [that are] big enough [tend] to be caught in the upper airways and eliminated through the nose and mouth. [Very small p]articles . . . are small enough to be dealt with by the body’s immune response Particles between these sizes can accumulate in the lungs, however, . . . [sometimes] causing scarring. Many of the inorganic dusts, such as asbestos and silica, continue to cause scarring in the lungs long after they are inhaled.

Id.

²⁰ *See Alternative Exposures, supra* note 6, at 2-7; *infra* note 22 and accompanying text (providing examples of substances that can cause pneumoconiosis).

²¹ *See Definition of Pneumoconiosis, supra* note 5 (stating that the various conditions “are often named for the implicated substance”).

and siderosis (iron-based).²² And it would be remiss to not mention the exotic variant of pneumoconiosis known as pneumonoultramicroscopic silico-volcanoconiosis (very fine silica dust).²³

B. Similarities Between Pneumoconiosis and Asbestos-Related Lung Diseases

Little or no introduction to health problems wrought by asbestos is needed, and indeed, an in-depth or abstract explanation of asbestos-related legal or medical problems is beyond the scope of this Comment. For our purposes, it suffices to say that asbestos is responsible for one of the worst medical crises the United States has seen,²⁴ and that the situation has proven to be a significant impetus for insurers to exclude coverage for asbestos and similar pollutants, as well as for Congress to propose legislation seeking to control the rampant litigation related to asbestos claims.²⁵ Primarily because of this, an examination of the similarities in medical terms between asbestos-related diseases and pneumoconiosis is warranted.

Rather than comparing asbestos ailments in general to pneumoconiosis, it would be more fruitful to restrict the discussion of such diseases to that of asbestos' manifestation of pneumoconiosis, aptly named *asbestosis*.²⁶ Simply put, asbestosis is the name given to pneumoconiosis caused by the inhalation of asbestos.²⁷ The disease is characterized by a scarring of the lungs caused by the deposit of asbestos fibers,²⁸ and typical symptoms displayed by those suffering from asbestosis include heart failure,²⁹ progres-

²² See generally *id.* (listing these and other causes of pneumoconiosis); see also text accompanying *supra* note 20 (noting that there are over two dozen causes of pneumoconiosis); *infra* note 97 (mentioning byssinosis, a type of pneumoconiosis caused by inhalation of cotton particles).

²³ See Dictionary.com, *What is the Longest Word in the Dictionary?*,

<http://dictionary.reference.com/help/faq/language/longestword.html> (last visited Feb. 17, 2006). As of yet, no person has actually been diagnosed with this variation of pneumoconiosis, see *id.*, but it warrants mention here by virtue of the word's dubious distinction as the longest word in the English language. See *id.*

²⁴ See generally Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001) (providing background on medical and litigation costs brought on by asbestos).

²⁵ These will be discussed in *infra* Part II.

²⁶ Many different types of diseases other than asbestosis are known to be caused by asbestos, including lung cancer and mesothelioma, a rare cancer of the chest and abdomen lining. See generally American Lung Association, *Asbestos*, available at <http://www.lungusa.org/site/pp.asp?c=dvLUK9O0E&b=35368> (last visited Feb. 17, 2006) [hereinafter *Asbestos*] (describing ill affects of asbestos). However, this Comment will focus more on asbestosis, since that condition is a type of pneumoconiosis, see accompanying text to *infra* note 27, and is therefore more relevant to the discussion.

²⁷ See *Asbestos*, *supra* note 26.

²⁸ See *id.*

²⁹ See AMERICAN COUNCIL ON SCIENCE AND HEALTH, PAMPHLET ON ASBESTOS 3 (1992) (on file with author).

sively worsening dyspnea,³⁰ dry-cough,³¹ and non-specific chest discomfort.³² These symptoms are not unlike those commonly associated with pneumoconiosis in general,³³ so the likeness between asbestosis and pneumoconiosis in terms of both contraction and symptoms cannot be denied.

With this brief medical background in hand, we can now proceed to examine insurance policies and law relating to pneumoconiosis.

II. CURRENT STATE OF THE LAW AND INSURANCE

In order to better appreciate the relationship between a possible future surge in mixed-dust claims and insurance policies and legislation dealing with asbestos and pneumoconiosis that are in existence today, an analysis of pertinent insurance policies and laws, both federal and state, is necessary. This, in turn, requires an examination of case law dealing with insurance policies, particularly opinions resolving interpretive issues concerning what is and is not covered under a policy, as well as claims filed in tort or workers' compensation cases where the claimants alleged to be suffering from some form of pneumoconiosis.

A. Case Law Dealing with Pneumoconiosis

Reported cases involving claims of pneumoconiosis first appeared in the early twentieth-century, both in state³⁴ and federal³⁵ courts, and, not surprisingly, are still occurring today.³⁶ Many of these cases, then and now, are appeals from lower decisions that either awarded or denied workers' compensation benefits to claimants who alleged they developed pneumoconiosis in the workplace.³⁷ That these claimants might be correct is not surpris-

³⁰ See Basil Varkey et al., *Asbestosis*, available at <http://www.emedicine.com/med/topic171.htm> (last modified July 8, 2005; last visited Feb. 26, 2006). Dyspnea is a condition where an afflicted person experiences difficulty in breathing, and is sometime referred to as "air hunger." See Dictionary.com, at <http://dictionary.reference.com/search?q=dyspnea> (last visited Feb. 26, 2006).

³¹ See Varkey, *supra* note 30.

³² See *id.*

³³ See generally Pulmonary Fibrosis, *supra* note 6 (providing symptoms on interstitial lung disease). As noted earlier in note 6, pneumoconiosis is sometimes referred to as interstitial lung disease.

³⁴ E.g., *Kovaliski v. Collins Co.*, 128 A. 288, 288 (Conn. 1925) (Workers' compensation case where plaintiff contracted pneumoconiosis due to "grinding," described by the court as "the process of removing on a revolving stone the rough surfaces and edges of axes and other tools there manufactured").

³⁵ E.g., *Grammer v. Mid-Continent Petroleum Corp.*, 71 F.2d 38, 39 (10th Cir. 1934) (Wrongful death action where plaintiff died of pneumoconiosis arising out of his employment as a cleaner of gas oil stills). A still in this context is "[a]n apparatus for distilling liquids . . . consisting of a vessel in which the substance is vaporized by heat and a cooling device in which the vapor is condensed." See Dictionary.com, <http://dictionary.reference.com/search?q=still> (last visited Feb. 17, 2006).

³⁶ E.g., *Drummond Co. v. Johnson*, 886 So. 2d 825 (Ala. Civ. App. 2003).

³⁷ E.g., *supra* note 34. Some plaintiffs nonetheless elect to bring the claim under a tort theory, such as wrongful death. See, e.g., *Triff v. National Bronze & Aluminum Foundry Co.*, 20 N.E.2d 232, 233 (Ohio 1939) (administratrix of decedent who died of silicosis sued decedent's former employer,

ing, as occupational lung disease is the number-one work-related illness in the United States.³⁸ It is also not surprising to learn that a fair number of asbestos cases (which, as discussed earlier, share definite similarities with pneumoconiosis cases as a whole,³⁹) are also brought under workers' compensation,⁴⁰ rather than in the torts context. One likely reason for this is that under the workers' compensation laws of most states, plaintiffs are generally foreclosed from pursuing claims against their employers through the courts, but rather must rely on the applicable state's workers' compensation scheme;⁴¹ this is commonly referred to as the "exclusive remedy" rule,⁴² and a similar limitation applies to federal employees.⁴³

alleging various counts of negligence such as failure to inform workers of dangerous workplace conditions and failure to provide a safe workplace).

³⁸ NEW YORK STATE DEP'T OF HEALTH, OCCUPATIONAL LUNG DISEASE REGISTRY (2002), <http://www.health.state.ny.us/nysdoh/lung/lungreg.pdf> (last modified Dec. 2002; last visited Feb. 17, 2006; on file with author).

³⁹ See generally *supra* Part I.B.

⁴⁰ See Deirdre A. McDonnell, Comment, *Increased Risk of Disease Damages: Proportional Recovery as an Alternative to the All or Nothing System Exemplified by Asbestos Cases*, 24 B.C. ENVTL. AFF. L. REV. 623, 644 n.186 (1997) (noting that the majority of asbestos claims stem from persons who were injured due to "occupational exposure"); see also Melissa A. Vallone, Note, *Employer Liability for Workplace Environmental Tobacco Smoke: Get Out of the Fog*, 30 VAL. U. L. REV. 811, 828 (1996) (stating that "[s]tarting in the 1950s, many asbestos plaintiffs pursued remedies through state workers' compensation laws"). Some of the possible reasons behind a plaintiff's choice to pursue an asbestos claim under a workers' compensation scheme as opposed to in tort might have to do with the expense, time, and uncertainty that are inherently involved in lawsuits, which are alleviated somewhat under the "no-fault" structure of most states' workers' compensation schemes. See Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 342 (2003) ("Workers' compensation is a no-fault system in which employees recover . . . [a]s long as the employee's injury 'arises out of and in the course of employment'"); see Rachel Schaffer, *Grabbing Them by the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes From Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 636-39 (2000) (providing an overview of workers' compensation schemes).

Nonetheless, there are drawbacks to proceeding with a claim under workers' compensation as opposed to filing a lawsuit, chief among those being that the maximum amount recoverable under workers' compensation would likely be much lower than the damages that might be awarded in a lawsuit. See Sidney A. Shapiro, *Economic Analysis of State Employment Law Issues Symposium: The Necessity of OSHA*, 8 KAN. J.L. & PUB. POL'Y 22, 28 (1999) ("All states have caps on damages and other limitations that significantly restrict [the amount awarded under] workers' compensation"). And because employers are often immune from lawsuits stemming from work-related injuries, see *infra* notes 41-43 and accompanying text, persons who choose to sue for their injuries stemming from asbestos exposure might have no choice but to go after the manufacturer(s) of the asbestos product(s) that caused the plaintiff's injuries, and this would not be desirable because many of these companies simply cannot afford to pay any judgments entered against them, see *infra* note 306 and accompanying text.

⁴¹ See, e.g., *Travelers Indem. Co. v. Reker*, 100 S.W.3d 756 (Ky. 2003) (after analyzing Kentucky's Workers' Compensation Scheme, found in sections 342.011-990 of the Kentucky Revised Statutes (2002), the court held that the plaintiff's exclusive remedy for securing benefits for injuries sustained on the job lay within the state's workers' compensation scheme).

⁴² See, e.g., John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?*, 47 ARK. L. REV. 1, 41 (1994) ("[Under most workers' compensation schemes,] employers are granted immunity from most employee tort claims because workers' compensation is the

The role of the courts in a workers' compensation case involving a mixed-dust claim may be gauged by examining a typical opinion such as *Clinchfield Coal Company v. Reed*.⁴⁴ In *Clinchfield*, the Virginia Court of Appeals was faced with an appeal from the defendant, Clinchfield Coal Company, challenging an award of medical benefits by the Virginia Workers' Compensation Commission to the claimant, Farrell D. Reed, for the coal workers' pneumoconiosis he allegedly had developed from his job.⁴⁵

In affirming the award of benefits,⁴⁶ the court first noted that a very deferential standard applied in that context.⁴⁷ The court then briefly defined coal workers' pneumoconiosis as "a disease of the lung that results from the accumulation of coal dust in the lungs"⁴⁸ and proceeded to examine the evidence presented to the Commission.⁴⁹ After noting that the evidence in the record sufficiently supported the Commission's finding that the plaintiff had contracted the illness through his employment,⁵⁰ the court turned to the decisive question before it, namely whether the plaintiff's disease was one for which compensation could be had under Virginia's workers' compensation scheme.⁵¹ After analyzing the relevant statutory provision,⁵² the court recognized that the disease the plaintiff was suffering from, coal workers' pneu-

exclusive remedy. . . . [M]ost jurisdictions [have] traditionally recognized only a few narrow exceptions to the exclusive remedy doctrine."); see Jennifer Moyer Gaines, Comment, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH L. REV. 139, 144-48 (2000) (providing background on the "exclusivity" rule in workers' compensation schemes).

⁴³ See generally William R. Kraus, *How "Exclusive" is "Exclusive"? The Federal Employees' Compensation Act and Compensatory Damages in Discrimination Cases*, 43 A.F. L. REV. 145 (1997) (exploring the exclusivity rule in federal workers' compensation laws).

⁴⁴ 577 S.E.2d 538 (Va. Ct. App. 2003).

⁴⁵ See *id.* at 539.

⁴⁶ *Id.*

⁴⁷ *Id.* ("On appeal, we view the evidence in the light most favorable to the prevailing party before the commission.") (internal quotations omitted). The majority of courts adopt a similarly deferential standard in workers' compensation appeals. See, e.g., Brad A. Elward, *Workers' Compensation Reviews and Appeals: A Review and Suggestion for Change*, 22 N. ILL. U. L. REV. 493, 517-18 (2002) (noting that "[the m]anifest weight of the evidence [standard] is the most common standard of review in workers' compensation appeals," and that "so long as 'some' evidence is presented to support the [workers' compensation board's] decision, that decision must be affirmed").

⁴⁸ *Clinchfield*, 577 S.E.2d at 539.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 540-42.

⁵² *Id.* The court focused primarily on section 65.2-403(B) of the Virginia Code (2003), which at the time provided in part that "[a]n employee who has an occupational disease that is covered by this title shall be entitled to the same hospital, medical and miscellaneous benefits as an employee who has a compensable injury by accident").

moconiosis, was indeed a compensable injury for the purposes of workers' compensation,⁵³ and affirmed the judgment.⁵⁴

The *Clinchfield* case is illustrative of the type of analysis courts will undertake in reviewing workers' compensation claims for injuries stemming from pneumoconiosis. First, they are highly deferential to the conclusions reached by the tribunals below, whether it be a trial court or administrative body.⁵⁵ Second, the courts will focus on interpreting and applying statutory schemes to the case before it, rather than tort or other legal principles.⁵⁶ Finally, they will tend to engage in the difficult analysis of medical evidence and related questions only to the extent that is necessary to review the lower body's decision.⁵⁷

Sometime after cases related to "simple" pneumoconiosis appeared,⁵⁸ cases involving claims of *mixed-dust* pneumoconiosis began appearing in various courts, with the first of these tracing back to New York courts in 1963.⁵⁹ They continue to appear with some frequency,⁶⁰ and as with cases alleging ordinary pneumoconiosis,⁶¹ a good number - in fact, most - of reported opinions involving claims of mixed-dust pneumoconiosis are in the form of appeals from workers' compensation board decisions.⁶²

⁵³ See *Clinchfield*, 577 S.E.2d at 541. In reaching this conclusion, the court relied in part on the Commission's statement that "[a]sbestosis is but one of the several occupationally-induced pneumoconioses for which workers' compensation benefits, including medical benefits, are available." *Id.*

⁵⁴ *Id.* at 543.

⁵⁵ See *supra* note 47 and accompanying text.

⁵⁶ See, e.g., *Kusenko v. Republic Steel Corp.*, 484 A.2d 374, 376 (Pa. 1984) (noting that "[r]esolution of th[e] issue [of whether benefits should be awarded] necessarily requires an examination of the statutory language which governs the recovery of benefits in a Workmen's Compensation case").

⁵⁷ See, e.g., *Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd.*, 572 A.2d 843, 844-45 (Pa. Commw. Ct. 1990) (noting that "the referee is the ultimate factfinder in a workmen's compensation case and he has the sole prerogative of assessing credibility and resolving conflicts in testimony").

⁵⁸ See, e.g., *supra* notes 34-35 (examples of such cases).

⁵⁹ *Groff*, 239 N.Y.S.2d 738. *Groff* involved an appeal by an employer of a decision by New York's workers' compensation board that awarded benefits to a worker for disabilities he developed as a result of working as a miner. *Id.* at 739. The plaintiff had been diagnosed with, among other things, mixed-dust pneumoconiosis after coming into contact with gypsum and silica. *Id.* at 739-40. The *Groff* case was mentioned in passing earlier in *supra* note 3 and the text accompanying it.

⁶⁰ E.g., *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868 (Ky. Ct. App. 2001). *Bailey* is somewhat unusual in that it is not a workers' compensation case; rather, certain employees of a factory that made asbestos-containing products sued the manufacturer, alleging that the company's negligence was responsible for the various diseases they had contracted, among them being mixed-dust pneumoconiosis (of which asbestos was one factor). *Id.* at 870. For an examination of how the *Bailey* court addressed the plaintiffs' claims, which by so doing allows one to glean some of the differences between a claim filed in tort and one filed in workers' compensation, see *infra* Part IV.D.1.

⁶¹ See *supra* note 37 and accompanying text.

⁶² E.g., *supra* note 59 (providing an example of such a case). A search on Westlaw done on February 26, 2006, for both federal and state cases containing the words "mix! dust pneum!" (! is a wildcard character in Westlaw, meaning, for example, that any words beginning with "mix" would be found) netted thirty-three cases, and most of those involved workers' compensation claims (including many from Pennsylvania, which is not surprising given the amount of mining that is done there.) A similar but broader search done the same day using the words "mix!-dust" was a bit more fruitful, yield-

Mixed-dust pneumoconiosis cases share another similarity with other types of pneumoconiosis cases; although mixed-dust pneumoconiosis cases are obviously not identical to those in which plaintiffs allege “ordinary” pneumoconiosis,⁶³ courts will, at least when dealing with workers’ compensation cases, take a comparable approach in deciding both. Illustrative of this is *Alston v. Chrysler Corporation*,⁶⁴ an appeal from a decision by Michigan’s Worker’s Compensation Appellate Commission (WCAC) in which the court chose to adopt the magistrate’s findings that the plaintiff was afflicted with mixed-dust pneumoconiosis and asbestos, and then went on to find Chrysler Corporation responsible for paying the worker medical benefits.⁶⁵ As was the case in *Clinchfield*,⁶⁶ the court in *Alston* began its opinion by noting the extremely deferential standard that applies in appeals from workers’ compensation decisions involving mixed-dust pneumoconiosis.⁶⁷

The court then proceeded to the merits of the claim by analyzing the magistrate’s findings that the “plaintiff was disabled by a work-related dust disease resulting from his exposure to asbestos.”⁶⁸ [Oddly enough, “[t]he magistrate did not expressly state the type of dust disease from which the plaintiff suffered.”]⁶⁹ As is typical in these cases,⁷⁰ the magistrate reached

ing 48 cases. Possible reasons for there being many more mixed-dust workers’ compensation claims than tort claims are explored in *supra* note 40 and accompanying text and *infra* note 334 and accompanying text.

⁶³ The most glaring difference between the two is, of course, that mixed-dust pneumoconiosis involves at least two substances, while ordinary pneumoconiosis is composed of only one. See text accompanying *supra* note 5; *supra* note 9 and accompanying text.

⁶⁴ 622 N.W.2d 795 (Mich. Ct. App. 2000).

⁶⁵ *Id.* at 796-97. Chrysler did not challenge the magistrate’s findings to the effect that the plaintiff had been stricken with the diseases as a result of his work, but rather argued that it should be reimbursed for the benefits it paid the plaintiff by the Silicosis, Dust Disease, and Logging Industry Compensation Fund (Fund). *Id.* at 796. In reversing the magistrate’s ruling on this point and finding against Chrysler, the *Alston* court noted that Chrysler failed to establish a prerequisite of the Fund’s reimbursement, namely that the diseases that the plaintiff was suffering from represented “a threat to the automobile industry,” i.e., that the potential of similar claims by workers being filed could have a crippling economic effect on the industry. *Id.* at 796-99.

⁶⁶ The *Clinchfield* case was discussed in *supra* notes 44-54 and accompanying text.

⁶⁷ See *Alston*, 622 N.W.2d at 796:

Our review of a decision of the WCAC [Worker’s Compensation Appellate Commission] is limited to whether the WCAC exceeded its authority or committed an error of law . . . If there is any evidence supporting the WCAC’s factual findings, and if the WCAC did not misapprehend its administrative appellate role in reviewing decisions of the magistrate, then the courts must treat the WCAC’s factual findings as conclusive. (internal citations and quotations omitted).

⁶⁸ *Id.* at 796.

⁶⁹ *Id.*

⁷⁰ See, e.g., OHIO REV. CODE ANN. § 4123.68 (Anderson 2005):

Before awarding compensation for disability or death due to silicosis, asbestosis, or coal miners’ pneumoconiosis, the administrator shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. (emphasis added).

her conclusion by relying on the submitted testimony of doctors.⁷¹ In particular, there was evidence presented from two doctors that indicated the plaintiff suffered from, *inter alia*, mixed-dust pneumoconiosis that was likely caused by a combination of the plaintiff being exposed to asbestos in the workplace and his habit of smoking.⁷² On appeal, the court summarily adopted the magistrate's findings on this issue, and although the correctness of the magistrate's medical findings was not the central issue in the case,⁷³ *Alston* is nonetheless indicative of the extreme deference that courts give to lower tribunals' decisions in workers' compensation cases.⁷⁴ As was alluded to earlier, the court ultimately affirmed the WCAC's ruling that Chrysler was responsible for the plaintiff's benefits.⁷⁵

B. Legislation Concerning Pneumoconiosis

1. State Laws

As of present, many states have enacted laws dealing with pneumoconiosis, usually in the context of workers' compensation.⁷⁶ These statutes range from providing definitions of pneumoconiosis⁷⁷ to listing examples of compensable pneumoconiosis⁷⁸ to creating presumptions in favor of pneumoconiosis victims.⁷⁹ In terms of liability in occupational settings, although

Such a requirement is common among workers' compensation statutes, probably because, as the Supreme Court recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982), "there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making [medical] decisions." *Id.* at 322-23.

⁷¹ See *Alston*, 622 N.W.2d at 796-97.

⁷² *Id.*

⁷³ See *supra* note 65.

⁷⁴ See *supra* notes 47, 57, 67 and accompanying text.

⁷⁵ See *supra* note 65 and accompanying text.

⁷⁶ See, e.g., ALA. CODE § 25-5-110 (2003); D.C. CODE ANN. § 32-1510 (2003); 820 ILL. COMP. STAT. 310/1 (2003); IOWA CODE § 85A.12 (2003); KY. REV. STAT. ANN. § 342.316 (BANKS-BALDWIN 2002); MICH. COMP. LAWS § 418.531 (2003); MONT. CODE ANN. § 39-72-303 (2003); N.Y. WORKERS' COMP. LAW § 44-A (CONSOL. 2003); N.D. CENT. CODE § 65-05-01.1 (2003); OHIO REV. CODE ANN. § 4123.68; 77 PA. CONST. STAT. § 411.1 (2003); R.I. GEN. LAWS § 28-34-2 (2003); TENN. CODE ANN. § 50-6-303 (2003); VA. CODE ANN. § 65.2-513 (MICHIE 2003); W. VA. CODE § 23-4-14 (2003). Additionally, in mid-2004 the legislature of Ohio passed a comprehensive bill regulating mixed-dust claims in several regards, including defining what a mixed-dust claim is, establishing what a claimant must prove in order to prevail, and detailing who may be held liable for such claims. See *generally* OHIO REV. CODE ANN. § 2307.84-902.

⁷⁷ See, e.g., ALA. CODE § 25-5-110:

Occupational pneumoconiosis [is a] disease of the lungs caused by inhalation of minute particles of dust over a period of time, which dust is due to causes and conditions arising out of and in the course of the employment, without regard to whether the causes or conditions are inherent in the employment or can be eliminated or reduced by due care on the part of the employer.

⁷⁸ See, e.g., D.C. CODE ANN. § 32-1510 (listing silicosis and asbestosis as examples of occupational diseases).

⁷⁹ See, e.g., N.Y. WORKERS' COMP. LAW § 44-a ("The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this

there are slight variations, typically the employer who will be held liable for compensating those who have contracted pneumoconiosis is the one in whose employ the afflicted were last exposed to the agent(s) causing pneumoconiosis.⁸⁰

The various state statutes dealing with workers' compensation for pneumoconiosis typically provide for procedures on how a worker may initiate a claim.⁸¹ An example of such a statute is section 342.316 of the Kentucky Statutes,⁸² which outlines in detail the steps that a claimant seeking benefits for occupational diseases must follow. First, he must file a "claim for resolution" that lists, among other things, the worker's complete work history, replete with the names and addresses of past employers and the dates of employment.⁸³ The employee must also provide at least one written medical report supporting his claim, prepared by a licensed physician, "which shall be made on the basis of clinical or X-ray examination performed in accordance with accepted medical standards and shall contain full and complete statements of all examinations performed and the results thereof."⁸⁴ In addition to the report, the claim must be accompanied by a chest X-ray examination "and appropriate pulmonary function tests"⁸⁵ that "comply with accepted medical standards."⁸⁶ The statute then minutely details the medical requirements and procedures that the examining physician must abide by.⁸⁷

chapter when disability or death of the employee shall be due to silicosis or other dust disease.") This and similar statutes creating presumptions regarding pneumoconiosis have been enacted by many states, as well as the federal government, and are examined in further detail in *infra* Parts II.B.1-2, IV.E.1.a.

⁸⁰ See, e.g., KY. REV. STAT. ANN. § 342.316(1)(a) ("The employer liable for compensation for occupational disease [including pneumoconiosis] shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease."); see also *infra* notes 399, 403 (discussing the "last injurious exposure" rule).

⁸¹ See, e.g., KY. REV. STAT. ANN. § 342.316; OHIO REV. CODE ANN. § 4123.68; VA. CODE ANN. § 65.2-513; W. VA. CODE § 23-4-8 (2003).

⁸² KY. REV. STAT. ANN. § 342.316

⁸³ *Id.* § 342.316 (3)(a).

⁸⁴ *Id.*

⁸⁵ *Id.* § 342.316 (3)(a)(2). Requiring a workers' compensation claimant to submit this type of evidence is not uncommon. See generally *infra* Part IV.D.2 (discussing workers' compensation case where similar requirements were imposed on the claimant).

⁸⁶ KY. REV. STAT. ANN. § 342.316 (3)(b).

⁸⁷ *Id.* § 342.316 (3)(b)(1)-(2):

Chest X-rays shall be of acceptable quality with respect to exposure and development . . . Physicians' reports of X-ray interpretations shall . . . classify the X-ray interpretation using the latest ILO Classification and be accompanied by a completed copy of the latest ILO Classification report. Only interpretations by National Institute of Occupational Safety and Health (NIOSH) certified "B" readers shall be admissible.

. . . Spirometric testing shall be conducted in accordance with the standards recommended in the latest edition available of the "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association and the 1978 ATS epidemiology standardization project with the exception that the predicted normal values for lung function shall not be adjusted based upon

Assuming that the employee complies with these filing requirements, the claim will then proceed to the next phase; the commissioner in charge of workers' compensation will notify the employer "and all other interested parties" by furnishing them with a copy of the application and any other materials submitted by the claimant.⁸⁸ The claim will then be assigned to an administrative law judge,⁸⁹ and within thirty days of receiving notice of the claim, the employer must notify the commissioner and "all parties of record" of its acceptance or denial of the claim.⁹⁰

If the employer denies the claim, within forty-five days of the claim being assigned to a judge, the employer must arrange for the employee to be examined by a physician of the employer's choosing.⁹¹ This examination must conform to the same requirements as that of the examination report filed by the claimant, and the results of the examination must be provided to the commissioner and "all other parties."⁹² The commissioner will then determine if the parties' filings are in consensus as specified by the statute,⁹³ and if he does so conclude, his findings will constitute fairly conclusive evidence and will be forwarded to the parties and the judge handling the case.⁹⁴ If the commissioner deems that the parties' filings are contradictory to one another, the judge will have to weigh the evidence and make a determination on the merits of the claim.⁹⁵ Either way, unless the parties reach a settlement beforehand, the judge's ruling is due no later than sixty days from the time of the initial hearing.⁹⁶

2. Federal Laws

As with state statutes, one can find federal codes and regulations dealing with pneumoconiosis, among the most prominent of which is the Black Lung Benefits Act.⁹⁷ Congress deemed it necessary to pass this legislation

the race of the subject. . . . Reports of spirometric testing shall include a description by the physician of the procedures utilized in conducting such spirometric testing and a copy of the spirometric chart and tracings from which spirometric values submitted as evidence were taken.

⁸⁸ *Id.* § 342.316 (4)(a).

⁸⁹ *Id.* § 342.316 (4)(b).

⁹⁰ *Id.* § 342.316 (4)(c).

⁹¹ *Id.* § 342.316 (4)(d). Giving an employee the ability to choose a physician in the context of workers' compensation is not uncommon. *See, e.g.,* CAL. LAB. CODE § 4601(a) (West 2004) (providing that in workers' compensation claims, "[if the] employee so requests, the employer shall tender the employee one change of physician").

⁹² *See* KY. REV. STAT. ANN. § 342.316 (4)(d).

⁹³ *Id.* § 342.316 (4)(f).

⁹⁴ *Id.* § 342.316 (4)(d)-(e).

⁹⁵ *Id.* § 342.316 (4)(e).

⁹⁶ *Id.* § 342.316 (4)(h).

⁹⁷ 30 U.S.C. §§ 901-45 (2003). The current version of the Black Lung Benefits Act is the evolutionary product of Congressional action tracing back to the 1960s. *See generally* Eric R. Olson, *Reducing the Overburden: The Doris Coal Presumption and Administrative Efficiency Under the Black Lung Benefits Act*, 99 MICH. L. REV. 696 (2000) (providing information and historical background on the Act).

because it found that “there [we]re a significant number of coal miners . . . who are totally disabled due to pneumoconiosis arising out of employment in . . . coal mines . . . and that few States provide benefits for [these] coal miners or their surviving dependents.”⁹⁸ As is suggested by its name, the focus of the Act is fairly narrow, as it applies only to pneumoconiosis claims that derive from working in coal mines.⁹⁹ Furthermore, the Act was, and still is, intended to complement, rather than replace, states’ workers’ compensation schemes for pneumoconiosis claims, for only when a claimant is not eligible for state benefits¹⁰⁰ or when the state benefits are inadequate¹⁰¹ does the Act apply. And the Act, as with many state compensation schemes,¹⁰² creates statutory presumptions that favor claimants.¹⁰³

For another example of federal law dealing with pneumoconiosis, the reader may wish to study *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981), where the Supreme Court had the opportunity to examine the validity of (and ultimately uphold) Title 29, Section 1910.1043 of the Code of Federal Regulations (2004), which represented the Occupational Safety and Health Administration’s highest threshold of tolerable occupational exposure to “cotton dust,” a substance that can lead to a variation of pneumoconiosis known as byssinosis. More information on this condition can be found in *Donovan*, 452 U.S. at 495-505.

⁹⁸ 30 U.S.C. § 901(a).

⁹⁹ 30 U.S.C. § 902(b) (“The term ‘pneumoconiosis’ [in this Act] means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”).

¹⁰⁰ See 30 U.S.C. § 931(a):

On and after January 1, 1974, any claim for benefits for death or total disability due to the pneumoconiosis shall be filed pursuant to the applicable State workmen’s compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen’s compensation law which provides adequate coverage for pneumoconiosis

¹⁰¹ 30 U.S.C. § 931(b)(1):

For purposes of this section, a State workmen’s compensation law shall not be deemed to provide adequate coverage for pneumoconiosis during any period unless it is included in the list of State laws found by the Secretary to provide such adequate coverage during such period. The Secretary shall, no later than October 1, 1972, publish in the Federal Register a list of State workmen’s compensation laws which provide adequate coverage for pneumoconiosis and shall revise and republish in the Federal Register such list from time to time, as may be appropriate to reflect changes in such State laws due to legislation or judicial or administrative interpretation.

¹⁰² See *supra* note 79 and accompanying text.

¹⁰³ *E.g.*, 30 U.S.C. § 921(c)(1) (stating that “[i]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment”); 30 U.S.C. § 921(c)(2) (providing that “[i]f a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be rebuttable presumption that his death was due to pneumoconiosis”). Other presumptions applicable to the Black Lung Act can be found in the Federal Code. See, *e.g.*, 20 C.F.R. § 718.304 (2003) (establishing irrebuttable presumption that a miner’s death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death if certain evidence is presented or under certain situations); 20 C.F.R. § 718.305 (2003) (creating rebuttable presumption that a miner is or was totally disabled due to pneumoconiosis or that his death was caused by pneumoconiosis if he was a coal miner for fifteen years or more and certain evidence, such as an X-ray, establishes a pulmonary impairment); 20 C.F.R. § 718.306 (2003) (providing rebuttable presumption that the survivors of a miner who was employed for 25 years or more and died prior to March 1, 1978,

Mainly through provisions of the Federal Code, the Black Lungs Act specifies, as do many state statutes,¹⁰⁴ the procedures that claimants seeking benefits must fulfill.¹⁰⁵ The Act's procedures have already been analyzed by other commentators,¹⁰⁶ and so only a cursory examination is necessary here. The basic requirements that a claimant must comply with in order to receive benefits under the Act, particularly in terms of what evidence of his injuries he must present, are outlined in title 20, sections 718.201-206 of the Code of Federal Regulations.¹⁰⁷ Not surprisingly, a threshold matter for the eligibility of benefits is a determination that the claimant suffers from pneumoconiosis,¹⁰⁸ and this may be achieved primarily through four means: 1) providing a chest X-ray that shows evidence of pneumoconiosis,¹⁰⁹ 2) submitting an autopsy or biopsy report,¹¹⁰ 3) relying on the various presumptions afforded by Congress,¹¹¹ and 4) procuring a finding by a physician "exercising sound medical judgment" that the miner suffers or has suffered from pneumoconiosis.¹¹²

C. Insurance Policies Dealing with Pneumoconiosis

Analyzing the potential impact that a possible surge in mixed-dust claims might have requires a look at the current state of insurance policies and how they might serve to limit, or at least complicate, such a trend.¹¹³

are entitled to the payment of benefits); *see generally* Olson, *supra* note 97 (discussing the role that presumptions have played in the Black Lung Benefits Act).

¹⁰⁴ *See generally supra* Part II.B.1 (describing the procedures a person must follow to initiate a workers' compensation pneumoconiosis claim in Kentucky).

¹⁰⁵ The bulk of these are located in Title 20, Sections 718.101-307 of the Code of Federal Regulations (2003).

¹⁰⁶ *See* Olson, *supra* note 97, at 698-700; Rita A. Massie, Student Work, *Modification of Benefits for Claimants Under the Federal Black Lung Benefits Program*, 97 W. VA L. REV. 1023, 1030-37 (1995) (both describing the process of filing claims under the Act).

¹⁰⁷ 20 C.F.R. §§ 718.201-206 (2003).

¹⁰⁸ 20 C.F.R. § 718.202. Linking the alleged cause of the plaintiff's injury to a defendant is, unsurprisingly, an essential element of almost any type of claim, whether it be in the nature of workers' compensation or tort. *See infra* notes 372-73 and accompanying text.

¹⁰⁹ 20 C.F.R. § 718.202(a)(1). The X-ray must be in conformity with the requirements listed in Title 20, Section 718.102 of the Code of Federal Regulations.

¹¹⁰ 20 C.F.R. § 718.202(2). The autopsy or biopsy must be conducted under the procedures specified in Title 20, Section 106 of the Code of Federal Regulations.

¹¹¹ 20 C.F.R. § 718.202(3). The presumptions specifically referenced are Title 20, Sections 718.304-06 of the Code of Federal Regulations, and these were discussed in *supra* note 103.

¹¹² 20 C.F.R. § 718.202(4). The physician's finding must "be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories," and furthermore, must "be supported by a reasoned medical opinion." *Id.*

¹¹³ There are, of course, many different types of insurance policies, ranging from automobile to property to life insurance. *See generally* Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373 (1995) (discussing various types of insurance policies and how they differ in terms of coverage and interpretation). However, given that the majority of mixed-dust claims arise out of work-related occurrences, which in turn means that many,

That is because today, most companies are protected by some form of insurance.¹¹⁴ Of course, this fact does not end, but rather begins, the question of if and to what extent companies will be liable for mixed-dust claims, for that question will naturally depend on the language of the policy.¹¹⁵ Thus, an examination of the most common types of insurance applicable in this context, as well as how courts have addressed these policies, is warranted.

1. The Commercial General Liability Policy (CGL)

The most widely used type of insurance policy by businesses is the CGL,¹¹⁶ which are form policies developed by the Insurance Service Office (ISO).¹¹⁷ These policies, as their name suggests, are broad and intended to “provide[] insurance for businesses against responsibility for accidents,”¹¹⁸ particularly for claims of bodily injury and property damage.¹¹⁹ Typically,

if not most, of the defendants will be companies, *see supra* note 40, the focus of this section will be on the type of insurance policies that businesses typically carry, namely the so-called comprehensive or commercial general liability policy (CGL), *see infra* note 116 and accompanying text. The titles of the policies are misleading, for while they “suggest[] the expectation of maximum coverage,” Timothy Stanton, *Now You See It, Now You Don't: Defective Liability Insurance*, 25 LOY. U. CHI. L.J. 109, 111 n.16 (1993), the scope of CGL policies is such that in actuality they only guard businesses against certain types of risks, *see id.* at 111 n.15-16.

¹¹⁴ See George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 286 n.195 (2002) (recognizing that “most companies carry substantial amounts of liability insurance”).

¹¹⁵ See, e.g., *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, 227 Cal. Rptr. 203, 205 (Cal. Ct. App. 1986) (“The starting point [of determining an insurer's liability], of course, is the plain meaning of the policy language.”).

¹¹⁶ See, e.g., Lisa A. Small, *Offensive and Defensive Insurance Coverage for Patent Infringement Litigation: Who Will Pay?*, 16 CARDOZO ARTS & ENT. L.J. 707, 712 (1998) (“The most common type of liability insurance coverage for businesses is Comprehensive (or Commercial) General Liability (‘CGL’) insurance.”); Lee H. Ogburn, *The Progression of Trigger Limitation in Maryland—Determining the Appropriate Trigger of Coverage, Its Limitations, and Ramifications*, 53 MD. L. REV. 220, 221 (1994) (“[T]he policy that most businesses purchase to protect against claims . . . for bodily injury or property damage [is the CGL]”; *see also infra* notes 118-19 and accompanying text (describing purpose of CGL policies)).

¹¹⁷ The ISO is a private institution that exists primarily to write standard policy forms for the insurance industry. See Small, *supra* note 116, at 712. Aside from writing the actual policies, the ISO files the policies with the various states' insurance regulators, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 772 (1993), which is required by the law of many states, *see Melody A. Hamel, Comment, The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor of Coverage in 1996 and Beyond*, 34 DUQ. L. REV. 1083, 1103 (1996) (stating that most states require proposals for new policy language to be filed with and approved by the state insurance commissioner prior to inclusion of that language in policies). In addition, and somewhat expectedly, the ISO also supplies insurance companies with useful statistical information pertaining to the industry: for example, it collects and interprets data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form. See *Hartford*, 509 U.S. at 772. More information about the ISO may be had at its website, <http://www.iso.com> (last visited Feb. 17, 2006).

¹¹⁸ Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and the Use of the “Just Result” Principle*, 31 LOY. L.A. L. REV. 557, 592 n.195 (1998).

¹¹⁹ See Small, *supra* note 116; *Westchester Fire Ins. Co. v. Pittsburgh*, 768 F. Supp. 1463, 1468 n.5 (D. Kan. 1991) (both recognizing that CGL policies are meant to insure a business against personal

the policies will first identify the risks that are covered, and then specify possible exclusions from those general areas of risk.¹²⁰ For the purpose of this Comment, the most noteworthy of these exclusions is the “pollution exclusion” clause, which, significantly, may be found in virtually all CGLs in existence today.¹²¹ Somewhat obviously, the ISO periodically updates these forms to correspond with changing times and needs;¹²² in the context applicable here, namely what type of liability related to mixed-dust incidents is and is not covered by CGL insurance policies, the most influential version has been, and continues to be, the one authored by the ISO in 1986.¹²³ Because of this, the impact that the 1986 CGL policy has had, and may have, on mixed-dust claims may be better appreciated by briefly examining the evolution over time that these “pollution exclusion” clauses have undergone.¹²⁴

a) *Reasons for the Prevalence of Pollution Exclusion Clauses and How They Evolved Over Time.* It is agreed by most that the primary reason for today’s proliferation of pollution exclusion clauses was the “enormous expense and exposure resulting from the ‘explosion’ of environmental liti-

injury and property damage claims). *But see supra* note 113; *infra* note 125 (both noting that the actual coverage provided by the policies can be disappointing to insureds).

¹²⁰ See Prince, *supra* note 118, at 592 n.195.

¹²¹ See Doerr v. Mobil Oil Corp., 774 So. 2d 119, 123 n.1 (La. 2000) (“Some form of th[e] absolute pollution exclusion [clause] is part of the standard CGL policy purchased by almost all large and small businesses since the mid-1980s.”); Bryan C. Devine, Recent Decision, *The Standard Pollution Exclusion Clause in Commercial General Liability Insurance Policies Bars Coverage for Personal Injuries Resulting from On-Site Exposure to Pollutants Discharged Within a Construction Envelope: Madison Construction Co. v. Harleysville Mutual Insurance Co.*, 38 DUQ. L. REV. 949, 958 (2000) (“By 1970, . . . pollution exclusion clauses were a standard feature of virtually all commercial general liability policies.”).

¹²² See Ogburn, *supra* note 116, at 221 n.5 (noting that the standard CGL policy has undergone several “significant revisions”); see Jim L. Julian & Charles L. Schlumberger, *Insurance Coverage for Environmental Clean-Up Costs Under Comprehensive General Liability Policies*, 19 U. ARK. LITTLE ROCK L.J. 57, 57-59 (1996) (outlining changes made by the ISO to its policies as a response to external events).

¹²³ See Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “ABSOLUTE” Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 5 (1998) (noting that “[today’s] absolute pollution exclusion was drafted during the early 1980s and was incorporated into the standard form CGL in 1986”); Amanda C. Leiter, Note, *Environmental Insurance: Does It Defy the Rules?*, 25 HARV. ENVTL. L. REV. 259, 294 n.173 (2001) (“Significant parts of the 1986 absolute pollution exclusion, and in particular the definition of ‘pollutants’[, . . remain unaltered in subsequent versions of the exclusion.”).

¹²⁴ For the purposes of this Comment, a brief look at the history and purpose of the CGLs’ pollution exclusion clause will suffice. However, for those seeking a more comprehensive study of the myriad changes that have occurred to pollution exclusion clauses since their origin, and the reasons for those changes, many fine sources exist. See Richardson v. Nationwide Mut. Ins. Co., 826 A.2d 310, 314-19 (D.C. Cir. 2003), *vacated on other grounds* by 832 A.2d 752 (2003); Leiter, *supra* note 123, at 280-84; Jonathan C. Averback, Comment, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language—Same Results?*, 14 B.C. ENVTL. AFF. L. REV. 601, 604-10 (1987) (all providing background and historical information on the evolution of the “pollution exclusion” clause in insurance policies, particularly those promulgated by the ISO).

gation.”¹²⁵ Even so, the clauses trace back to well over half a century, with the first significant change to them occurring in 1966.¹²⁶ Prior to then, CGL policies provided coverage for bodily injury or property damage caused by “accidents.”¹²⁷ To complicate things, however, what constituted an accident was not defined in the policies, which led to much confusion and, ultimately, litigation.¹²⁸ Tired of this, in 1966 the ISO replaced the “accident” trigger with that of the “occurrence” trigger, with “occurrence” being defined as “an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury and property damage that was neither expected nor intended from the standpoint of the insured.”¹²⁹ Much to the dismay of the ISO, insurance companies, and insureds, the

¹²⁵ *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975, 977 (N.H. 1996) (quoting *Vantage Dev. Corp. v. American Environment Technologies Corp.*, 598 A.2d 948, 953 (N.J. Super. Ct. Law Div. 1991)). It might seem elementary that insurance companies would try to limit their responsibility to defend or indemnify claims filed against their insureds, but the extent of the companies’ efforts in the pollution exclusion context is such that one court had this to say of one insurance carrier who contended that its policy did not cover asbestos-related risks: “In plain language, [the insurance carrier here] has adopted the unholy mantra, ‘we collect premiums; we do not pay claims.’” *Owens-Illinois v. United Ins. Co.*, 625 A.2d 1, 17 (N.J. Super. Ct. App. Div. 1993). And perhaps it is more than just a mere coincidence that it was in 1986, the same year that the “absolute” pollution exclusion clause was created and that the “insurance crisis” began, *see infra* notes 138-139 and accompanying text, that these general insurance policies became known as “commercial,” rather than “comprehensive,” general liability policies (which, incidentally, is how they are still referred to as today). *See* Thomas K. Bick & Lisa G. Youngblood, *The Pollution Exclusion Saga Continues: Does it Apply to Indoor Releases?*, 5 S.C. ENVTL. L.J. 119, 124 (1997) (noting that 1986 “marked a change in the name of the liability policy from a comprehensive general liability policy to a commercial general liability policy”); Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 89 (2001) (deducing that the 1986 name change of CGL policies from comprehensive to commercial “can only be assumed [to have been] an effort to eliminate the disadvantage that insurers faced in litigation over whether there was coverage under a ‘comprehensive’ policy”).

¹²⁶ *See American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 79-80 (Ill. 1997) (stating that “in response [to various events,] the insurance industry [significantly] revised the CGL policy in 1966”).

¹²⁷ *See Center for Creative Studies v. Aetna Life & Casualty Co.*, 871 F. Supp. 941, 943 n.3 (E.D. Mich. 1994) (explaining how CGL policies went from being “accident-based” to “occurrence-based” in 1966).

¹²⁸ *See id.* at 944 (“The biggest interpretation issue to date has been over what the terms ‘sudden’ and ‘accidental’ [in CGL policies] mean.”). The courts certainly did their part in ensuring uncertainty as to the meaning of “accident,” for the word took vastly different connotations depending on which court was deciding the issue. *See* E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1243 (1986) (“The courts ignored the insurers’ intentions by formulating a variety of definitions for the word ‘accident.’”). For example, some courts took the clause at face value and precluded coverage for losses that were foreseeable because, they reasoned, something that is foreseeable could not have happened “accidentally,” i.e., suddenly. *See id.* Other courts took an opposite approach and concluded that just because something was foreseeable did not mean it could not be “accidental,” and in support of their stance, would cite to negligent acts as an example; these were “accidental” in the sense that they were not done with intent, but could still be deemed foreseeable. *See id.*

¹²⁹ *Morton Int’l v. General Accident Ins. Co.*, 629 A.2d 831, 849 (N.J. 1993).

1966 change did not entirely eliminate the confusion over under which circumstances the pollution exclusion clause applied.¹³⁰

At around the same time of the 1966 revision, Congress passed substantial amendments to the Clean Air Act,¹³¹ which had the effect, inter alia, of imposing greater economic burdens on insurance underwriters, particularly those providing standard-form CGL policies.¹³² These burdens were increased yet further by contemporaneous and well-publicized environmental disasters, such as Times Beach and Love Canal.¹³³ Mainly because of these events, in 1970 the ISO promulgated the first “true” pollution exclusion clause,¹³⁴ which, in pertinent part, provided:

[This policy shall not apply to bodily injury or property damage] arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.¹³⁵

¹³⁰ See *Koloms*, 687 N.E.2d at 80 (“Despite [the 1966] changes, courts continued to construe the policy to cover damages resulting from long-term, gradual exposure to environmental pollution.”); see Sharon M. Murphy, Note, *The “Sudden and Accidental” Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161, 165-67 (1992) (describing the reasons for the 1966 revision, and how the change did not have the intended effect the insurance industry had hoped for).

¹³¹ 42 U.S.C. §§ 7401-7671 (2003).

¹³² See *Pittsburg*, 768 F. Supp. at 1469 n.8 (recognizing that “sweeping legislation” passed by Congress, including the Clean Air Act, led to an increase in the adoption of pollution exclusion clauses by insurers).

¹³³ See *Aetna Life*, 871 F. Supp. at 941 (noting that the Times Beach and Love Canal incidents served as an impetus for the adoption of pollution exclusion clauses). In Love Canal, which is located near Niagara Falls, New York, a public school and residential subdivisions were unwittingly built in the 1950s on top of reclaimed land that had previously been used by Hooker Chemical and Plastics Corporation as a dumpsite for chemical wastes. See Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1237 n.86 (1998). Public authorities later discovered that the town’s water supply had been contaminated by the chemicals, resulting in the ultimate evacuation of hundreds of families and an almost complete devaluation of the area’s property value. See *id.*

A similarly disastrous situation occurred in Times Beach, Missouri, where in 1971, a waste oil dealer sprayed contaminated oil on Times Beach’s dirt roads in an extremely misguided attempt to keep the dust down. See *id.* at 1237 n.87. Times Beach residents were unaware of the danger for years, even though virtually all households in the area started experiencing somewhat rare health problems. See *id.* In 1982, the government, aware of the potentially deadly consequences, recommended a property buy-out of the area, and since then, all of Times Beach’s residents, numbering over 2000 in all, have moved out. See *id.*

¹³⁴ See *Koloms*, 687 N.E.2d at 81 (explaining that “the insurance industry drafting organizations began in 1970 the process of drafting and securing regulatory approval for the standard pollution-exclusion clause,” and that “[t]he result of these efforts was the addition of an [early pollution exclusion clause] to the standard-form CGL policy in 1970”).

¹³⁵ Devine, *supra* note 121, at 959 n.74 (emphasis added).

As will be explained shortly, the ISO's attempt to reduce confusion over the pollution exclusion clause's applicability to particular factual situations by adding the phrase "sudden and accidental" was not as successful as the organization would have hoped.

b) *Interpretative Issues Associated With Pollution Exclusion Clauses.* Somewhat predictably, the next intensely debated issue over the next decade or so pertaining to pollution exclusion clauses was the meaning of "sudden and accidental,"¹³⁶ leading one commentator to describe this issue as one of "the most hotly litigated insurance coverage questions of the late 1980's."¹³⁷ Partly because of this, in 1986 (the exact year that the "insurance crisis" peaked)¹³⁸ the ISO felt compelled to yet again change its pollution exclusion clause, this time to a version that was to be dubbed the "absolute" pollution exclusion clause.¹³⁹

It is agreed that this policy does not apply to personal injury or property damage arising out of the contamination of the environment by pollutants introduced at any time into or upon land, the atmosphere or any watercourse or body of water or aquifer. This exclusion applies whether or not the contamination is introduced into the environment intentionally or accidentally or gradually or suddenly and whether or not the insured or any other person or organization is responsible for the contamination.¹⁴⁰

¹³⁶ See *Koloms*, 687 N.E.2d at 80 ("During the next 13 years, various courts labored over the exact meaning of the words 'sudden and accidental.'").

¹³⁷ JEFFREY W. STEMPER, INTERPRETATION OF INSURANCE CONTRACTS: LAW AND STRATEGY FOR INSURERS AND POLICYHOLDERS 825 (1994). Much of the litigation focused on whether the word "sudden" should be given a strictly temporal meaning, i.e., whether in order for the exception to apply, the discharge of pollution had to have been "abrupt." See *Koloms*, 687 N.E.2d at 80-81.

¹³⁸ See Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. REV. 1207, 1220 (1995) ("The year 1986 is viewed as the peak of the insurance crisis, a time when the cost of liability insurance skyrocketed and the availability of coverage for some products and services disappeared altogether."); see generally Richard N. Clarke et al., *Perspectives on the Insurance Crisis: Sources of the Crisis in Liability Insurance: An Economic Analysis*, 5 YALE J. ON REG. 367 (1988) (providing background information on the insurance crisis and some of its possible causes). But see Peter A. Lefkin, *Perspectives on the Insurance Crisis: Shattering Some Myths on the Insurance Liability Crisis: A Comment on the Article by Clarke, Warren-Boulton, Smith, and Simon*, 5 YALE J. ON REG. 417 (1988) (questioning the existence of an "insurance crisis," at least as to the full extent claimed by insurers).

¹³⁹ See *Koloms*, 687 N.E.2d at 81 ("[Around 1985,] insurance companies responded [to the confusion over 'sudden and accidental' by drafting a new version of the [pollution] exclusion [clause], which . . . is now commonly known as the 'absolute pollution exclusion.'").

¹⁴⁰ Amy Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion: Why the Insurer, and not the Innocent Insured, Should Pay for Pollution Caused by Prior Landowners*, 46 BAYLOR L. REV. 355, 375 n.72 (1994). As noted earlier, these and other forms of insurance are updated every so often, see *supra* note 122 and accompanying text, so naturally, variations of the "absolute" exclusion language exist. For example, another fairly common version provides that "[t]his insurance does not apply to . . . [b]odily [i]njury or [p]roperty [d]amage arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants at or from premises you own, rent or occupy." Bick, *supra* note 125, at 124. However, the original "abso-

While one might think that the 1986 pollution exclusion clause would have provided a “rock solid” defense for insurers, one feature of the clause, that being its definition of the term “pollutant,”¹⁴¹ served to allow insurers’ liability and confusion over the clause to live on. Today’s standard definition characterizes “pollutant” as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.”¹⁴² Furthermore, some policies include more specific pollution exclusion clauses that focus on a type or class of pollutants, in particular asbestos.¹⁴³ For instance, the court in *Highlands Insurance Company v. Celotex Corporation*¹⁴⁴ was charged with determining whether asbestos exclusion policies applied only to asbestosis, or to all asbestos-related diseases.¹⁴⁵ One of the policies at issue¹⁴⁶ provided that “[t]his policy shall not apply to any liability arising out of ASBESTOSIS and related diseases arising out of asbestos products.”¹⁴⁷ The court ultimately concluded that this policy was meant to exclude all asbestos-related diseases, partly by relying on the doctrine of collateral estoppel.¹⁴⁸

lute” clause quoted in the full text above continues to form the basis for the ones existing today. See *supra* note 123 and accompanying text (stating as much).

¹⁴¹ William Goldfarb et al., *Unsafe Sewage Sludge or Beneficial Biosolids?: Liability, Planning, and Management Issues Regarding the Land Application of Sewage Treatment Residuals*, 26 B.C. ENVTL. AFF. L. REV. 687, 757 (1999).

¹⁴² *Id.*

¹⁴³ See, e.g., Walter G. Wright, Jr. & Stephanie M. Irby, *The Transactional Challenges Posed by Mold: Risk Management and Allocation Issues*, 56 ARK. L. REV. 295, 354 n.366 (2003) (stating that “[m]any policies exclude coverage for indoor contaminants such as asbestos, lead-based paint, and mold”); *Redmond v. State Farm Ins. Co.*, 728 A.2d 1202, 1204 (D.C. 1999) (noting that “State Farm [, a prominent insurance company,] ha[s] excluded lead paint coverage since August 24, 1987”). Further support lies in the fact that it has traditionally been difficult, if not impossible, to obtain insurance for certain substances such as asbestos. See *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1202 (2d Cir. 1995) (noting that “no coverage was available for asbestos claims after 1985”); Nicholas J. Guiliano, Comment, *The Sudden and Accidental Exception to the Pollution Exclusion Solution?*, 13 TEMP. ENVTL. L. & TECH. J. 261, 280 (1994) (“[T]oday[,] virtually no one can obtain pollution insurance at any price.”).

Interestingly, some courts have actually suggested that insurance companies should (or at least could) be a bit more detailed and careful in the drafting of their pollution exclusion clauses in order to increase the clauses’ effectiveness. See, e.g., *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 624 n.3 (Md. 1995) (“To be sure that lead paint poisoning claims were excluded from coverage, Allstate [an insurance company] could have included a provision . . . explicitly excluding such claims.”).

¹⁴⁴ *Highlands Ins. Co. v. Celotex Corp.*, 743 F. Supp. 28 (D. D.C. 1990).

¹⁴⁵ *Id.* at 29.

¹⁴⁶ There were actually fourteen different exclusion clauses before the court that had been issued from several different insurance companies, but all of the clauses were similar to one another. See *id.* at 30-31.

¹⁴⁷ *Id.* at 30 n.12.

¹⁴⁸ See *id.* at 32-33. The collateral estoppel doctrine essentially acts to prohibit parties from relitigating issues that were already decided by a court or administrative body. See Jerald D. Stubbs, *Fighting Fraud Illustrated: The Robins AFB Case*, 38 A.F. L. REV. 141, 168 (1994) (“The doctrine of collateral estoppel precludes relitigating issues of fact or law actually litigated and determined in a prior lawsuit The effect of collateral estoppel attaches not only to judicial proceedings, but also to ad-

Similarly, in *In re Asbestos Products Liability Litigation*,¹⁴⁹ it fell to the court to determine whether an insurance carrier that had issued a policy expressly excluding asbestos from coverage was entitled to summary judgment on the issue of being liable to the plaintiffs' claims of injuries stemming from exposure to asbestos.¹⁵⁰ The policy at hand, which was issued by United National Insurance Company ("United"),¹⁵¹ provided in part that "[the] insurance does not apply to any liability arising out of . . . ingesting or prolonged physical exposure to asbestos or goods of products containing asbestos [, or t]he manufacture, sale, storage or disposal of asbestos or goods or products containing asbestos."¹⁵² The court found that the policy's "clear and unambiguous" language precluded United from being liable to the plaintiffs.¹⁵³

As these last two cases help to demonstrate, the meaning of pollutant has and continues to be heavily litigated,¹⁵⁴ and as will be shown later, this may prove to be one of the key issues in mixed-dust cases.¹⁵⁵

In summary, the most obvious effect, as well as the intent of insurers, behind the creation the "absolute" pollution exclusion clauses (which remains the standard today),¹⁵⁶ as well the more specific pollution exclusion

ministrative proceedings if certain conditions are met."). Virtually all courts use the doctrine in one way or another. See Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "MEND the Hold," "FRAUD on the Court" and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 680 (1997-98) ("Most courts and the Restatement, Second, of Judgments apply collateral estoppel [when the proper conditions are met] . . .").

¹⁴⁹ *In re Asbestos Prods. Liab. Litig.*, No. 96-968, 1997 U.S. Dist. LEXIS 13383 (E.D. La. Sept. 2, 1997).

¹⁵⁰ See *id.* at *3-5. There were actually three unique policies issued from three different carriers at issue, see *id.*, but only the policy dealing with asbestos merits attention here.

¹⁵¹ *Id.* at *30. United is an insurance carrier based out of Pennsylvania and handles many different types of policies. See Pa. Ins. Dep't, Company Information, available at <http://www.insurance.state.pa.us/cgi/gfsearch.pl?level=2&item=gf1581> (last modified Feb. 10, 2006; last visited Feb. 26, 2006).

¹⁵² *In re Asbestos Prods.*, 1997 U.S. Dist. LEXIS 13383 at *30-31.

¹⁵³ See *id.* at *31-32.

¹⁵⁴ See Kurt C. Schultheis, Sullins v. Allstate: *Lead Paint and the Growing Ambiguity of the Pollution Exclusion Clause*, 27 U. BALT. L. REV. 475, 493-94 (1998) (noting that "the pivotal issue current courts often face [when dealing with CGLs] revolves around defining pollutants" and that "[c]onsiderable debate surrounds the legally operative meaning of the word [pollutant]"); see also *infra* note 159 (discussing issues related to the precise scope of pollution exclusion clauses).

¹⁵⁵ See generally *infra* Parts II.C.1.e, III.A.2-4 (analyzing the key issue of what constitutes a pollutant within the meaning of pollution exclusion clauses, and how courts' interpretation of the word might impact the filing of mixed-dust claims).

¹⁵⁶ See *supra* note 123 and accompanying text. Not only does the language of the 1986 "absolute" clause provide the basis for today's pollution exclusion clauses, see *id.*, but it also replaced prior versions upon and since its release, see, e.g., Mark G. Cooper, Survey, *Annual Survey of Michigan Law, June 1, 1999-May 31, 2000: Insurance Law*, 47 WAYNE L. REV. 601, 645 n.286 (2001) (stating that the "sudden and accidental exclusion has now nearly universally been replaced by the . . . 'absolute pollution' exclusion [clause]."); see also *supra* note 139 and accompanying text (noting that the absolute pollution exclusion clause continues to play a tremendous role in insurance policies today).

of the type just examined, was to eliminate any exceptions to the pollution exclusion by removing the “sudden and accidental” proviso.¹⁵⁷ While the fairly straightforward language of the “absolute” pollution exclusion clause did not prove to be the “elixir” that insurers had hoped, it did serve to alleviate litigation concerning the clauses somewhat.¹⁵⁸ But given that history is a great predictor of the future, the precise application and meaning of today’s policies, as was the case with the 1986 and other versions, will likely continue to be a source of much dispute and confusion in the courts.¹⁵⁹ Since the 1986 revision remains the standard today,¹⁶⁰ it is necessary to examine under what circumstances courts have upheld the use of such clauses, and how they have been interpreted. This, in turn, requires a look into general principles of insurance policy interpretation.

c) *Legal Principles Pertaining to Insurance Interpretation.* At the outset, it must be noted that insurance policies, generally speaking, are considered to be normal contracts, and thus are interpreted as any other contract would be.¹⁶¹ As one court has noted, “[t]he goal of interpreting an insurance policy is to ascertain the intent of the parties as manifested by the language of the written instrument.”¹⁶² This means that courts tend to uphold insurance clauses as valid without regard to whether they are “fair” or not.¹⁶³ The Alabama Supreme Court recognized the majority rule when it

¹⁵⁷ See, e.g., *Weaver*, 674 A.2d at 977.

¹⁵⁸ See *Leiter*, *supra* note 123, at 293-97 (listing interpretative issues in CGL policies that were eliminated or reduced by the adoption of the absolute pollution exclusion clause).

¹⁵⁹ See, e.g., *Bick*, *supra* note 125, at 119 (noting that “[a] new universe of debate is on the rise, namely, the application of . . . the ‘absolute’ pollution exclusions to indoor releases of pollutants”); *Leiter*, *supra* note 123, at 295 (“[T]he [1986] revised pollution exclusion is not as absolute as the insurance industry no doubt hoped. Several terms remain ambiguous, including the all-important terms ‘discharge, dispersal, release or escape,’ and ‘pollutants.’”); see also text accompanying *supra* note 141; *supra* note 154 and accompanying text (stating that interpretative issues pertaining to pollution exclusion clauses, such as the meaning of “pollutant,” remain a problem).

¹⁶⁰ See *supra* note 156 and accompanying text.

¹⁶¹ See, e.g., *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546, 553 (6th Cir. 2003) (“In general, interpretation of insurance policies is governed by the same principles used to interpret ordinary contracts.”).

¹⁶² *Riccio v. American Republic Ins. Co.*, 683 A.2d 1226, 1231 (Pa. Super. Ct. 1996) (internal quotations omitted). This is buttressed by the “general rule that an insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.” *Fireman’s Fund Ins. Co. v. Fibreboard Corp.*, 227 Cal. Rptr. 203, 205 (Cal. Ct. App. 1986).

¹⁶³ See, e.g., *Tate v. Allstate Ins. Co.*, 692 So. 2d 822, 824 (Ala. 1997) (“[A c]ourt must not rewrite [an insurance] policy so as to include or exclude coverage that was not intended.”). Of course, this does not mean that courts will blindly “rubber stamp” any insurance policy without regard to its content. In particular, if a court deems that an insurance policy is contrary to public policy, which has been described as “a very unruly horse, and when once you get astride it you never know where it will carry you,” *Story v. First Nat’l Bank & Trust Co.*, 156 So. 101, 103 (Fla. 1934), then the policy will be declared void, and thus unenforceable. See, e.g., *Burt v. Union Cent. Life Ins. Co.*, 187 U.S. 362 (1902) (declaring life insurance policy procured by a man after he was convicted and sentenced to be executed to be against public policy, as his beneficiaries would benefit from his committing crimes); *Tate*, 692 So.

wrote that “[i]t is a GENERALLY accepted principle that if there is no ambiguity in an INSURANCE POLICY, a court is bound to enforce the policy as written and cannot ignore express provisions of the contract.”¹⁶⁴ One court stated this more bluntly:

A court may not "rewrite" an insurance contract, or construe clear and unambiguous language to mean other than what it says. An insured will not be heard to complain that his reasonable expectations were frustrated by policy terms which are clear and unambiguous.¹⁶⁵

Although the preceding method of interpreting insurance agreements, which is typically referred to as “four corners” or formalistic approach,¹⁶⁶ represents the majority rule,¹⁶⁷ another widely used and competing system exists, known as the “reasonable expectations” (sometimes referred to as the “functional”) approach.¹⁶⁸ As its name suggests, under the “reasonable

2d 822 (holding that insurance providing coverage for award of punitive damages was contrary to public policy, as honoring it would have thwarted the rationale of punitive damages).

Even so, courts are usually reticent to strike down insurance contracts on public policy grounds. *See, e.g.*, T.H.E. Ins. Co. v. DeMutis, No. 98-1683, 1999 U.S. Dist. LEXIS 1561, at *11 (E.D. Pa. Feb. 17, 1999) (“Generally[,] insurance companies are free to decide what risks to undertake and what risks to reject. The power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law.”) (internal citations and quotations omitted).

¹⁶⁴ *Tate*, 692 So. 2d at 824.

¹⁶⁵ *Riccio*, 683 A.2d at 1231 (internal citations omitted); *accord Fibreboard*, 227 Cal. Rptr. at 205 (“In reviewing the terms of an insurance policy, courts must interpret the words according to their plain meaning . . . and will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.”) (internal citations and quotations omitted).

¹⁶⁶ *See, e.g.*, *Collins v. Farmers Ins. Co.*, 822 P.2d 1146, 1159 (Or. 1991):

Under [this] approach, the court looks to the “four corners” of the insurance policy . . . [and t]he insured is held to have read and to have understood the clear language of the policy. Extrinsic evidence relating to the insurance contract may [only] be examined for the purpose of determining the parties’ intention to an objective analysis of the “four corners” of the contract.

Id. at 1159 (internal citations omitted); *see generally* Keith A. Rowley, *Contract Construction and Interpretation: From the “Four Corners” to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73 (1999) (providing background on the various interpretative techniques that courts employ when dealing with contracts, including the “four corners” approach).

¹⁶⁷ *See, e.g.*, *Duff Supply Co. v. Crum & Forster Ins. Co.*, 1997 U.S. Dist. LEXIS 6383, No. 96-8481, at *12-13 (E.D. Pa. May 8, 1997) (describing the “four corners” test in the context of insurance interpretation and stating that “[i]t is the majority rule”).

¹⁶⁸ *See, e.g.*, *Collins*, 822 P.2d at 1159 (“Two competing decisional approaches to interpreting insurance contracts have evolved [, including] the ‘functional’ or ‘reasonable expectation’ approach.”); *see also* Jeffrey W. Stempel, *Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders*, 25 WM. MITCHELL L. REV. 769, 848 (1999) (noting that “Minnesota, like many [other] states, has adopted in [some] form the ‘reasonable expectations’ approach [in interpreting CGL policies]”). Significantly, comment e to section 211 of the Restatement (Second) of Contracts (1981) seems to endorse the “reasonable expectation” method in interpreting insurance contracts, as it provides that “[a]part from government regulation, courts in construing and applying a standardized contract [including insurance policies] seek to effectuate the reasonable

expectation” method, “objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”¹⁶⁹ It could thus be said that the “reasonable expectations” doctrine is more of a results-oriented, rather than a true interpretive, approach.¹⁷⁰ Essentially, courts that have adopted the “reasonable expectations” approach will go out of their way, even “bend over backward,”¹⁷¹ to find coverage for insureds, even though neither the policy nor the insurer intended for the coverage to exist.¹⁷²

expectations of the average member of the public who accepts it.” *See also id.* cmt. e, illus. 4 (suggesting that policy-holder should be provided coverage under policy “without regard to his knowledge or understanding of the quoted language at the time of contracting”). Even so, some courts, such as the Florida Supreme Court, adamantly oppose the doctrine:

We decline to adopt the doctrine of reasonable expectations To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged [Furthermore, c]onstruing insurance policies upon a determination as to whether the insured’s subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation [We also note that] after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.

Deni Assocs. v. State Farm Fire & Cas. Ins. Co., 711 So. 2d 1135, 1140 (1998); *see also* Peter Nash Swisher, *Symposium Introduction*, 5 CONN. INS. L.J. 1, 6-7 (1998) (stating that “a number of . . . commentators have been critical of the [doctrine], and [many] courts have expressly rejected [it]”).

¹⁶⁹ Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part I*, 83 HARV. L. REV. 961, 967 (1970). The formal birth of the “reasonable expectations” doctrine has been attributed to then-professor of law (now Judge) Keeton’s influential article on the subject. *See Swisher, supra* note 168, at 1-8 (describing the origins of the controversial approach).

¹⁷⁰ *See Swisher, supra* note 168, at 5 (describing the doctrine as being “result-oriented” as opposed to the “more traditional [f]ormalistic insurance contract analysis”). It should also be noted that there are several variations to the approach, and the Arizona Supreme Court had an occasion to note some of the more common ones:

- 1) Where the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured.
- 2) Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage.
- 3) Where some activity which [sic] can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured.
- 4) Where some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy.

Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 283-85 (1987) (internal citations omitted).

¹⁷¹ Tracey Cordes, *Who Gets the Bill?: Determining Insurers’ Duty to Defend and Indemnify Against Hazardous Waste Clean-up Costs Under General Liability Policies*, 18 ENVTL. L. 931, 951 (1988).

¹⁷² *See generally* Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989) (questioning the motives and correctness of the approach, and providing examples of how courts seemingly ignore express language in policies in their quests to find insurers liable for coverage). For anyone seeking more material on the controversy regarding the reasonable

Returning now to the majority rule, a corollary of the “four corners” approach is that “[a] policy is not made ambiguous by the fact that the parties interpret the policy differently.”¹⁷³ And especially important for our purposes is that the rule applies equally to exclusion clauses found within insurance policies, i.e., as long as they are unambiguous and do not violate public policy, they will be upheld by courts employing the majority approach.¹⁷⁴ In particular, many courts have upheld the “absolute” pollution exclusion clauses, such as the 1986 ISO one.¹⁷⁵ According to one commentator, at least two reasons exist for this:¹⁷⁶ First, pollution exclusion clauses are necessary for insurance companies to be able to “continue to serve their function of providing economic stability to their insureds;”¹⁷⁷ Second, the absence of the clauses might lead to intentional or careless pollution by insureds, because they would know that their insurer(s) would be obligated to defend them in any action related to pollutants.¹⁷⁸ But at least one more reason exists: Placing the financial responsibility for pollution that may occur gradually over time on the insured makes sense, since the insured is the party that is in the most advantageous situation to guard against such pollution.¹⁷⁹

Although the preceding makes it apparent that insurance contracts, including pollution exclusion clauses, are, for the most part, upheld as written by the courts, the general rule is tempered by the constructive principle

expectations doctrine, one excellent source to consult is Swisher, *supra* note 168 (providing general information on the doctrine and listing many law review articles and pieces both advocating and disparaging its use).

¹⁷³ *Tate*, 692 So. 2d at 824.

¹⁷⁴ *See, e.g., DeMutis*, 1999 U.S. Dist. LEXIS 1561, at *7 (“Explicit and unambiguous exclusions contained in insurance policies will be upheld.”); *Knight v. Aetna Life Ins. Co.*, No. 92-2244, 1993 U.S. Dist. LEXIS 3760, at *2 (E.D. La. Mar. 24, 1993) (“When [they are] clear and unambiguous, [insurance] exclusions are upheld.”).

¹⁷⁵ *See, e.g., Alcolac, Inc. v. California Union Ins. Co.*, 716 F. Supp. 1546, 1549 (D. Md. 1989) (“This pollution exclusion [clause] is just what it purports to be—*absolute*—and the Court perceives no reason why [the insurer] should be denied the benefit of its bargain with [the insured], as reflected in the insurance contract.”) (emphasis added); *see also* Schultheis, *supra* note 154, at 493 (noting that “[c]ourts tend to uphold and enforce pollution exclusion clauses”). The 1986 clause is reproduced in the text accompanying *supra* note 140.

¹⁷⁶ *See* Schultheis, *supra* note 154, at 493 (stating that courts principally rely on “two [unique] public policy rationales” to uphold pollution exclusion clauses).

¹⁷⁷ *Id.*; *see also* Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 628 (1990) (stating that “[f]rom a public and regulatory point of view, CGL insurance is designed to promote business stability”).

¹⁷⁸ *See* Schultheis, *supra* note 154, at 493. This concern was shared by the Supreme Court of North Carolina: “Relaxed vigilance is even more likely where the insured knows that the intentional deposit of toxic material in his dumpsters, so long as it is unexpected, affords him coverage. In this case, it pays the insured to keep his head in the sand.” *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 381 (1986).

¹⁷⁹ *See Peerless*, 340 S.E.2d at 381 (noting that the insured is “the party with the most control over the circumstances most likely to cause the pollution”).

known as *contra proferentum*¹⁸⁰ that courts often employ when interpreting contracts.¹⁸¹ Essentially, this doctrine holds that any ambiguities in a document are to be construed against the drafter, which in this context are obviously insurance companies.¹⁸² The rationale most often cited for this principle is that since it is the drafting party that is in the most advantageous position to secure favorable terms for it and to reduce confusing language in the document that could be construed against the party's interests, common sense and fairness dictate that any ambiguities should be resolved in favor of the non-drafting party.¹⁸³ Because insurance policies, including even the so-called "absolute" pollution exclusion clauses, are often deemed ambiguous,¹⁸⁴ the *contra proferentum* principle is one of great importance in insurance law. Indeed, one authority has labeled it "the most familiar expression in the reports of insurance cases,"¹⁸⁵ and virtually every state recognizes the principle.¹⁸⁶

Having examined in general terms some of the contract law principles that apply to the interpretation of insurance policies, we can now examine how courts have actually used these principles in resolving some of the more common issues that arise in connection with CGL policies, including the prevalent pollution exclusion clauses.¹⁸⁷

¹⁸⁰ In Latin, literally "against the offeror." *Klapp v. United Ins. Group Agency, Inc.*, 663 N.W.2d 447, 455 n.12 (Mich. 2003).

¹⁸¹ See, e.g., *In re Celotex Corp.*, 196 B.R. 973, 1003 n.210 (M.D. Fla. 1996) (Labeling the maxim as "the most prominent rule of construction in insurance law").

¹⁸² See Gregory T. Lawrence, Note, *Sheets v. Brethren Mutual: Maryland's High Court Misconstrues CGL to Cover Excluded Economic Loss Caused by Negligent Misrepresentation*, 27 U. BALT. L. REV. 189, 194 n.24 (1997) (describing the *contra proferentum* doctrine, particularly in the context of insurance policy interpretation).

¹⁸³ See generally David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988) (providing background on the creation and reasons for the *contra proferentum* doctrine). The use of *contra proferentum* in the context of insurance policies is also sometimes justified on the ground that insurance policies essentially amount to contracts of adhesion, thus placing courts in the unenviable position of having to "police" the policies to prevent unfairness. See *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1260 (N.J. 1992) ("[B]ecause insurance policies are adhesion contracts, courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness."); see *Ware*, *supra* note 172, at 1463-66 (listing factors applicable to insurance policies that are seen by courts as indicia of adhesion contracts, and describing how courts have dealt with the problem).

¹⁸⁴ See, e.g., *supra* notes 154, 159 and accompanying text.

¹⁸⁵ 2 GEORGE COUCH ET AL., *COUCH ON INSURANCE* § 15:74, 334 (rev. ed. 1984); see also note 182 and accompanying text (noting that many courts rely on the doctrine when called on to interpret insurance policies).

¹⁸⁶ See, e.g., *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-39 (9th Cir. 1990) ("According to the law of California and, indeed, every other state as well as the District of Columbia, ambiguities in insurance contracts must be construed against the insurer.").

¹⁸⁷ Addressing every possible contemporary interpretative issue stemming from pollution exclusion (and there are possibly hundreds of them, see *Leiter*, *supra* note 123, at 283 n.120 (recognizing that "more than 800 disputes relating to pollution exclusion clauses in CGL policies have been litigated since 1970")) is neither possible nor necessary for the purposes of this Comment. Rather, certain key issues

d) *Determining the Applicability of Pollution Exclusion Clauses to Particular Factual Situations.* As a preliminary matter, and contrary to what many might think, most cases involving pollution exclusion clauses do not hinge on the overall validity of the clauses;¹⁸⁸ rather, courts are typically asked to resolve narrower issues, perhaps chief among which is the applicability of a clause to the fact pattern before it.¹⁸⁹ Probably the threshold issue that must be decided is whether the CGL policy in question is “occurrence-based” or “claims-made,”¹⁹⁰ for this may single-handedly determine whether and to what extent the insured will be provided coverage under the CGL.¹⁹¹ Under an occurrence-based policy, the policy that was in effect at the time of the event that gave rise to the claim will control, regardless of when the insured posts its claim with the insurance carrier.¹⁹² Thus, for example, if a coal miner who between the years of 1975-1977 was exposed to pneumoconiosis-developing agents and who develops an illness several years later sues his employer in 1988, and the company then seeks indemnification or other assistance from the insurance carrier, the policy that would determine the extent, if any, of the carrier’s responsibility would be the one(s) in place between 1975-1977, the time of when the event that led to the claim took place.

In contrast, under a claims-based structure, the policy that was in effect at the time the insured files its claims with the carrier will determine what coverage, if any, exists.¹⁹³ This, of course, is desirable from the insurance companies’ point of view in the context of pollution exclusion clauses, for the more recent the CGL policy is, the less likely it is that the insured will be provided coverage.¹⁹⁴ So, to vary slightly our previous example involving the miner, if the mining company’s insurance policy was a claims-made one, then the controlling policy would have been the one in place in 1988. This might very well preclude the carrier from being liable, as 1986 marked the year when the insurance industry began adopting the

that seem to be litigated fairly frequently will be discussed in order to demonstrate, and possibly predict, how courts might resolve pollution exclusion cases.

¹⁸⁸ See Schultheis, *supra* note 154, at 493 (“Litigation concerning the current pollution exclusion clause focuses less on the clause’s general validity or whether the facts supporting the underlying claim meet the definition of an occurrence.”).

¹⁸⁹ See, e.g., *supra* notes 154, 159 and accompanying text (providing examples of issues courts must resolve in the context of pollution exclusion clauses).

¹⁹⁰ See Julian, *supra* note 122, at 60 (“Determining the applicable policy begins by ascertaining whether the CGL policy is a claims made policy or an occurrence policy.”).

¹⁹¹ See *id.* (“This first step of determining [whether] the applicable policy [is based on the occurrence or claims made trigger] can be critical to evaluating the case for coverage.”).

¹⁹² See *id.* Determining the exact time of the occurrence is not always so simple. See *id.* at 61.

¹⁹³ See *id.* at 60.

¹⁹⁴ See generally Part II.C.1.a (explaining various changes that CGL policies have undergone, including the reasons for them and how they have lessened insurers’ liability); see also *Hartford*, 509 U.S. at 770-78 (describing interests of insurance companies and some of the tactics used to accomplish them).

“absolute” pollution exclusion clauses.¹⁹⁵ Incidentally, the most prevalent type of policy today is “claims-made,”¹⁹⁶ which has done wonders from the insurance carriers’ point of view to cut down on their liability towards insureds.¹⁹⁷ This decrease in liability was magnified by the insurance companies’ successful insistence on the inclusion of a retroactive provision that transformed former occurrence-based policies into claims-made ones.¹⁹⁸

e) The Meaning of “Pollutant” Within Pollution Exclusion Clauses. Another important and oft-litigated interpretative issue associated with pollution exclusion clauses is the meaning of “pollutant,”¹⁹⁹ for this may very well determine whether the clause will serve to spare the insurer from liability.²⁰⁰ Although the word is typically defined in CGL policies,²⁰¹ courts nonetheless often find themselves faced with the task of determining whether a specific type of pollutant is covered under a CGL.²⁰² One substance whose status as a pollutant has spawned considerable dispute is lead paint,²⁰³ but among the many other materials that have been alleged by insurance companies to be pollutants are carpet dye used in a private home,²⁰⁴

¹⁹⁵ See *supra* notes 123, 125, 156 and accompanying text.

¹⁹⁶ See, e.g., Julian, *supra* note 122, at 59 (“Prior to the 1980s, most CGL policies were [occurrence-based]. Since then, virtually all CGL policies take the [claims-made] form.”); Ian Ayres and Peter Siegelman, *The Economics of the Insurance Antitrust Suits: Toward an Exclusionary Theory*, 63 TUL. L. REV. 971, 974 (1989) (“New CGL forms are written on a claims-made rather than an occurrence basis.”).

¹⁹⁷ See Ayres, *supra* note 196, at 976 (“The move to a claims-made form . . . eliminated the insured’s coverage for prospective claims made after the expiration of a current policy, the so-called long tail risk.”); Julian, *supra* note 122, at 59 (“[E]stablishing an earlier occurrence policy as the applicable policy is more likely to result in coverage than under a later claims made policy.”); see generally *Hartford*, 509 U.S. 764 (describing the insurance industry’s motivations for changing policies from being occurrence-based to claims-made, and the effects of this change).

¹⁹⁸ Ayres, *supra* note 196, at 975:

The movement to the claims-made form by itself would not have eliminated insurers’ liability for [all] past injuries To eliminate their responsibility for these past risks, however, insurance companies changed the CGL forms to include a retroactive provision. This provision ended insurance companies’ liability for injuries that occurred before a certain date, typically the start of the policy term.

Id.; see also *Hartford*, 509 U.S. at 771 (“[T]he [insurance industry] wanted the ‘claims-made’ policy to have a ‘retroactive date’ provision, which would further restrict coverage to claims based on incidents that occurred after a certain date.”).

¹⁹⁹ See *supra* notes 154, 159 and accompanying text.

²⁰⁰ See Schultheis, *supra* note 154, at 494 (“[T]he pivotal issue current courts often face revolves around defining pollutants because once something is deemed a pollutant, coverage is barred by the absolute pollution exclusion clause.”); see also *infra* notes 213-17 (describing case where the court concluded that insurance carrier was not liable on a suit alleging injuries caused by exposure to lead paint after finding that lead was a “pollutant” within the meaning of the carrier’s insurance policy).

²⁰¹ See *supra* notes 141-42 and accompanying text.

²⁰² See *supra* notes 154, 159 and accompanying text.

²⁰³ See Schultheis, *supra* note 154 (analyzing cases that involved the issue of whether lead paint was a “pollutant” under insurance policies).

²⁰⁴ *Regent Ins. Co. v. Holmes*, 835 F. Supp. 579 (D. Kan. 1993).

flooring material used in a chicken processing plant,²⁰⁵ sand that blew from a construction site,²⁰⁶ and carbon monoxide expelled from a residential bathroom heater.²⁰⁷

As explained earlier, courts will apply general principles of contract interpretation when analyzing insurance policies,²⁰⁸ and pollution exclusion clauses are no exception.²⁰⁹ Accordingly, when required to interpret the definition of pollutant in a CGL policy, the first step courts take is to determine whether the policy is ambiguous.²¹⁰ As it turns out, courts addressing the issue often find ambiguity in the language of CGL policies, particularly as to the meaning of pollutant.²¹¹ However, when a court finds that no ambiguity in the policy exists and that the policy's pollutant definition encompasses the substance in question, the insurance company will prevail.²¹² This was precisely the case in *St. Leger v. American Fire & Casualty Insurance Company*,²¹³ where the court had to determine whether lead paint was a pollutant under the applicable pollution exclusion clause.²¹⁴ The court found that the pollution exclusion clause was not ambiguous, and that the clause's definition of pollutant included lead paint.²¹⁵ In support of its conclusion, the court found persuasive another opinion in which the court had found that "lead is a chemical that irritates and contaminates."²¹⁶ The *St. Leger* decision was based on several additional factors, including that ingestion of dust in homes containing lead released by lead paint is the most common cause of lead poisoning in children and that Congress has identi-

²⁰⁵ West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692 (N.C. Ct. App. 1991).

²⁰⁶ Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977).

²⁰⁷ Thompson v. Temple, 580 So. 2d 1133 (La. Ct. App. 1991).

²⁰⁸ See *supra* note 161 and accompanying text.

²⁰⁹ See, e.g., Aetna Cas. & Sur. Co. v. Dow Chem. Co., 28 F. Supp. 2d 440, 445 (E.D. Mich. 1998) (court noting that "[t]he general rules of contract construction dictate[d]" its construction of the pollution exclusion clause in question).

²¹⁰ See, e.g., *id.* at 444 ("If a contract is clear and unambiguous, the court must enforce the contract as written, according to its plain meaning, without looking to extrinsic evidence. It is improper for the court to ignore the plain meaning of the policy's language in favor of a technical or strained construction.") (internal citations omitted); see also *supra* notes 163-165 and accompanying text (recognizing this tendency by the courts).

²¹¹ See *supra* notes 154, 158-59, 187-88 and accompanying text (addressing some interpretative issues that arise in connection with CGL policies).

²¹² See, e.g., Schultheis, *supra* note 154, at 486-87 ("From the policy alone, the court must determine what acts by the insured entitle the insured to the duty to defend. If the policy's terms are unambiguous, the inquiry ends."); see also *supra* notes 164-65, 212, and accompanying text (noting that courts typically uphold unambiguous insurance policies and other contracts as written).

²¹³ 870 F. Supp. 641 (E.D. Pa. 1994).

²¹⁴ See *id.* at 642-43. A pollution exclusion clause virtually identical to the one at issue in the case is reproduced in *supra* note 140.

²¹⁵ *St. Leger*, 870 F. Supp. at 643.

²¹⁶ See *id.* at 643. The case relied on by the court was *Kaytes v. Imperial Casualty & Indemnity Company*, No. 93-1573, 1994 U.S. Dist. LEXIS 21256 (E.D. Pa. Jan. 7, 1994).

fied lead as a pollutant in the context of ambient air quality under the Clean Air Act.²¹⁷

In contrast, when a court charged with interpreting the meaning of pollutant in a pollution exclusion clause finds the term to be ambiguous, it will undergo a much more extensive analysis, namely through the admittance of extrinsic evidence.²¹⁸ One substance whose status as a “pollutant” seems rife with ambiguity, and which is particularly relevant to this Comment, is asbestos.²¹⁹ The courts seem to be torn on this issue, with some conclusively finding that asbestos falls within the pollution exclusion clause,²²⁰ and others reaching the opposite conclusion.²²¹ However, regardless of the substance at issue, courts tend to take a similar approach in determining the meaning of a pollution exclusion clause when the clause is said to be ambiguous,²²² and illustrative of such an approach is *Owens-Corning Fiberglas Corporation v. Allstate Insurance Company*.²²³ In *Owens-Corning*, the court, faced with determining whether asbestos fibers were a pollutant,²²⁴

²¹⁷ *St. Leger*, 870 F. Supp. at 643. For more information on the Clean Air Act, see *supra* notes 131-32 and accompanying text.

²¹⁸ See, e.g., *Alabama Plating Co. v. United States Fid. & Guar. Co.*, 690 So. 2d 331, 335 (Ala. 1996) (“Given th[e] ambiguity in the ‘pollution exclusion [clause],’ we look to extrinsic evidence of the drafter’s intent.”); Schultheis, *supra* note 154, at 487 (“Only when the relevant portion of the insurance policy is ambiguous, must the court attempt to construe the meaning of the policy. In doing so, the court may look to extrinsic evidence proffered by the insurer or the insured.”). The prerequisite of finding ambiguity before consulting extrinsic evidence is well established, for courts are loath to “create ambiguity where none exists.” See *Schilberg Integrated Metals Corp. v. Cont’l Cas. Co.*, 819 A.2d 773, 794 (Conn. 2003); see also *supra* notes 212 and accompanying text (stating that if a court interpreting a contract deems the document to be unambiguous, its duty ends).

²¹⁹ See, e.g., *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 144, 149 (Ohio Ct. Com. Pl. 1993) [discussed in *infra* notes 223-239 and accompanying text] (“It . . . is far from certain whether asbestos constitutes an ‘irritant,’ ‘contaminant,’ or ‘pollutant’ within the meaning of the [pollution] exclusion.”); see also Sylvia Pena-Alfaro, Comment, *The Toxic Mold Terrifying Texas: Mold’s Hold on the Insurance Industry*, 34 ST. MARY’S L.J. 541, 564 (2003) (identifying asbestos as “the most litigated . . . among the indoor air pollutants that cause infirmities”).

²²⁰ See, e.g., *American States Ins. Co. v. Zippro Constr. Co.*, 455 S.E.2d 133, 135 (Ga. Ct. App. 1995) (“There is little question that asbestos constitutes a pollutant as unambiguously defined in the exclusion.”); see also *supra* notes 144-48 and accompanying text; *infra* note 237 and accompanying text (instances where asbestos was deemed to be a “pollutant”).

²²¹ See, e.g., *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206 (S.D.N.Y. 1991):

[The court] find[s] the language of the provision ambiguous at least with regard to asbestos [N]othing in the provision suggests that asbestos falls within its terms. One would not usually associate asbestos with the substances listed in the exclusion, namely, smoke, fumes or waste. Those substances bear a closer relation to industrial pollution, the usual subject of the ordinary pollution exclusion.

Id. at 1229 (internal citations omitted); see also *supra* note 219 (recognizing the confusion surrounding asbestos’ status as a pollutant within the meaning of pollution exclusion clauses).

²²² See, e.g., *supra* notes 161, 186, 218 and accompanying text (providing examples of uniformity in courts’ approach to analyzing insurance contracts).

²²³ 74 Ohio Misc. 2d 144.

²²⁴ See *id.* at 147. The definition of pollutant that was at issue was similar to the ones found in the text accompanying *supra* notes 135 and 142.

commenced its task by analyzing whether the pollution exclusion clause was ambiguous.²²⁵ The court answered this question in the affirmative after noting in part that first, asbestos was not defined anywhere in the exclusion, and second, that it was not undisputed that asbestos was to be considered a pollutant within the meaning of the policy.²²⁶ The court then recalled the principle of *contra proferentum*²²⁷ before moving on with its analysis. Initially, the court very briefly discussed the pollution exclusion clauses' historical background, and noted that they were created mainly due to insurers' concerns over "environmentally related losses and liabilities."²²⁸

Next, the court turned to the main question before it, namely whether asbestos should be considered a "pollutant" under the clause as a matter of law.²²⁹ The court recognized that many other decisions had classified asbestos as pollutants, but ultimately did not find these to be terribly persuasive because, in the court's opinion, they were not on point.²³⁰ For instance, one of those decisions had dealt not with pollution exclusion clauses, but rather with the question of whether asbestos was a pollutant under the purview of a federal act.²³¹ Another of the decisions had primarily focused on "whether the manner in which the material was released affected the applicability of the pollution exclusion."²³²

²²⁵ See *Owens-Corning*, 74 Ohio Misc. 2d at 148 ("Initially, [we note that] if the terms of a contract are definite and certain, construction is unnecessary, and the court must apply the plain meaning of the contract . . ."). As mentioned earlier, determining whether a contract or insurance policy is ambiguous is almost always the first step courts take in their analyses. See *supra* note 212 and accompanying text.

²²⁶ See *Owens-Corning*, 74 Ohio Misc. 2d at 149.

²²⁷ *Id.* at 149 ("A contract of insurance prepared by an insurer and in language selected by the insurer must be construed liberally in favor of the insured and strictly against the insurer if the language used is doubtful, uncertain or ambiguous.") (quoting *Am. Fin. Corp. v. Fireman's Fund Ins. Co.*, 239 N.E.2d 33, 35 (Ohio 1968)).

²²⁸ *Owens-Corning*, 74 Ohio Misc. 2d at 150 (emphasis in original). The court additionally noted that "[i]t . . . would appear that general product liability matters were not a chief concern." See also *supra* note 125 and accompanying text (mentioning the prominent role that environmental pollution played in the proliferation of pollution exclusion clauses).

²²⁹ See *Owens-Corning*, 74 Ohio Misc. 2d at 150-52.

²³⁰ See *id.*

²³¹ See *id.* at 50. That opinion was *United States v. Nicolet, Inc.*, 712 F. Supp. 1205 (E.D. Pa. 1989), and the act at issue there was the Comprehensive Environmental Response, Compensation, and Liability Act, see *id.* at 1206, which is currently codified in Title 42, Sections 9601-9675 of the United States Code (2004). For readers who wish to explore this act further, which was mainly passed to address the problem of hazardous waste sites, see Martin A. McCrory, *Who's on First: CERCLA Cost Recovery, Contribution, and Protection*, 37 AM. BUS. L.J. 3, 4 (1999), a good starting point would be Payson R. Peabody, Comment, *Taming CERCLA: A Proposal to Resolve the Trustee "Owner" Liability Quandary*, 8 ADMIN. L.J. AM. U. 405 (1994), which explains, among other things, why the act was passed and the procedures it sets for filing claims against offenders.

²³² *Owens-Corning*, 74 Ohio Misc. 2d at 151. That case was *Hydro Systems, Inc. v. Continental Insurance Company*, 717 F. Supp. 700 (C.D. Cal. 1989).

Then, the *Owens-Corning* court turned to authorities that had reached the opposite conclusion, i.e., that *did* find asbestos to be a pollutant.²³³ The court began by noting that “plentiful authority” demonstrated that the pollution exclusion clauses were created mainly to limit liability relating to toxic waste causing *environmental* damage, rather than “ordinary” damage like bodily injury to persons.²³⁴ For example, the court quoted with approval *Continental Casualty Company v. Rapid-American Corporation*,²³⁵ which had found that the pollution exclusion clauses at issue did not apply to the plaintiffs’ actions because “[t]he underlying complaints before us do not allege environmental pollution of land, a water course, or the atmosphere, but simply bodily injury sustained by an ultimate user of a product.”²³⁶

The *Owens-Corning* court then acknowledged that some opinions had explicitly classified asbestos as a pollutant within the meaning of pollution exclusion clauses,²³⁷ but dismissed these as unpersuasive because they “[we]re [not] supported by [either] case law [or] a compelling rationale.”²³⁸ The court proceeded to conclude that asbestos could not be categorized as a pollutant within the meaning of the exclusion.²³⁹

f) *Pollution Exclusion Clauses Relating to Environmental Pollution.* One final issue related to pollution exclusion clauses that comes up fairly often, and is thus worth addressing here, is the applicability of such clauses to incidents that are not related to environmental pollution.²⁴⁰ As

²³³ See *Owens-Corning*, 74 Ohio Misc. 2d at 152.

²³⁴ See *id.* at 151-52; see generally *supra* notes 125, 129, 131-34, 228 and accompanying text (describing some of the events that led up to the adoption of pollution exclusion clauses by the insurance industry).

²³⁵ 581 N.Y.S.2d 669 (N.Y. App. Div. 1992).

²³⁶ *Id.* at 670.

²³⁷ See *Owens-Corning*, 74 Ohio Misc. 2d at 152. One of those cases was *Great Northern Insurance Company v. Benjamin Franklin Federal Savings and Loan Association*, 793 F. Supp. 259 (D. Or. 1990), where the court found that “asbestos is a solid irritant,” *id.* at 263, and that asbestos “is . . . a contaminant within the meaning of the policy,” *id.* at 264.

²³⁸ See *Owens-Corning*, 74 Ohio Misc. 2d at 153.

²³⁹ See *id.* at 158. The *Owens-Corning* court had to decide other issues, most of which are tangential to this Comment. One of those was whether the manner in which the asbestos was released was relevant to interpreting the pollution exclusion clause, see *id.* at 152-55, which the court ultimately found that it was not, see *id.* at 154. Another such issue was whether the asbestos had been released into the “atmosphere” (which was one of the elements of the pollution exclusion clause), see *id.* at 154-56, and after relying in part on a dictionary definition of atmosphere, *id.* at 155, the court concluded that the asbestos fibers in the case at bar had not been released into the atmosphere, see *id.* at 156.

²⁴⁰ See, e.g., Leiter, *supra* note 123:

The most interesting current controversy over the [applicability] of [pollution exclusion clauses] involves circumstances in which an individual is injured by exposure to a toxic substance in a non-environmental setting. Clearly, most circumstances in which a known pollutant discharged into the environment results in injury to exposed individuals fall squarely under the absolute exclusion. When an individual is injured in a more routine exposure to a toxic substance, however, some courts find that the resulting losses fall outside the scope of the exclusion.

noted earlier, it is widely accepted that the original purpose of pollution exclusion clauses, including that of the “absolute” clause, was to curtail insurance carriers’ liability for damages arising out of pollution or other environmentally related disasters.²⁴¹ Somewhat expectedly, the courts are in disagreement on this issue: while the majority of them tend to uphold the clause in all applicable contexts,²⁴² some courts have reached the opposite result.²⁴³

An opinion illustrative of the majority position is *Assicurazioni Generali, S.p.A. v. Neil*,²⁴⁴ where the court was faced with the question of whether a pollution exclusion clause precluded an insurance carrier from being liable to a claim filed against a hotel by former guests who had allegedly suffered from carbon monoxide poisoning during their stay.²⁴⁵ The plaintiffs argued that the exclusion clause had been intended to eliminate coverage only for injuries arising out of environmental pollution, and not from the type of incident they alleged (carbon monoxide poisoning inside of a hotel).²⁴⁶ Specifically, the plaintiffs argued that carbon monoxide was not a “pollutant” within the meaning of the policy.²⁴⁷ In rejecting the plaintiffs’ contention, the court found that the language of the policy was “quite expansive . . . [and] exclude[d] from coverage the contamination of *any* environment by pollutants that are introduced at *any time, anywhere, in any way*.”²⁴⁸ The court also found to be of significance other language of the policy that defined “contamination” as “*any* injurious condition arising out of the presence of pollutants, whether permanent or transient in *any* environment.”²⁴⁹ Based on the preceding language and the policy’s definition of pollutant, the court concluded that carbon monoxide, the substance alleg-

Id. at 295; *see also supra* note 159 and accompanying text (noting that the exact applicability of pollution exclusion clauses is often the source of debate and confusion). This issue was also addressed by the court in *Owens-Corning*, 74 Ohio Misc. 2d 144, which was discussed in *supra* Part II.C.1.e.

²⁴¹ *See* text accompanying *supra* note 234.

²⁴² *See, e.g., Leiter, supra* note 123, at 296 n.188; *see also supra* notes 163-65 and accompanying text (noting that most courts will give effect to the plain meaning of clearly written contracts, including insurance policies).

²⁴³ *See, e.g., Sullins*, 667 A.2d at 623 (“It appears . . . that the insurance industry intended the pollution exclusion to apply only to environmental pollution. That supports our conclusion that [the pollution exclusion clause] . . . before us [does] *not* encompass[] lead paint, a product used legally and intentionally.”) (emphasis in original); *see also supra* notes 235-36 and accompanying text (describing case where court found that the plaintiffs’ complaints were not of the type for which the pollution exclusion clauses at issue had been drafted).

²⁴⁴ 160 F.3d 997 (4th Cir. 1998).

²⁴⁵ *See id.* at 999.

²⁴⁶ *See id.* at 1000-01.

²⁴⁷ *See id.* at 1000. The policy defined pollutants as “smoke, vapors, soot, fumes, acids, sounds, alkalies, chemicals, liquids, solids, gases, thermal pollutants and all other irritants or contaminations,” *id.* at 999-1000, which closely resembles the standard definition found in typical policies, *see, e.g., supra* note 224.

²⁴⁸ *See Assicurazioni*, 160 F.3d at 1000 (emphasis added).

²⁴⁹ *Id.* (emphasis added).

edly responsible for causing plaintiffs' injuries, "plainly f[ell] within th[e] policy"²⁵⁰

As mentioned earlier, however, not every court agrees with the majority approach.²⁵¹ According to one commentator, decisions reaching an opposite conclusion from that adopted by the *Assicurazioni* court, i.e., that standard pollution exclusion clauses found in CGLs apply *only* to claims stemming from environmental or similar pollution-related events, and *not* to those involving "ordinary" personal injury or property damage, generally fall into two somewhat related categories.²⁵² The first of these stems from a sense of public policy or fairness, where courts are tempted to curtail the reach of the pollution exclusion clauses in order to avoid potentially inequitable or absurd results,²⁵³ while the second occurs when courts rely on the "reasonable expectations" doctrine to construe the policies as applying only to "traditional" environmental pollution.²⁵⁴

One case exemplifying the first category is *Westchester Fire Insurance Company v. Pittsburg*,²⁵⁵ in which the court had to determine whether an insurance company had a duty to defend a city against a lawsuit filed by some of the city's residents who claimed to have suffered injuries as a result of chemicals being sprayed by one of the city's vehicles.²⁵⁶ The case hinged on whether the substance that had injured the plaintiffs was a "pollutant" within the meaning of the policy at issue.²⁵⁷

In ruling against the insurance company, the court stated that it was being asked by the insurance company "to stretch the definition of 'pollutant' beyond what a reasonable person placed in the position of the insured would have understood the word to mean."²⁵⁸ The court further noted that the insurance company's proposed definition of pollutants would include "any substance or chemical that allegedly causes injury to any person,"²⁵⁹ and that this construction was unacceptable because "there is virtually no substance or chemical in existence that would not irritate or damage some

²⁵⁰ *Id.*

²⁵¹ See *supra* note 242 and accompanying text.

²⁵² See Leiter, *supra* note 123, at 296-97.

²⁵³ See *id.* at 295-96. That some courts have taken this stance is hardly surprising, as it has been said that "[t]he comprehensiveness of the absolute pollution exclusion almost defies belief." *Id.*; see also *supra* note 125 (addressing the burgeoning scope of pollution exclusion clauses).

²⁵⁴ See Leiter, *supra* note 123, at 296. As mentioned earlier, the reasonable expectations doctrine is widely used by courts in interpreting insurance policies. See, e.g., *supra* note 168 and accompanying text.

²⁵⁵ 768 F. Supp. 1463. See *supra* note 119 (mentioning the *Pittsburg* case).

²⁵⁶ See *Pittsburg*, 768 F. Supp. at 1465.

²⁵⁷ See *id.* at 1465-66, 1469. The definition of pollutant at issue, *id.* at 1469, was similar to those previously analyzed, see, e.g., *supra* note 247.

²⁵⁸ *Pittsburg*, 768 F. Supp. at 1470.

²⁵⁹ *Id.*

person or property.”²⁶⁰ The court ultimately construed the term pollutant as “not merely any substance that may cause harm . . . , but rather [as] a toxic or particularly harmful material [that] is recognized as such in industry or by governmental regulators.”²⁶¹

Illustrative of the second category is *Nautilus Insurance Company v. Jabar*.²⁶² In *Jabar*, an insurance company maintained that it had no duty to defend a roofing company from a lawsuit brought by a woman who was allegedly injured after being exposed to fumes from the roofing company’s products at her place of employment, for the claim, the company argued, fell within the language of the insured’s pollution exclusion clause.²⁶³

Initially, the court found that the “total pollution exclusion clause is ambiguous . . . because an ordinarily intelligent insured could reasonably interpret the pollution exclusion clause as applying only to environmental pollution.”²⁶⁴ This conclusion was based in part on the court’s reasoning that certain terms found in the pollution exclusion clause, such as discharge, dispersal, release, and escape, were considered “terms of art” in environmental law, and that such terms usually refer to damage or injury resulting from environmental pollution.²⁶⁵ According to the court, this had two effects: first, the insured, a roofing company, could not have been reasonably expected to think that its insurance policy would not have provided protection against the type of suit it was facing.²⁶⁶ Second, adopting the insurance company’s proposed interpretation of the policy would be unfair to the insured, as this “would [have] render[ed] the [insurance] policy virtually meaningless to [the roofing company.]”²⁶⁷

²⁶⁰ *Id.* The court’s concern over the expansive breadth of pollution exclusion clauses was shared by the justices deciding *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Company*, 976 F.2d 1037 (7th Cir. 1992), which involved an issue similar to that found in *Pittsburg*. In interpreting the pollution exclusion language, the *Pipefitters* court noted that “[w]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results,” *id.* at 1043, and that “[in order t]o redress this problem, courts have taken a common sense approach when determining the scope of [the policies],” *id.*; see also *supra* note 125 (commenting on the seemingly ever-widening exclusionary nature of the clauses).

²⁶¹ *Pittsburg*, 768 F. Supp. at 1460. In reaching its conclusion, the court seemed to rely in part on the *contra proferentum* doctrine, because in construing the policy against the carrier, the court noted that the company “failed to define the limitations of its pollution exclusion clause in clear and explicit terms.” *Id.* at 1471. It will be recalled that courts often invoke this doctrine when an insurance policy or contract is deemed to be ambiguous. See, e.g., *supra* notes 181, 186-87 and accompanying text.

²⁶² 188 F.3d 27 (1st Cir. 1999).

²⁶³ See *id.* at 28. Predictably, the policy’s language was similar to that found in policies addressed earlier. See, e.g., *supra* note 257.

²⁶⁴ *Jabar*, 188 F.3d at 30.

²⁶⁵ See *id.*

²⁶⁶ *Id.* at 30 (“[I]t is entirely reasonable that an ordinarily intelligent insured would understand this provision to exclude coverage only for injuries caused by traditional environmental pollution.”).

²⁶⁷ *Id.* Ironically, it is likely that this is precisely what the insurance company wanted. See *supra* note 125.

The court also found ambiguity in the policy's definition of "pollutant."²⁶⁸ In the course of deciding the issue, the court noted that adopting "[a] purely literal interpretation of this language, without regard to the fact pattern alleged in the underlying complaint, would surely stretch the intended meaning of the policy exclusion."²⁶⁹ Thus, the court stated that it "agree[d] with those courts which have restricted the exclusion's scope to only those hazards traditionally associated with environmental pollution,"²⁷⁰ in part because "[i]t seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as environmental pollutants"²⁷¹ Relying on this reasoning and on the *contra proferentum* principle,²⁷² the court ultimately ruled in favor of the insured.²⁷³

The above discussion should serve to demonstrate the extent of insurance law's potential influence on the number of mixed-dust claims filed. The focus of the Comment will now turn to proposed federal legislation, in particular the Fairness in Asbestos Resolution Act, that could have a similar, or perhaps even more pronounced, impact on the filing of mixed-dust claims.

D. Potential Federal Legislation Dealing With Asbestos

1. Previous Failed Attempts by Congress to Pass Asbestos Legislation

The number of mixed-dust pneumoconiosis claims filed might also be influenced by Congressional efforts to deal with asbestos. In light of the "elephantine" problem of asbestos,²⁷⁴ Congress has tried numerous times,

²⁶⁸ See *Jabar*, 188 F.3d at 30. It is not uncommon, of course, for courts to find ambiguity in the word "pollutant" within the meaning of pollution exclusion clauses. See, e.g., *supra* notes 155, 160 and accompanying text.

²⁶⁹ *Jabar*, 188 F.3d at 30. In connection with this point, the court approvingly quoted *Pittsburg*, 768 F. Supp. 1463, and *Pipefitters*, 976 F.2d 1037, which were discussed earlier in *supra* notes 255-61 and accompanying text.

²⁷⁰ *Jabar*, 188 F.3d at 31.

²⁷¹ *Id.* (quoting *Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994)).

²⁷² *Jabar*, 188 F.3d at 31 ("It is a well-settled principle . . . that if the language of an insurance policy is ambiguous, it will be construed against the insurer in favor of coverage.") (internal citations and quotations omitted). As further proof of its prevalence, *contra proferentum* was also used by the court in the previous case examined, *Pittsburg*. See *supra* note 261.

²⁷³ *Jabar*, 188 F.3d at 31.

²⁷⁴ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). In *Ortiz*, the Court had to determine whether the lower courts had properly granted class certification to plaintiffs suing a manufacturer for asbestos-related injuries. See *id.* at 821. This particular class was founded upon a "limited fund" settlement, meaning that the aggregate of the claims outweighed the assets available under the fund. See *id.* at 821, 828-30, 834. The Court ultimately reversed the Fifth Circuit's judgment and remanded the

albeit unsuccessfully, to pass legislation dealing with the issue.²⁷⁵ The first major attempt at this came in 1998 through the “Fairness in Asbestos Compensation Act of 1998,”²⁷⁶ whose objective was to “establish legal standards and procedures for the fair, prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure, and for other purposes.”²⁷⁷ The bill was sent to, and considered by, the Committee on the Judiciary of both the House and Senate, but ultimately nothing came of it.²⁷⁸ The following year, a new session of Congress, the 106th, considered a new variation of the 1998 proposed act entitled the “Asbestos Compensation Act of 2000,”²⁷⁹ but the bill never went beyond the floor of the House.²⁸⁰ Somewhat curiously, the next attempt by Congress to pass legislation aimed

case to district court, in part because it found that some class members’ needs had not been given adequate consideration. *See id.* at 830-32. In his brief concurring opinion, Chief Justice Rehnquist lamented “the massive impact [that] asbestos-related claims [have had] on the federal courts,” *id.* at 865, and stated that “the elephantine mass of asbestos cases . . . cries out for a legislative solution,” *id.* (internal citations and quotations omitted). Other courts and commentators share Justice Rehnquist’s sentiments about the asbestos situation. *See, e.g.,* *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985) (“There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.”); Robin Jones, Comment, *Searching for Solutions to the Problems Caused by the “Elephantine Mass” of Asbestos Litigation*, 14 TUL. ENVTL. L.J. 549, 565 (2001) (“Congress should act to create a commission to regulate the diagnosis of asbestos-related diseases.”).

²⁷⁵ *See* Georgene Vairo, *Remedies for Victims of Terrorism*, 35 LOY. L.A. L. REV. 1265, 1291 (2002) (“There have been [many] bills proposed in Congress to deal with the asbestos litigation.”); Kenneth S. Rivlin & Jamaica D. Potts, *Not so Fast: The Sealed Air Asbestos Settlement and Methods of Risk Management in the Acquisition of Companies With Asbestos Liabilities*, 11 N.Y.U. ENVTL. L.J. 626, 643 (2003) (“For at least 15 years, Congress has reviewed asbestos legislation but has not adopted substantial reform except in the area of bankruptcy.”); *see generally* Mary S. Lyman & Letitia Chambers, *Asbestos Litigation: A History of Congressional Consideration 1977 to 2000*, 18 MEALEY’S LITIG. REP.:ASBESTOS, Sept. 17, 2003 (providing historical background information on Congress’ past failed attempts to legislate asbestos).

²⁷⁶ Virtually identical versions of the bill were introduced in both the Senate and the House of the 105th Congress. The Senate bill was S. 2546, while the House version was H.R. 3905. For more information on S. 2546, *see* Jennifer S. Ray, *Products Liability Update: Legislative Update - A Return to Modest Proposals*, Findlaw.com, at <http://library.findlaw.com/1999/Jan/1/130852.html> (last visited Feb. 26, 2006), while more information about H.R. 3905 may be found in George F. Sanderson, III, Note, *Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present*, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 315, 320 (1998-99).

²⁷⁷ Congress, Bill Summary & Status for the 105th Congress for S. 2546, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SN02546:@@L&summ2=m&> (last visited Feb. 20, 2006) [hereinafter Status of S. 2546]. The aspirations of the House version, H.R. 3905, were identical to those of S. 2546. Congress, Bill Summary & Status for the 105th Congress for H.R. 3905, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR03905:@@L&summ2=m&> (last visited Feb. 20, 2006) [hereinafter Status of H.R. 3905].

²⁷⁸ *See* Status of S. 2546, *supra* note 277; Status of H.R. 3905, *supra* note 277.

²⁷⁹ H.R. 1283 (1999). When it was introduced in the House, the bill was unimaginatively named the “Fairness in Asbestos Compensation of 1999,” but its title was changed by the time it was reported. *See* Congress, Bill Summary & Status for the 106th Congress for H.R. 1283, at <http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.1283>: (last visited Feb. 20, 2006) [hereinafter Status of H.R. 1283] (listing two different bills under H.R. 1283); *see* Jones, *supra* note 274, at 549-50, 554-56 (describing purposes and procedures of the proposed Act).

²⁸⁰ *See* Status of H.R. 1283, *supra* note 279.

at curbing the problem of asbestos litigation did not occur until earlier in 2003, when several different bills were proposed;²⁸¹ among these are the Asbestos Claims Criteria and Compensation Act of 2003,²⁸² the Asbestos Compensation Fairness Act of 2003,²⁸³ and the Fairness in Asbestos Injury Resolution Act of 2003, or “FAIR Act of 2003” for short.²⁸⁴

2. The FAIR Act

More recently, the Senate had occasion to consider the FAIR Act of 2004.²⁸⁵ In an oversimplified summary, the Act would create an administrative division called the Office of Asbestos Disease Compensation within the Department of Labor that would be responsible for processing both existing and future claims involving asbestos-related injuries. Under the non-adversarial, no-fault scheme of the Act, a claimant would have to prove an entitlement to compensation under a preponderance of evidence standard, and any claims would be paid out from the so-called Asbestos Injury Claims Resolution Fund, which would be bankrolled by companies and insurers, that the Act would create. The Act would also establish the Advisory Committee on Asbestos Disease Compensation that would be responsible for, among other things, streamlining the filing and claims processing procedures and establishing benchmarks to ensure the quality and integrity of the compensation program.

²⁸¹ This does not mean that no type of asbestos legislation was considered during that period. For example, in 2001, the House of the 107th Congress considered (but never passed) bill H.R. 1412, whose purpose was to exempt asbestos settlement funds from federal taxes. *See* Congress, Bill Summary & Status for the 107th Congress of H.R. 1412, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR01412:@@L&summ2=m&> (last visited Feb. 20, 2006). And in 2002, the Senate of the 107th Congress pondered a (doomed) bill, S. 2641, that would have eliminated, to the extent that was possible, any products containing asbestos. *See* Congress, Bill Summary & Status for the 107th Congress of S. 2641, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN02641:@@L&summ2=m&> (last visited Feb. 20, 2006).

²⁸² S. 413, 108th Cong. For a summary of the bill and other information, see Congress, Bill Summary & Status for the 108th Congress of S. 413, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN00413:@@L&summ2=m&> (last visited Feb. 20, 2006).

²⁸³ H.R. 1586, 108th Cong. Further information about the bill may be found at Congress, Bill Summary & Status for the 108th Congress of H.R. 1586, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01586:@@L&summ2=m&> (last visited Feb. 20, 2006).

²⁸⁴ S. 1125, 108th Cong. *See* Congress, Bill Summary & Status for the 108th Congress of S. 1125, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01125:@@L&summ2=m&> (last visited Feb. 20, 2006) [hereinafter Status of S. 1125]. The FAIR Act of 2003 was approved by the Senate Judiciary Committee and sent to the full Senate for a vote, but the bill failed to pass. *See* Anthony J. Sebok, *The New Asbestos Bill, Part One: Why It Is Imperative That It Pass*, FindLaw.com (July 14, 2003), at <http://writ.news.findlaw.com/sebok/20030714.html> (last visited Feb. 20, 2006) (“On July 10, the Senate Judiciary Committee voted to send a modified version of FAIR to the full Senate.”); Status of S. 1125.

²⁸⁵ S. 2290, 108th Cong.

As with Congress' previous efforts to enact major asbestos-related legislation, the FAIR Act of 2004 failed to pass.²⁸⁶ Even so, the Act, along with the other past attempts, evinces Congress' determination to legislatively solve, or at least diminish, the "asbestos crisis." And because the FAIR Act garnered a lot of attention, even though it did not pass it is likely a good indication of the sort of legislation Congress might one day enact to deal with asbestos. Thus, it is worth examining a few key aspects of the Act that, as will be addressed in greater detail later,²⁸⁷ could have a pronounced impact on mixed-dust claims.

The first of these is the Act's preemption of all other federal and state laws that would conflict with it.²⁸⁸ Relatedly, the Act would also render void "[a]ny agreement, understanding, or undertaking ... with respect to the treatment of any asbestos claim that requires future performance by any party...."²⁸⁹ As if these features were not enough to establish the Act's prominence in the realm of asbestos claims, the Act goes on to expressly foreclose the possibility of pursuing asbestos-related claims in other venues.²⁹⁰ Furthermore, any existing asbestos claims, except for those in which a plaintiff is seeking to enforce an already-entered judgment from which no more appeals may be had, are preempted by the act.²⁹¹ Thus, the preemptive nature of the Act would likely impact the number of mixed-dust claims brought in the future.²⁹²

The other significant part of the Act that merits attention here is that depending on the type of disease alleged, the claimant must, as part of establishing his claim, demonstrate that his disease was not caused by substances other than asbestos. Specifically, claimants alleged to be suffering

²⁸⁶ See Congress, Bill Summary & Status for the 108th Congress of S. 2290, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN02290:@@D&summ2=m&> (last visited Feb. 20, 2006).

²⁸⁷ See generally *infra* Part III.B (discussing how the FAIR Act, if it were to become law, might lead to an increase in the number of mixed-dust claims filed).

²⁸⁸ S. 2290 § 403(a) ("The provisions of this Act shall supersede any and all Federal and State laws insofar as they may relate to any asbestos claim . . .").

²⁸⁹ *Id.* § 403(b)(1); see also *id.* § 403(b)(2) ("Any such agreement, understanding, or undertaking by any such person or affiliated group shall be of no force or effect, and no person shall have any rights or claims with respect to any of the foregoing.").

²⁹⁰ *Id.* § 403(c) ("The remedies provided under this Act shall be the exclusive remedy for any asbestos claim . . . under any Federal or State law."); see also *id.* § 403(d)(1) ("No asbestos claim . . . may be pursued and no pending asbestos claim may be maintained in any Federal or State court, except for enforcement of claims for which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judicial review before the date of enactment of this Act.").

²⁹¹ *Id.* § 403(d)(3) ("Any action asserting an asbestos claim . . . in any Federal or State court, except actions for which an order or judgment has been duly entered by a court that is no longer subject to any appeal or judicial review before the date of enactment of this Act, is preempted by this Act.").

²⁹² See generally *infra* Part III.B (analyzing the potential that this feature of the FAIR Act might have on the filing of mixed-dust claims).

from non-malignant Level III,²⁹³ non-malignant Level IV,²⁹⁴ and non-malignant Level V²⁹⁵ asbestos diseases must all provide medical documentation “excluding other more likely causes of [his or her] pulmonary condition.”²⁹⁶ Just as with the Act’s preemptive character just examined, it is likely that this aspect of the Act would affect the filing of mixed-dust claims.²⁹⁷

III. POTENTIAL IMPACT OF INSURANCE POLICY EXCLUSIONS AND ASBESTOS LEGISLATION SIMILAR TO THE FAIR ACT ON THE NUMBER OF MIXED-DUST CLAIMS FILED

As suggested by the earlier discussion, the current state of insurance policies, especially as they apply to claims alleging injuries related to asbestos exposure, might lead to an increase in the number of asbestos lawsuits filed under the rubric of mixed-dust claims. The passing of legislation dealing with asbestos claims, such as the FAIR Act, might have a similar effect on asbestos claims being filed as mixed-dust ones. This section will first analyze in further detail why some would-be asbestos plaintiffs might be motivated to file mixed-dust claims instead, and will then examine some problems that they might face in their attempts.

A. How Insurance Law as It Currently Stands Can Affect Asbestos Claims

1. Policies Containing Specific Asbestos Exclusion Clauses

For plaintiffs who are considering filing lawsuits alleging injury caused by asbestos exposure, the most formidable obstacle before them from an insurance standpoint, even more so than the generic “absolute” pollution exclusion clause,²⁹⁸ is policies that specifically exclude asbestos from coverage.²⁹⁹ As was noted earlier, aside from the pervasiveness of pollution exclusion clauses in general,³⁰⁰ it is becoming increasingly more common for insurance companies to include language in their policies that excludes from coverage specific substances,³⁰¹ and particularly relevant to this Comment are those policies that single out asbestos.

²⁹³ See S. 2290 § 121(d)(3).

²⁹⁴ See *id.* § 121(d)(4).

²⁹⁵ See *id.* § 121(d)(5).

²⁹⁶ See *id.* §§ 121(d)(3)(D)(ii), 121(d)(4)(D)(ii), 121(d)(5)(D)(ii). Expectedly, an evidentiary requirement that is common to all claims under the Act is a showing of “exposure” to asbestos. See *id.* § 121(d) (categorizing the different levels of compensable diseases).

²⁹⁷ See generally *infra* Part III.B (discussing this possibility in more detail).

²⁹⁸ See *supra* note 140 and accompanying text.

²⁹⁹ See, e.g., *supra* notes 147, 152 and accompanying text.

³⁰⁰ See *supra* notes 123, 125, 156 and accompanying text.

³⁰¹ See, e.g., *supra* notes 143, 147, 152 and accompanying text.

It is, of course, difficult to predict in a vacuum how or whether a particular insurance policy might apply to any given set of facts,³⁰² especially since the language of insurance policies frequently change.³⁰³ Even so, because it is likely that a policy specifically excluding asbestos from coverage would be declared enforceable³⁰⁴ and, obviously, applicable to asbestos,³⁰⁵ there would be an obvious incentive for a plaintiff that is considering filing a personal injury claim to try to get around such an exclusion, possibly by simply not alleging asbestos as an injury-causing agent in the complaint, so that the insurance carrier(s), as well as the defendant(s), might be held liable. This is because many firms are either on the brink of or have already declared bankruptcy as a result of asbestos litigation,³⁰⁶ and so even if a plaintiff were to win a judgment for his asbestos-related injuries, he might not be able to collect any money from the defendant(s) directly.

³⁰² See, e.g., *Consumers County Mut. Ins. Co. v. PW & Sons Trucking Inc.*, 307 F.3d 362, 365 (5th Cir. 2002) (stating that “[w]hen interpreting an insurance policy, [the court] . . . cannot simply consider its terms in the abstract [, but r]ather [should] consider the policy as a whole”) (internal citations and quotations omitted); see Donald A. Winslow, *Tax Avoidance and the Definition of Insurance: The Continuing Examination of Captive Insurance Companies*, 40 CASE W. RES. 79, 104-05 (1990) (describing case where a court “consider[ed] all the facts and circumstances in determining whether . . . insurance [existed]”). This is so, notwithstanding that “[m]ost CGL policies are virtually identical[, since they are based on] standard forms [that are] traditionally drafted by insurance industry trade associations.” Brian S. Rudick, Comment, *The Pollution Exclusion Clause in Pennsylvania: Revisiting Techalloy v. Reliance*, 56 U. PITT. L. REV. 885, 891 (1995). See also *supra* notes 117, 156 and accompanying text (noting the characteristic uniformity among CGL policies).

³⁰³ See, e.g., *supra* note 122 and accompanying text.

³⁰⁴ See, e.g., *Pittston Co. Ultramar Am. v. Allianz Ins. Co.*, 124 F.3d 508, 520 (3d Cir. 1997) (“[W]hen the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not [to] make a better contract for either of the parties.”); see also *supra* notes 163-65, 175, 242 and accompanying text (recognizing that courts typically enforce policies without modifying them). But see *supra* note 163 (noting that courts do have the power to render certain insurance policies void on the ground that they are contrary to public policy).

³⁰⁵ Because courts generally will uphold insurance policies that are written clearly, see, e.g., *supra* note 165 and accompanying text, it is almost inconceivable that a court would find a policy explicitly excluding asbestos from coverage to be inapplicable to a claim alleging injuries stemming from asbestos exposure. See, e.g., *Fibreboard*, 227 Cal. Rptr. at 205 (“The insurance [policies] eliminated coverage for asbestos-related injuries arising from exposure . . . [, and w]hen a policy of insurance in plain language excludes a particular peril from coverage that language must be respected.”); *supra* notes 149-53 (similar case); cf. *Carey Canada, Inc. v. Columbia Casualty Co.*, 940 F.2d 1548 (D.C. Cir. 1991) (finding possible ambiguity in the term “asbestosis” as used in a policy’s exclusion clause, and remanding case for a determination as to whether the term encompassed just asbestosis, or all asbestos-related diseases); *supra* notes 144-48 (discussing similar issue of ambiguity as to the term asbestosis).

³⁰⁶ See Rivlin, *supra* note 275, at 642-43 (describing the bankruptcy of companies vis-à-vis the asbestos problem); see also H. Ward Classen, *An Investigation into the Statute of Limitations and Product Identification in Asbestos Litigation*, 30 HOW. L.J. 1, 21 (1987) (noting that “many asbestos manufacturers c[ould] no longer afford to pay [asbestos] claims” in as early as 1987). Because of this, many asbestos plaintiffs have taken to suing smaller or local companies or defendants, even those who might only have been tangentially linked to the plaintiffs’ injuries, such as a hardware store that at one point might have sold a product containing asbestos or an independent contractor that possibly used asbestos-containing material in his work. See Love & Goldberg, *supra* note 8, at 18.

2. Possible Duties That Insurers Might Have in Relation to Mixed-Dust Claims Filed

This last point leads to the related issue of what it would mean for the parties involved in an asbestos or mixed-dust lawsuit if it were determined, as a preliminary matter, that the exclusion clause in an insurance policy did not alleviate the carrier from any responsibility in the suit; in other words, the insurance company would not be “let off the hook,” although how and for what the insurer might be held liable would naturally depend on the outcome of the case. Of course, it is hard to predict the exact nature and extent of an insurance company’s liability in any given case, since this would depend on what the policy provided and the facts of the case. Even so, one analyzing in general terms the duties of an insurance carrier under the typical business CGL policy³⁰⁷ that could be implicated in a claim alleging diseases caused by asbestos or mixed-dust might find two distinct categories, those being to defend the claim and to indemnify the insured defendant from any adverse judgments against it.³⁰⁸

To determine whether either duty exists, a separate analysis for each type is required,³⁰⁹ and this process can be complex in asbestos-related cases.³¹⁰ A detailed examination of the exact contours of the analyses is not

³⁰⁷ See *supra* note 116 and accompanying text.

³⁰⁸ See, e.g., Schultheis, *supra* note 154, at 476, 479-80:

Insurers owe their insureds two contractual duties—the duty to defend and the duty to indemnify . . . Pollution exclusion clauses attempt to limit or eliminate the[se duties] . . . against claims involving pollution. [However, w]hen the . . . pollution exclusion clause [is deemed to] not apply, . . . the insurer may have a duty to defend and indemnify the insured.

Id.

³⁰⁹ See, e.g., *Enron Oil Trading & Transp. Co. v. Underwriters of Lloyd’s of London*, 47 F. Supp. 2d 1152, 1160-61 (D. Mon. 1996) (“It is well settled that the duty to indemnify is not necessarily coextensive with the duty to defend. On the contrary, an insurer’s duty to defend is conceptually distinct from and legally independent of its duty to indemnify . . .”) (internal citations and quotations omitted).

³¹⁰ See, e.g., Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation (Part 2 of 2)*, 36 VAND. L. REV. 573, 709-10 (1983) (“Ascertaining which, if any, insurance companies has incurred the duty to defend and indemnify an asbestos manufacturer is difficult because many different insurers may have insured a manufacturer during the progress of a claimant’s asbestos-related disease.”). An issue that was alluded to earlier in *supra* notes 127-30 and accompanying text, and which is probably the single most complicated aspect of determining an insurer’s duty, is whether the injury or incident at the heart of the plaintiff’s claim occurred during the coverage period, or whether the policy was “triggered.” See generally James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625 (1997) (describing the issue of triggering vis-à-vis insurance policies and the inherent difficulties related thereto, especially as it applies to exposure claims filed in tort). For our purposes, it is enough to say that courts have adopted several types of tests to determine if and when an insurance policy was triggered, including the “manifestation theory,” which looks at the time the victim became aware of the problem, the “injury in fact theory,” which asks when actual damage or physical injury occurred, the “exposure theory,” which focuses on the time that the victim was first exposed to the injury-causing agents, and the “continuous” or “multiple” trigger theory, which contemplates exposure at several different spans of time. See *Inland Waters Pollution Control v. Ins. Co.*, 997 F.2d 172, 183 (6th Cir. 1991) (describing the above tests). As

needed here, and is best left to be addressed by other sources.³¹¹ It suffices to say that the duty to defend, as its name suggests, imposes an obligation on the insurance carrier to provide legal representation to a defendant being sued,³¹² while the duty to indemnify makes the insurer responsible for the actual judgment entered against a defendant that falls within the coverage of the policy.³¹³ Since in most cases, defending against a lawsuit would probably be cheaper than paying the entire resulting judgment, it is perhaps not surprising that a duty to defend is much more likely to be found than a duty to indemnify.³¹⁴ A further difference between the two duties is at what point their existence is determined; the decision regarding a duty to defend is made at the beginning of the lawsuit, while the one regarding a duty to indemnify is made after a verdict or other decision is reached.³¹⁵

As it relates to this Comment, the practical effect of how courts determine whether there is a duty to indemnify or defend is that, at a minimum, an insurance carrier who has issued a CGL would likely be obligated to defend an insured who is being sued for injuries stemming from asbestos or other similar pollutants,³¹⁶ notwithstanding that the policy might contain a

might be expected, the appropriateness of each type of test depends on which of the various trigger manifestations is provided for in the policy at hand. *See, e.g., YWCA v. Allstate Ins. Co.*, 275 F.3d 1145, 1151 (D.C. Cir. 2002) (“Examination of the language in the [i]nsurers’ policies indicates the appropriateness of applying a [certain] trigger.”). It is not a mere coincidence that most of today’s CGL policies are of the “claims-made” variety. *See supra* notes 196-98 and accompanying text (documenting insurers’ interests in issuing claims-made policies and some of their attempts to accomplish that goal).

³¹¹ *See* Schultheis, *supra* note 154, at 479-89 (describing how some courts determine whether there is a duty to defend); *Enron Oil Trading*, 47 F. Supp. 2d at 1160-61 (explaining process to impose a duty to indemnify on an insurer, and how it differs from the one used to find a duty to defend).

³¹² *See generally* Susan Randall, *Redefining the Insurer’s Duty to Defend*, 3 CONN. INS. L.J. 221 (1996-97) (describing duty to defend and raising typical questions that arise in association with it).

³¹³ *See* *Cyprus Amax Minerals Co. v. Lexington Ins. Co.*, 74 P.3d 294, 299-302 (Colo. 2003) (explaining duty to indemnify and some common issues related to it).

³¹⁴ *See, e.g., Ethicon, Inc. v. Aetna Cas. & Surety Co.*, 737 F. Supp. 1320, 1330 (S.D.N.Y. 1990) (“[T]he duty to indemnify is far narrower than the duty to defend.”); *see also* *Cyprus*, 74 P.3d at 299 (“Because the duty to defend encompasses any potential claims raised by the facts and the duty to indemnify relates to the actual liability imposed, this court has considered the duty to defend to be a broader concept than the duty to indemnify.”); *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 97 (2d Cir. 2002) (“An insurer’s duty to defend is broader than its duty to indemnify Indeed, an insurer has a duty to defend even if . . . the claim may be meritless or not covered [by the policy].”).

³¹⁵ *See* *Ethicon*, 737 F. Supp. at 1330, where the court, in deciding whether an insurance provider was liable for indemnifying its insured, stated:

Whereas an insurer’s duty to defend is viewed from the beginning of a lawsuit, the duty to indemnify is decided after the completion of litigation. It is a retrospective, rather than a prospective, determination. The [c]ourt must . . . determine whether the injury found, and the cause of action decided, fit within the insurance policy at issue. . . . [For example, i]n the instant case, the [c]ourt must decide if the findings of the . . . jury, which resulted in a total verdict of almost \$12 million for [the defendant in the original action], arose from the type of injury covered by the [insurance] policies.

³¹⁶ This is not only because courts tend to liberally find a duty to defend, *see supra* note 314 and accompanying text, but also because exactly what constitutes a pollutant within the meaning of a policy

specific³¹⁷ or generic³¹⁸ pollution exclusion. Whether the insurance carrier would ultimately have to indemnify any adverse judgments entered against the insured is harder to predict,³¹⁹ but even if the insurer's duty were limited to defending the claim, this would still, of course, be helpful to a defendant. In addition, the plaintiff may be further prejudiced if only a duty to defend, and not to indemnify, is found, because the defendant(s) in the case might not be able to pay a judgment in favor of the plaintiff.³²⁰

3. Applicability of Pollution Exclusion Clauses to Mixed-Dust Claims Alleging Asbestos

Another interesting question that is raised in conjunction with the applicability of pollution exclusions to mixed-dust claims is what would happen if asbestos were only one of several substances alleged by the plaintiff to have caused his injuries. Such a scenario is hardly only an academic point, for mixed-dust claims, by definition, involve the allegation of at least two injury-causing substances,³²¹ and there is a good chance that asbestos could be one of those substances.³²² It is hard to predict what courts faced with such a situation would do, but two outcomes are likely, depending on the details of the insurance policy: if the policy contained exclusionary language dealing specifically with asbestos,³²³ it is probable that courts would find that an allegation of asbestos in the complaint would be enough to trigger the policy's exclusion clause, and hence the insurance carrier would be devoid of liability. It is also possible, although unlikely, that the plaintiff might be allowed to proceed with his claim after having been given a chance to modify the complaint to eliminate any references to asbestos.

is a question that comes up frequently, and one that courts often struggle to answer. *See, e.g., supra* notes 154, 159 and accompanying text. *But see* Government Employees Ins. Co. v. Ropka, 536 A.2d 1214, 1218 (Md. Ct. Spec. App. 1988) ("It is generally true that an insurer has no duty to defend a cause of action against an insured if that cause of action asserts liability on the part of the insured that comes within an exclusion in the insurance policy."); Leiter, *supra* note 123, at 296 ("The many cases in which courts find the absolute pollution exclusion to be clear and unambiguous far outnumber the few in which courts choose . . . to grant coverage for the insured.").

³¹⁷ *See, e.g., supra* note 143 and accompanying text.

³¹⁸ *See, e.g., supra* note 140 and accompanying text.

³¹⁹ *See supra* note 314 and accompanying (noting that courts are more willing to find a duty to defend than to indemnify).

³²⁰ *See supra* note 306 and accompanying text.

³²¹ *See* text accompanying *supra* note 5.

³²² *See, e.g.,* Mark A. Koppel, Case Notes, Gilliam v. Roche Biomedical Laboratories: *An Introduction to Fear-of-Disease Damages in Arkansas*, 48 ARK. L. REV. 555, 567 (1995) ("Possibly the most common examples of toxic tort litigation are the asbestos cases. It has been estimated that the potential number of lawsuits arising from work-related asbestos exposure could be in the millions."); *see also supra* note 219 and accompanying text (noting the prominent role that asbestos plays in litigation involving pollution exclusion clauses).

³²³ *See, e.g.,* text accompanying *supra* note 152.

If, however, the policy only has a general pollution exclusion clause,³²⁴ predicting the outcome would be harder, for one of two things would be possible, depending on whether asbestos were deemed by the court to be a “pollutant” within the meaning of the clause:³²⁵ if the court found that asbestos is indeed a pollutant, then, as explained above, the pollution exclusion clause would most likely shield the insurance carrier from liability, unless the plaintiff were given the opportunity to proceed with his claim sans the asbestos allegation; if the court reached the opposite conclusion, however, then the extent, if any, of the insurance carrier’s liability would likely depend on whether the other injury-causing substances alleged by the plaintiff were classified as pollutants within the meaning of the pollution exclusion clause.³²⁶

4. Effect of Pollution Exclusion Clauses on Mixed-Dust Claims Alleging at Least One Pollutant Within the Meaning of the Clause

A similar dilemma would arise in a situation where a plaintiff alleges that his injuries were caused by several substances, and a court were to find that only one or some of the substances listed in the complaint were “pollutants” within the meaning of the policy’s pollution exclusion clause at issue. For instance, if a plaintiff alleged that he was suffering from mixed-dust pneumoconiosis caused by asbestos, talc, lead paint, and beryllium, and a court were to conclude that only asbestos and beryllium were pollutants, it is unlikely that the court would dismiss the plaintiff’s suit, since presumably he could still make a *prima facie* case with the other substances not falling within the purview of the pollution exclusion clause (talc and lead paint in this hypothetical case); rather, the court would probably allow the plaintiff the opportunity to modify his complaint accordingly.

B. Possible Ramifications of Legislation Like the FAIR Act Being Passed

As mentioned earlier, Congress did not enact the FAIR Act of 2004.³²⁷ Even so, given the high number of similar past attempts³²⁸ and the opinion

³²⁴ See, e.g., *supra* note 140 and accompanying text.

³²⁵ The reader may recall that a disagreement exists among many courts as to whether asbestos should be qualified as a pollutant under pollution exclusion clauses. See, e.g., *supra* notes 219-21 and accompanying text.

³²⁶ See, e.g., *supra* note 212 and accompanying text (noting that an insurer’s liability is often determined by the court’s interpretation of the word “pollutant” in the policy’s pollution exclusion clause).

³²⁷ See text accompanying *supra* note 286.

³²⁸ See generally *supra* Part II.D.1 (discussing failed asbestos legislation proposals).

of many influential persons like Chief Justice William Rehnquist that the asbestos situation as it stands can only be remedied through a legislative solution,³²⁹ it is not far-fetched to think that some form of legislation relating to asbestos claims will one day be passed by Congress. Furthermore, because the aim of such legislation would be to prevent persons from filing asbestos-related lawsuits, a corresponding increase in the number of asbestos claims filed under the rubric of mixed-dust is possible.

This may be illustrated by using the FAIR Act of 2004 as an example. Had the Act passed, an increase in mixed-dust claims might have resulted because the Act would have served as the exclusive means for persons suffering from asbestos-related ailments to receive compensation, since the Act would prohibit any asbestos claims from being filed in state or federal courts.³³⁰ Furthermore, the Act would have negated almost all settlements and claims related to asbestos that are already in existence.³³¹ Simply put, if the FAIR Act or similar legislation were to pass, a plaintiff suffering from asbestos-related ailments who, for whatever reason,³³² wanted to bring his claim in the form of a tort lawsuit in the court system rather than as an administrative claim would have had to either forego his claim altogether, or somehow shape his claim in such a way as to fall out of the legislation's scope. That is where mixed-dust claims come in.

As explained earlier, one of the things that a claimant must do to receive compensation for certain diseases under the FAIR Act is to establish that his injuries were caused either exclusively or heavily by asbestos.³³³ The significance of this is that some plaintiffs whose injuries were at least partly caused by substances *other* than asbestos would probably not be eligible to apply for compensation under the FAIR Act, and so would look toward filing their claims elsewhere, that is, in the courts. This means that someone who is contemplating filing a lawsuit to recover damages for his asbestos-related afflictions should at least consider the possibility of mold-

³²⁹ See *supra* note 274 and accompanying text.

³³⁰ See *supra* notes 290-91 and accompanying text.

³³¹ See *supra* note 289 and accompanying text.

³³² One such reason might be a belief that the amount available for recovery would be lower than in a lawsuit. See, e.g., Brotherhood of Maintenance of Way Employees Division, BMW Legislative Issues – 108th Congress (2004), available at <http://www.bmwewash.org/Legislative%20Issues/2004%20-%2003-04%20Legis%20Issues.htm> (last visited Feb. 26, 2006) (describing the FAIR Act of 2004 as a “partisan measure that fails to provide asbestos disease victims fair and certain compensation”). This would be particularly true if mixed-dust lawsuits were considered to be in the nature of either products liability or toxic tort claims, as they likely would be, see, e.g., *infra* note 405; *infra* note 401 and accompanying text, because damage awards in products liability cases and toxic tort cases are notoriously large. See, e.g., Neil Vidmar, *The American Civil Jury for Auslander (Foreigners)*, 13 DUKE J. COMP. & INT’L L. 95, 112 (2003) (“[P]roducts liability verdicts [routinely] involve very large awards.”); Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-N.W. J. ENV. L. & POL’Y 71, 77 (1999) (“Damages in toxic tort cases are renowned for their enormity.”).

³³³ See *supra* notes 293-96 and accompanying text.

ing his complaint to allege diseases other than asbestos as the cause of his injuries so as to escape the purview of the FAIR Act. In other words, limitations like those in the FAIR Act on what types of injury-causing substances are compensable might lead to a corollary increase in the number of asbestos claims filed under the rubric of mixed-dust. Conversely, if legislation like the FAIR Act were to indeed become law, it is likely that some would-be mixed-dust and asbestos plaintiffs would find the no-fault scheme or other features to be attractive,³³⁴ and for that reason might mold their claims accordingly so as to ensure eligibility under the Act, meaning that the only injury-causing substance alleged would be asbestos.

IV. CAUSATION ISSUES IN MIXED-DUST CLAIMS

The preceding discussion on the potential impact that insurance law and future asbestos legislation may have on the number of mixed-dust claims filed would not be complete without addressing the role that the all-important issue of causation would play in such cases. Having said that, an exhaustive look at every facet of the problem is not needed here; rather, this section will first address what are likely to be some of the most prominent causation issues associated with mixed-dust cases, and will then conclude by offering some possible solutions to those issues.

A. Basic Causation Issues Applicable to Mixed-Dust Claims

At its most basic, causation in the tort realm simply refers to the general requirement that in order for a plaintiff to recover damages, he must establish to the satisfaction of the court that his injuries were a result of the defendant's actions.³³⁵ Naturally, the difficulty of meeting this requirement

³³⁴ See *supra* note 40 and accompanying text (discussing positive and negative aspects of filing workers' compensation claims as opposed to suing in tort). In fact, some attorneys always favor settling their cases. See, e.g., Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. ILL. L. REV. 21, 32 (1993) ("Because settling saves litigation costs, risk-neutral parties normally will prefer to settle the case for an amount [that is likely to be accepted by both sides]."); see also footnotes 497-502 and accompanying text (noting possible advantages to settling disputes instead of litigating them).

³³⁵ See, e.g., *Buckner v. Sam's Club*, 75 F.3d 290 (7th Cir. 1996):

To establish a *prima facie* [negligence] case, [the plaintiffs] had to present admissible evidence that [the defendant] owed [the plaintiff] a duty, that the duty was breached, and that the breach proximately caused [her] injury. Causation, therefore, is essential, and [it] means, at a minimum, causation in fact—that is, that the harm would not have occurred “but for” the defendants' conduct.

Id. at 294 (internal citations and quotations omitted). There is also the matter of the plaintiff having to establish “proximate” or “legal” causation, which is a normative inquiry that asks whether the defendant *should* be held, rather than *was*, responsible for the plaintiff's injuries. See, e.g., Lawrence R. Liebeman & Steven G. Davison, *Takings of Wildlife Under the Endangered Species Act After Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 5 U. BALT. J. ENVTL. L. 137, 157 (1995) (stating that “proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences”). To the extent that this concerns which parties *should*, as opposed to

depends on the type and facts of the case the plaintiff alleges,³³⁶ and mixed-dust claims are no exception to this rule, for two reasons.

First, because mixed-dust claims, by definition, involve the allegation of at least two injury-causing substances,³³⁷ it would be hard, if not impossible, for some plaintiffs to convincingly establish which and to what extent particular substances caused his injuries, not to mention the difficulty in proving that a specific defendant or defendants was the source of origin of the substances.³³⁸ Illustrative of this is *In Re Liquidation of Midland Insurance Company*.³³⁹ In *Midland*, a former manufacturer of asbestos sought to be indemnified by an insurance company against asbestos-related claims,³⁴⁰ and although the case was ultimately remanded for further factual development,³⁴¹ the court, in the course of its opinion, addressed the inherent difficulty that belies diagnosing and tracing asbestos diseases, and in part noted that “[various] factors combine to make it impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease.”³⁴² It is likely that the problem presented in *Midland* would only be made worse in mixed-dust claims, since a plaintiff in such a situation would have to contend with tracing the exposure of not just one substance, but at least two.³⁴³

Second, most mixed-dust claims could be likened to other “toxic tort” cases,³⁴⁴ and satisfying the causation requirement in toxic tort cases has

those who *could*, be held responsible for mixed-dust claims, however, such considerations are beyond the scope of this Comment.

³³⁶ See, e.g., *In re Ethyl Corp.*, 975 S.W.2d 606, 616 (Tex. 1998) (stating that “[the type of] evidence [that would be required] regarding causation [in an asbestos case] would vary depending on the length of exposure and the dates of exposure”); see also Ramona L. Paetzold, *Same-Sex Sexual Harassment: Can it be Sex-Related for Purposes of Title VII*, 1 EMPL. RTS. & EMPLOY. POL’Y J. 25, 47 (1997) (noting that “[the d]ifficulty in establishing the causation nexus for sexual harassment varies depending on the type of conduct that is alleged to be harassing”).

³³⁷ See text accompanying *supra* note 5.

³³⁸ See Love & Golberg, *supra* note 8, at 17 (“[W]ith the many different dusts known to cause lung disease found in industrial and commercial workplaces, it is . . . improbable that a physician will be able to discern which portion of [the lung] scarring is caused by which source.”).

³³⁹ 709 N.Y.S.2d 24 (N.Y. App. Div. 2000).

³⁴⁰ See *id.* at 27.

³⁴¹ See *id.* at 39.

³⁴² *Id.* at 30.

³⁴³ See text accompanying *supra* note 5.

³⁴⁴ See, e.g., *Jones v. Nathan Trotter & Co.*, 615 N.Y.S.2d 162 (N.Y. App. Div. 1994); *Loupe v. Avondale Shipyards*, 470 So. 2d 336 (La. Ct. App. 1985) (both involving mixed-dust claims in which the plaintiff alleged that he was exposed to “toxic” substances). That the substances alleged in a mixed-dust claim may be either organic or inorganic, see *supra* notes 17-18 and accompanying text, are of little import, for either type can serve as the basis for a toxic tort claim. See, e.g., *Castellow v. Chevron USA*, 97 F. Supp. 2d 780 (S.D. Tex. 2000) (toxic tort claim in which plaintiff alleged that benzene, an inorganic substance, was responsible for causing decedent’s leukemia); *Roche v. Lincoln Prop. Co.*, 278 F. Supp. 2d 744 (E.D. Va. 2003) (toxic tort case where plaintiffs sued the company that owned their apartment, alleging that they had become sick as a result of being exposed to mold, an organic substance).

always been challenging.³⁴⁵ An exhaustive analysis of toxic tort cases is unwarranted here, but in an oversimplified manner it can be said that these cases, which are of a relatively modern origin,³⁴⁶ involve situations in which a plaintiff suffers harm after being exposed to a toxic substance and sues the manufacturer of the substance or the person or company responsible for the exposure having taken place.³⁴⁷ Among the most prominent examples of toxic tort cases are those involving asbestos, silicone breast implants, tobacco, Agent Orange, and formaldehyde,³⁴⁸ as well as the relatively new “wave” of toxic mold cases.³⁴⁹ As was alluded to earlier, the hardest obstacle to overcome for toxic tort plaintiffs is that of proving causation.³⁵⁰ This is most likely due to a combination of several characteristics that distinguish toxic tort cases from other tort cases, among those being the complex

³⁴⁵ See, e.g., Scott Richardson, Comment, *Attorney General's Warning: Legislation May Now be Hazardous to Tobacco Companies' Health*, 28 AKRON L. REV. 291, 295 (1995) (“One of the largest problems with toxic tort cases has been the ability to prove actual causation.”); M. Neil Browne et al., *The Epistemological Role of Expert Witnesses and Toxic Torts*, 36 AM. BUS. L.J. 1, 2 (1998) (“[P]roving causation is often a heavy burden for a toxic tort plaintiff.”); Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into “Good Neighbors” Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147, 168 (2002) (“[A] significant challenge for toxic tort plaintiffs is establishing causation.”); *infra* note 350 and accompanying text; see generally Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997); Laurie Alberts, Comment, *Causation in Toxic Tort Litigation: “Which Way Do We Go, Judge?”*, 10 N.Y.U. ENVTL. L.J. 147 (2002) (both advocating the adoption of alternative causation models in toxic tort cases, in light of the difficulties plaintiffs in those case often face).

³⁴⁶ See, e.g., Robert F. Blomquist, Book Review, *Bottomless Pit: Toxic Trials, The American Legal Profession, and Popular Perceptions of the Law*, 81 CORNELL L. REV. 953, 954 n.5 (1996) (reviewing JONATHAN HARR, *A CIVIL ACTION* (1995) (“Toxic tort law is of relatively recent vintage in American law.”)).

³⁴⁷ See Ann Taylor, Comment, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 756 (1994) (“Toxic torts are the legal actions arising when a person is exposed to toxic substances and harm results.”). For more information on toxic tort cases in general, the reader may wish to consult Allan Kanner, *Toxic Tort Litigation in a Regulatory World*, 41 WASHBURN L.J. 535 (2002) and Steiner, *supra* note 332, which are both excellent sources of guidance on the topic.

³⁴⁸ See Browne, *supra* note 345, at 2. Many of these cases are brought under a theory of product liability. See *id.* at 3 n.14 (noting that “[t]oxic tort cases are usually brought under theories of negligence, strict products liability and nuisance, trespass, or liability for abnormally dangerous activities”); Robert F. Blomquist, *Emerging Themes and Dilemmas in American Toxic Tort Law, 1988-91: A Legal-Historical and Philosophical Exegesis*, 18 S. ILL. U. L. J. 1, 25 (1993) (recognizing that “[t]oxic tort liability theory has definite antecedents in product liability law of the 1960s”).

³⁴⁹ See, e.g., Pena-Alfaro, *supra* note 219, at 544 (realizing a “recent surge in [toxic] mold-related claims”); see generally Kristin A. Grant, Note, *Toxic Mold: What Insurers Can Do to Abate the Influx of Litigation and Convince the American Homeowner That, When it Comes to Mold Coverage, They Can Still Be Fun Guys*, 38 NEW ENG.L. REV. 141 (2003) (providing information on what toxic mold is and the magnitude of the problem concerning toxic mold litigation); D. Chris Harkins, Comment, *The Writing is on the Wall . . . And Inside it: The Recent Explosion of Toxic Mold Litigation and the Insurance Industry Response*, 33 TEX. TECH L. REV. 1101 (2002) (tracing the history of toxic mold and commenting on the increasing number of toxic mold claims).

³⁵⁰ See *supra* note 345 and accompanying text; see also Carey C. Jordan, Comment, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 HOUS. L. REV. 473, 479 (1996) (“[C]ausation usually presents the tallest hurdle in a toxic tort action because the plaintiff cannot establish a straightforward cause and effect relationship.”).

etiology³⁵¹ of the diseases, the inadequacy of scientific data on toxic exposure and its impact on humans, and the often-long latency between exposure and manifestations of sickness.³⁵²

In any event, in order for a toxic tort plaintiff to satisfy his burden as it relates to causation, he must, at a minimum, prove both that he was exposed to a toxic substance and that the exposure caused the injury he seeks compensation for.³⁵³ The first of these prongs can be thought of as “general” causation, because the question asked at this stage is whether the substance(s) in question *could have* caused the injuries alleged by the plaintiff.³⁵⁴ In contrast, the second part of the analysis, commonly referred to as “specific” causation, is concerned with whether the exposure to the substance(s) *in fact* caused the plaintiff’s injury.³⁵⁵ Almost invariably, the way a plaintiff would go about proving causation in these circumstances is to present expert testimony or other scientific data, typically in the form of epidemiological or other scientific studies,³⁵⁶ that support his position.³⁵⁷

³⁵¹ The study of etiology in this context refers to the determination of a disease’s cause or origin, typically accomplished via a medical diagnosis. See Steven A. Heimberg, Comment, *Status of the Emergency Room Psychotherapist: Privacy Rites*, 30 UCLA L. REV. 1316, 1317 n.10 (1983).

³⁵² See Taylor, *supra* note 347, at 757-61 (discussing latency issues in toxic tort cases and how complicated the act of proving causation can be). For a more detailed analysis of these issues, see Jordan, *supra* note 350, at 479-80 (etiology); Gary E. Marchant, *Genetics in the Courtroom: Genetics and Toxic Torts*, 31 SETON HALL L. REV. 949, 972-76 (2001) (exposure); and Jesse R. Lee, *Medical Monitoring Damages: Issues Concerning the Administration of Medical Monitoring Programs*, 20 AM. J. L. AND MED. 251, 256-57 (1994) (latency).

³⁵³ See Mandi L. Williams, Note, *The History of Daubert and Its Effect on Toxic Tort Class Action Certification*, 22 REV. LITIG. 181, 195 (2003).

³⁵⁴ See *id.*; see also Jeffrey D. Cutler, *Implications of Strict Scrutiny of Scientific Evidence: Does Daubert Deal a Death Blow to Toxic Tort Plaintiffs?*, 10 J. ENVTL. L. & LITIG. 189, 198 (1995).

³⁵⁵ See Williams, *supra* note 353, at 195; Cutler, *supra* note 354, at 198.

³⁵⁶ Epidemiology is a branch of medicine that is concerned with “the study of the causes, distribution, and control of disease in populations.” Dictionary.com, <http://dictionary.reference.com/search?r=2&q=epidemiology> (last visited Dec. 29, 2003). The discipline is statistical in nature, as its purpose is to “track and compare large groups of individuals over extended periods of time.” Lars Noah, *Medicine’s Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community*, 44 ARIZ. L. REV. 373, 386 (2002). Thus, for purposes of establishing causation, these studies are considered circumstantial, as opposed to direct, evidence, since they do not concern the individual plaintiff, but rather only allow the fact-finder, based on the statistical information, to infer a link between a toxic substance and the plaintiff’s injury. See Michael C. McCarthy, Note, “Helpful” or “Reasonably Reliable”? *Analyzing the Expert Witness’s Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 363 (1992) (“[E]pidemiological studies only provide indirect support [to establishing causation], often supplying the basis from which to infer an affirmative answer to th[e] question [of whether a specific substance caused plaintiff’s injury].”).

Other types of studies commonly used by plaintiffs in toxic tort cases include results of animal testing, in vitro experiments, molecular analysis, and case studies. See Cutler, *supra* note 354, at 199-205 (describing these tests); see also *infra* notes 356-57 and accompanying text (discussing how causation is typically established in toxic tort suits).

³⁵⁷ See, e.g., Browne, *supra* note 345, at 71 (“[E]xpert testimony will virtually always be needed in toxic tort cases.”); Williams, *supra* note 353, at 195 (“In typical toxic tort suits, establishing causation depends on information from expert testimony, including epidemiological studies, case studies, animal studies, and pharmacological studies.”).

B. Possible Evidentiary Burdens to Proving Causation in Mixed-Dust Claims

Being of a scientific nature, the introduction of these types of evidence raises another complex issue, namely whether the evidence satisfy the requirements of admissibility under the rules of evidence of the various states and of the Federal system.³⁵⁸ It is not necessary to fully address this topic here,³⁵⁹ but a brief summary of the major issues that come up in this context, using the Federal Rules of Evidence (FRE) as a model,³⁶⁰ would be informative. The *sine qua non* of admissibility of all evidence, whether scientific or not, is its relevancy to the case at hand; simply put, if evidence is not relevant, it cannot be admitted.³⁶¹ Relevancy is defined as “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”³⁶² As this language suggests, the relevancy standard is extremely easy to satisfy,³⁶³ and this is consistent with the Federal Rules

³⁵⁸ See Alberts, *supra* note 345, at 41 (noting that “[t]he admissibility standards enumerated by the Federal Rules of Evidence with respect to scientific evidence and the cases that interpret such rules are applicable in toxic tort litigation”); Kuhn v. Sandoz Pharms. Corp., 14 P.3d 1170 (Kan. 2000) (subjecting expert testimony in toxic tort case to the admissibility standard of the Kansas rules of evidence); see generally Leslie A. Lunney, *Protecting Juries From Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103 (1994) (discussing evidentiary rule issues in connection with toxic tort cases).

³⁵⁹ Some sources that extensively discuss the problems of admissibility of scientific testimony in toxic tort cases are Lunney, *supra* note 358; Richardson, *supra* note 345; Jean Macchiaroli Eggen, *Clinical Medical Evidence of Causation in Toxic Tort Cases: Into the Crucible of Daubert*, 38 HOUS. L. REV. 369 (2001); and Wendy S. Neal, Case Note, *General Electric Co. v. Joiner*, 118 S. Ct. 512 (1997): *The Future of Scientific Evidence in Toxic Tort Litigation*, 67 U. CIN. L. REV. 881 (1999).

³⁶⁰ This is because “most, if not all, state evidentiary rules are based upon, or directly derived from, the Federal Rules of Evidence.” J. Allan Cobb, *Evidentiary Issues Concerning Online “Sting” Operations: A Hypothetical Based Analysis Regarding Authentication, Identification, and Admissibility of Online Conversations—A Novel Test for the Application of Old Rules to New Crimes*, 39 BRANDEIS L.J. 785, 788 n.21 (2001). See also James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459, 500 n.268 (2003) (“Forty-one states have adopted rules of evidence primarily based upon the Federal Rules of Evidence.”).

³⁶¹ FED. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which [sic] is not relevant is not admissible.”). See also Jill Witkowski, Note, *Can Juries Really Believe What They See? New Foundational Requirements for the Authentication of Digital Images*, 10 WASH. U. J.L. & POL’Y 267, 273 (2002) (“[Under] the Federal Rules of Evidence, evidence must first be relevant before it is admissible.”).

³⁶² FED. R. EVID. 401.

³⁶³ See Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused’s Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U.L. REV. 651, 654 (1993) (“Relevance . . . is relatively easy to clear given the liberal standards established by the Federal Rules of Evidence.”).

of Evidence's skewed approach as a whole towards admissibility of evidence.³⁶⁴

Assuming that the proposed evidence is found to be relevant in a toxic tort case, there is still the matter of satisfying the requirements applicable to scientific evidence set forth in Rule 702, which embodies a three-pronged test.³⁶⁵ Under Rule 702, evidence of a scientific nature may only be admitted if: 1) it is based upon sufficient facts or data, 2) it is the product of reliable principles and methods, and 3) the principles and methods were applied reliably to the facts of the case.³⁶⁶ This test is essentially a codification of the seminal Supreme Court case *Daubert v. Merrell Dow Pharmaceuticals*,³⁶⁷ which itself replaced the long-standing *Frye* standard for the

³⁶⁴ See Eli P. Mazur, Note, *Rational Expectations of Lenience: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333, 1350 (2002) (noting that "the Federal Rules of Evidence have a 'liberal thrust' favoring the admission of relevant evidence"). This does not mean, of course, that any piece of evidence will be admitted automatically if it is found to be relevant, for even highly relevant evidence may be excluded if, for instance, it is being offered for an improper purpose or if the court determines that the evidence would do more harm than good. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see also Timothy B. Henseler, Comment, *A Critical Look at the Admissibility of Polygraph Evidence in the Wake of Daubert: The Lie Detector Fails the Test*, 46 CATH. U.L. REV. 1247, 1291 n.286 (1997) (recognizing that "[e]xcludable evidence may in fact be highly relevant") (emphasis added).

³⁶⁵ FED. R. EVID. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

³⁶⁶ *Id.* See generally Gregory Todd Jones & Reidar Hagtvedt, *Sample Date as Evidence: Meeting the Requirements of Daubert and the Recently Amended Federal Rules of Evidence*, 18 GA. ST. U.L. REV. 721 (2002) (analyzing Rule 702 in depth).

³⁶⁷ See Paul S. Miller & Bert W. Rein, "Gatekeeping" Agency Reliance on Scientific and Technical Materials After *Daubert*: Ensuring Relevance and Reliability in the Administrative Process, 17 Touro L. REV. 297, 298 (2000) ("[T]he principles laid down by the Supreme Court in *Daubert* and its progeny [are] now codified in Federal Rule of Evidence 702."). In *Daubert*, 509 U.S. 579 (1993), two minor children who were born with birth defects, along with their parents, brought suit against Merrell Dow, the manufacturer of the anti-nausea prescription drug Bendectin, alleging that the birth defects resulted from the mothers' ingestion of Bendectin during their pregnancies. See *id.* at 582. The defendant moved for summary judgment, and in support of its motion produced an affidavit by an expert who had concluded that no evidence showing that Bendectin caused birth defects existed. See *id.* The plaintiffs countered by presenting contrary testimony from no less than eight experts who, based on experiments and research conducted, claimed to have found a link between Bendectin and birth defects. See *id.* at 583.

The district court granted the defendant's motion for summary judgment because it determined that the expert testimony submitted by the plaintiffs did not pass the then-prevailing *Frye* test of admissibility, i.e., the plaintiffs had failed to establish that the evidence was generally accepted by the scientific community, and so it could not be considered by the court. See *id.* at 583-84. The Ninth Circuit Court

admissibility of scientific evidence.³⁶⁸ Again, a detailed examination of the mechanics of Rule 702 is not necessary here.³⁶⁹ Rather, it suffices to say that any person considering filing a mixed-dust claim should be aware of the Rules' limitations on the admissibility of evidence, particularly as they apply to scientific evidence, as it is likely that much of the evidence presented in support of a mixed-dust claim would be of such a nature.³⁷⁰

of Appeals, also citing to *Frye*, affirmed the lower court's ruling. *See id.* at 584. The Supreme Court granted certiorari to resolve a conflict among the Circuit Courts of Appeal as to whether the *Frye* standard of general acceptance was the appropriate one for admissibility of scientific evidence. *See id.* at 585.

In reversing the Ninth Circuit, the Court, after examining the language of Rule 702 and its drafting history, concluded that Rule 702 had superseded *Frye*'s "rigid 'general acceptance' requirement [, which was] at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'" *Id.* at 587-89. The Court then outlined the factors that a district court should consider, along with the requirements of Rule 702, when deciding the admissibility of scientific evidence, among which were 1) whether the evidence has been, or could be, tested, 2) whether the evidence has been subject to peer review and publication, 3) the known or potential rate of error associated with the data, 4) the existence and maintenance of standards controlling the accuracy of the evidence, and 5) to what degree the evidence enjoys general acceptance in the scientific community. *See id.* at 593-94.

An abundance of authority on *Daubert* and its implications exist. *See generally* Stan Kitzinger, Note, *The Supreme Court Waves Good-Bye to Frye: Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 58 ALB. L. REV. 575 (1994) (providing some background information on the case, as well as a dissection of the opinion); David G. Owen, *A Decade of Daubert*, 80 DENV. U.L. REV. 345 (2002) (tracking *Daubert*'s influence on later-decided cases, and in particular on district courts' "gate-keeper" role); William L. Anderson et al., *Daubert's Backwash: Litigation-Generated Science*, 34 U. MICH. J.L. REF. 619 (2001) (positing that *Daubert* has spawned "litigation-generated" science, i.e., scientific evidence that is achieved by tailoring data to meet the needs of its proponent).

³⁶⁸ *See* Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: from Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 75 n.29 (1998) ("Daubert rejected the seventy-year-old *Frye* test of admissibility of expert testimony."). The *Frye* test, whose name hails from the 1923 United States District of Columbia Court of Appeals decision in *Frye v. United States*, 293 F. 1013, was the prevailing standard for the admissibility of scientific evidence in federal courts for nearly seventy years before being rejected by the Supreme Court in *Daubert*. *See supra* note 362 and accompanying text. The crux of the *Frye* test was that in order for scientific evidence to be admitted, the party offering it had to establish to the satisfaction of the court that the evidence was "generally accepted" as reliable by the scientific community. *See* Ryan McDonald, Note, *Juries and Crime Labs: Correcting the Weak Links in the DNA Chain*, 24 AM. J. L. AND MED. 345, 359 (1998); *supra* note 367.

Although no longer used by the federal courts, many states to this day employ the *Frye* test. *See, e.g.,* Robin Jean Davis, *Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence*, 104 W. VA L. REV. 485, 494 n.35 (2002) ("[T]he *Frye* test is still used today by many state courts as the basis for admitting expert testimony.").

Interestingly, the influential *Frye* opinion is only a few pages long, and contains no citations to other cases or any other authority. *See Frye*, 293 F. 1013. For more information on the *Frye* case, see Lisa Gonzalez, *The Admissibility of Scientific Evidence: The History and Demise of Frye v. United States*, 48 U. MIAMI L. REV. 371 (1993) and Andrew R. Stolfi, Note, *Why Illinois Should Abandon Frye's General Acceptance Standard for the Admission of Novel Scientific Evidence*, 78 CHI.-KENT. L. REV. 861 (2003).

³⁶⁹ *See supra* notes 365-66 and accompanying text.

³⁷⁰ This is because most mixed-dust claims would be considered toxic tort cases, *see supra* note 344 and accompanying text, and scientific evidence is almost always needed to be presented in those types of cases in order for a plaintiff to prevail, *see supra* notes 356-57 and accompanying text.

C. Ways to Prove Causation in Mixed-Dust Claims

Returning now to the issue of how a toxic tort plaintiff would go about proving causation, it would be fruitful to examine the types of evidence a plaintiff alleging a mixed-dust claim could present. Aside from possibly relying on the same type of evidence frequently used in other toxic tort cases, such as epidemiological data or case studies,³⁷¹ a mixed-dust plaintiff's case-in-chief would likely hinge on an expert being able to successfully diagnose the different substances responsible for the plaintiff's ailments,³⁷² for without that diagnosis, it would not be possible to link the alleged substances to any particular defendants.³⁷³ The exact mechanics of that process is complex,³⁷⁴ and because a detailed analysis of it here would be neither necessary nor helpful, a summary will be presented instead.

The way that a diagnosis of mixed-dust disease, i.e., of a disease resulting from at least two substances,³⁷⁵ is made is through the use of a device known as a scanning electron microscope, which is powerful enough to be able to analyze the atomic particles of the plaintiff's lung tissue.³⁷⁶ Based on the results of the microscope's analysis, qualified technicians would first identify the substances found, and then would prepare a report quantifying the substances' presence per cubic centimeter of lung tissue.³⁷⁷ A pathologist would then mine the report for scientific data, as well as

³⁷¹ See *supra* notes 356-57 and accompanying text.

³⁷² See Raphael Metzger, *Silicosis or Mixed Dust Pneumoconiosis? Diagnosis and Etiology by Scanning Electron Microscopy*, 11 MEALEY'S EMERGING TOXIC TORTS: THE PLAINTIFFS' PERSPECTIVE, Oct. 4, 2002, at 25, 26 [hereinafter Mealey's Diagnosis] (stating that a "[mixed-dust] diagnosis is essentially a pathologic diagnosis that is dependent on the identification and quantification of [certain] particulates in the patient's lung tissue").

³⁷³ It will be recalled that by definition, mixed-dust claims always involve at least two substances, see text accompanying *supra* note 5, so it would be crucial for a plaintiff attempting to make such a case to produce a diagnosis that differentiates between the various substances so that each substance could be linked to the appropriate defendant(s). Linking the cause(s) of the plaintiff's injury to the actions of a defendant is, of course, needed to satisfy the "specific" causation requirement in toxic tort cases. See text accompanying *supra* note 355; cf. Part IV.E.2 (describing how some courts have eased causation requirements for plaintiffs in certain cases, including by shifting the burden to defendants to exculpate themselves from being responsible for plaintiff's injuries rather than requiring the plaintiff to identify which defendants caused his injuries, when doing so would be unfair or unduly restrictive to the plaintiff).

³⁷⁴ See generally Mealey's Diagnosis, *supra* note 372 (describing step-by-step how a diagnosis of mixed-dust would be made). For further reading, see K. HONMA, PATHOLOGY OF NON-ASBESTOS PNEUMOCONIOSIS (SILICOSIS AND MIXED DUST PNEUMOCONIOSIS) (1999), <http://www.conganat.org/seap/revista/v32-n3/97.pdf> (last visited Feb. 26, 2006; on file with author); Martha L. Warnock, *Case Study of Pneumoconiosis*, at <http://pathhsw5m54.ucsf.edu/case20/discussion20.html> (last modified Oct. 1, 1998; last visited Dec. 27, 2003); and *Alternative Exposures*, *supra* note 6.

³⁷⁵ See text accompanying *supra* note 5.

³⁷⁶ See Mealey's Diagnosis, *supra* note 372, at 26.

³⁷⁷ See *id.*

compare the amounts listed in the report to those found in the lungs of disease-free persons that are of similar age and sex to the plaintiff.³⁷⁸

Assuming that the procedures of the test were followed and that the data culled from the test was not corrupted, there is a fair chance that an accurate diagnosis of mixed-dust, if indeed the plaintiff is suffering from the condition, can be made.³⁷⁹ It is also possible to diagnose mixed-dust pneumoconiosis using simpler, more crude techniques than employing a scanning electron microscope, such as less sophisticated microscopy technology or an examination of tissue slides, but such techniques are not as accurate and can lead to incorrect results.³⁸⁰

For example, if scanning microscope technology is not possible or available because of monetary costs or logistical concerns, it is still theoretically possible to yield an accurate diagnosis of mixed-dust pneumoconiosis by using a combination of the patient's exposure history and an analysis of the patient's chest X-rays and pathology material.³⁸¹ In the hands of a trained and skilled pathologist, such a technique might allow for the correct separation and identification of the substances at issue because some of their unique characteristics, particularly their shape and size, would likely show up on the X-rays.³⁸² Even so, this technique is hardly foolproof, and an inaccurate diagnosis through its use should always be a concern.³⁸³

The use of a scanning electron microscope affords mixed-dust plaintiffs another advantage apart from more accurate diagnoses; it may also make it easier for a plaintiff to trace the etiology of the disease.³⁸⁴ This might be feasible because an accurate and complete identification and quantification of the particles found in a plaintiff's lung tissue would go a long way towards associating the particles with the materials that they came

³⁷⁸ See *id.*

³⁷⁹ See *id.* at 25-27. Despite the accuracy of the scanning electron microscope, there is no guarantee that a complete and successful diagnosis of mixed-dust disease will always be possible. See, e.g., *supra* note 338 and accompanying text; see generally Part IV (addressing some of the causation problems mixed-dust plaintiffs might face).

³⁸⁰ See Mealey's Diagnosis, *supra* note 372, at 26. One fairly frequent example of a misdiagnosis occurs when mixed-dust disease is mistaken for silicosis, most likely due to the fact that the appearance of silica is often confused with that of other substances. See *id.* Silicosis is a lung disease associated with the inhalation of silica particles, see text accompanying *supra* note 22, and is one of the most prevalent occupational lung diseases, see DEMOSTHENES BOUROS ET AL., ASSOCIATION OF MALIGNANCY WITH DISEASES CAUSING INTERSTITIAL PULMONARY CHANGES (2002), <http://www.chestjournal.org/cgi/reprint/121/4/1278.pdf> (last visited Feb. 26, 2006; on file with author) (identifying silicosis as a "common occupational lung disease").

³⁸¹ See Love & Goldberg, *supra* note 8, at 18.

³⁸² See *id.*

³⁸³ See *id.*; see also *supra* notes 379-80 and accompanying text.

³⁸⁴ See Mealey's Diagnosis, *supra* note 372, at 26-27; see also *supra* note 351 and accompanying text (addressing etiology).

from, and perhaps even the manufacturers of such materials.³⁸⁵ As mentioned earlier, this is crucial if the plaintiff is to make a successful case.³⁸⁶

D. How Courts Have Handled Causation Issues in Mixed-Dust Claims

Having introduced a few ways through which a mixed-dust plaintiff could establish causation, at this point it would be useful to see how courts faced with mixed-dust claims have handled causation issues. As mentioned earlier, one can find reported mixed-dust cases in the nature of both tort and workers' compensation.³⁸⁷ As can be expected, given that most workers' compensation cases operate on a no-fault basis,³⁸⁸ the level of causation that needs to be established in mixed-dust tort cases, as opposed to mixed-dust workers' compensation claims, is different.

1. Example of a Mixed-Dust Tort Case Dealing With Causation

One can glean what type of causation mixed-dust tort plaintiffs might be faced with by examining *Bailey v. North American Refractories Company*,³⁸⁹ one of the few mixed-dust tort cases reported.³⁹⁰ In *Bailey*, employees of a manufacturer of asbestos products sued the company, alleging that exposure to toxic substances during their employment had caused them mixed-dust pneumoconiosis, among other things.³⁹¹ The court ruled that in order for the employees to prevail in their suits, they had to establish by a preponderance of the evidence that their exposure to the substances were a

³⁸⁵ See Mealey's Diagnosis, *supra* note 372, at 26. One powerful example of this technology's potential is demonstrated by an episode where a pathologist who was asked to make a mixed-dust diagnosis was able to opine, after examining a subject's lung tissue slide with a scanning electron, that the subject had at one point come into contact with cadmium-containing red paint, presumably at the subject's workplace. See *id.* at 27. The pathologist came to this conclusion after the microscope analysis revealed a single particle of cadmium, along with an unidentified element. See *id.* The subject's occupational history, which had not been known to the pathologist, confirmed that the subject had performed auto bodywork for years, including by being involved in the process of sanding paint onto red sports cars, which likely explains the presence of cadmium (found in paint) and the unidentified element (from the sanding process). See *id.*

³⁸⁶ See, e.g., *supra* notes 372-73 and accompanying text (addressing the issue of linking injury-causing substances to defendants).

³⁸⁷ See, e.g., *supra* notes 59, 60 (examples of mixed-dust workers' compensation and tort claims, respectively).

³⁸⁸ See *supra* note 40.

³⁸⁹ 95 S.W.3d 868. *Bailey* was mentioned in *supra* note 60.

³⁹⁰ See *id.*; *supra* note 62 and accompanying text. Although not expressly stated in the opinion, the plaintiffs' case was essentially one based on a products liability theory, as they alleged that "products manufactured by either [of the defendants] exposed [them] to asbestos, thus causing asbestos-related illnesses [including mixed-dust pneumoconiosis]." *Bailey*, 95 S.W.3d at 870. This is not surprising, as a great portion of personal injury asbestos-related lawsuits are categorized as products liability actions. See, e.g., *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1214 (Cal. 1997) ("Most asbestos personal injury actions are tried on a products liability theory."). The same could be said for other types of toxic tort lawsuits. See *supra* note 438.

³⁹¹ See *supra* note 60.

“substantial factor” in the forming of their diseases.³⁹² In reaching its decision, the court declined to adopt the “fiber-drift”³⁹³ or “frequency-regularity-proximity”³⁹⁴ causation tests that were advocated by plaintiffs and the defendant, respectively,³⁹⁵ reasoning that adopting either test as a matter of law would infringe upon the jury’s prerogative to decide whether the manufacturer was indeed liable for plaintiffs’ injuries.³⁹⁶

2. Example of a Workers’ Compensation Claim Involving Mixed-Dust

Somewhat in contrast to *Bailey* is *Songer, Inc. v. Workmen’s Compensation Appeal Board*,³⁹⁷ a workers’ compensation case in which an industrial bricklayer alleged that he had been rendered permanently disabled from mixed-dust pneumoconiosis as a result of workplace exposure to several substances, including asbestos and silica.³⁹⁸ On an appeal by one of the claimant’s former employers,³⁹⁹ the court affirmed an award of workers’ compensation benefits to the claimant, based primarily on the testimony of a doctor who had diagnosed the claimant as suffering from mixed-dust disease after conducting an examination, pulmonary function studies, and X-rays on the claimant.⁴⁰⁰ In other words, in affirming the award of benefits to

³⁹² See *Bailey*, 95 S.W.3d at 871. Incidentally, this is the standard of causation that has been adopted by section 431 of the Restatement (Second) of Torts (1965), which provides in part that “[t]he actor’s negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm”).

³⁹³ The fiber-drift theory states that the particles of certain substances, once released in the air, can remain airborne for long periods of time and thus travel substantial distances. See *Bailey*, 95 S.W.3d at 872; see also *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1300 n.6 (8th Cir. 1993) (explaining fiber-drift theory).

³⁹⁴ Under the frequency-regularity-proximity test, the plaintiff must demonstrate that he was in close proximity to a specific substance on a regular basis and over an extended period of time. See *Bailey*, 95 S.W.3d at 872; see generally *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986) (asbestos case in which the court discusses and adopts the test).

³⁹⁵ See *Bailey*, 95 S.W.3d at 872-73.

³⁹⁶ See *id.*

³⁹⁷ 613 A.2d 658 (Pa. Commw. Ct. 1992).

³⁹⁸ See *id.* at 658.

³⁹⁹ The main issue before the court was which of the claimant’s former employers, *Songer, Inc.* or *Pneumatic Concrete Corporation*, should be held liable for the employee’s compensation. See *id.* at 659-660. *Songer*, the claimant’s most recent employer, argued that *Pneumatic* should be the one responsible because that is where the claimant had worked the longest, and therefore had presumably been more exposed to injurious substances there than at *Songer*. See *id.* at 659-62. The court ultimately sided with *Songer*, declining to adopt the “last injurious exposure” rule propounded by *Pneumatic*, and ruled that *Pneumatic* was the company liable for the claimant’s award. See *id.* at 661-62. The “last injurious exposure” rule is not uncommon in workers’ compensation scheme, and is mentioned elsewhere in this Comment. See *supra* note 80 and accompanying text; *infra* notes 403 (discussing the rule).

⁴⁰⁰ See *Songer*, 613 A.2d at 659. That is typical of the level of proof required in workers’ compensation cases. See, e.g., *Hartman v. Johns-Manville Sales Corp.*, 462 So. 2d 1310, 1312 (La. Ct. App. 1985):

the claimant, the *Songer* court practically took at face value plaintiff's and his doctor's testimony, and as will be elaborated shortly, this is not atypical in workers' compensation claims.

E. Facilitating the Obstacle of Establishing Causation in Mixed-Dust Claims

1. How Congress and Some States Have Eased the Causation Standard in Workers' Compensation Claims

Songer is an example of how the legislatures and courts have facilitated claimants' burden of proving causation in workers' compensation cases. Had *Songer* been filed as a toxic tort case instead, the claimant would have had to link, by a preponderance of the evidence, the substances allegedly responsible for his injuries to a specific defendant.⁴⁰¹ But because this was a workers' compensation claim, the claimant had no such burden. Rather, he had the benefit of title 77, section 411 of the Pennsylvania Statutes, which provided in part at the time:

The employer liable for compensation [for certain workplace diseases] shall be the employer in whose employment the employe [sic] was last exposed for a period of not less than one year to the hazard of the occupational disease claimed. In the event the employe [sic] did not work in an exposure at least one year for any employer during the three hundred week period prior to disability or death, the employer liable for the compensation shall be that employer giving the longest period of employment in which the employe [sic] was exposed to the hazards of the disease claimed.⁴⁰²

Statutes of this sort undoubtedly make it easier for claimants to be awarded benefits, for their practical effect is to ensure that there will always be at least one employer who can be found liable for a claimant's compen-

The next question [in this workers' compensation case] is whether [the claimant] proved that his lungs were impaired. His case was basically the testimony of . . . his treating physician . . . to the effect that he suffers from "mixed dust pneumoconiosis" We find this testimony, together with [the claimant's] subjective complaints of tiredness and shortness of breath, sufficient to constitute a prima facie case of impairment of the lungs.

Id. at 1312; see also KY. REV. STAT. ANN. § 342.316, described in *supra* Part II.B.1, and the Black Lung Benefits Act, analyzed in *supra* Part II.B.2 (both imposing similar requirements of medical evidence on claimants seeking workers' compensation benefits).

⁴⁰¹ See text accompanying *supra* note 355.

⁴⁰² *Songer*, 613 A.2d at 660. The current version of the statute may be found in Title 77, Section 411 of the Pennsylvania Statutes (2003).

sation. Perhaps that is why similar statutes have been enacted in many other states.⁴⁰³

a) *Applicability of Existing Pneumoconiosis Statutes to Mixed-Dust Claims.* In addition to statutes like the one examined above, both states and the federal government have enacted several other types of presumptions intended to facilitate the recovery of workers' compensation awards for pneumoconiosis injuries that arguably would be applicable to claims involving mixed-dust disease.⁴⁰⁴ This is only arguable, rather than certain, because it is hard to predict the impact that such statutes would have on mixed-dust claims, whether they are in the form of a tort lawsuit or a workers' compensation claim, given that, by their terms, the statutes seem to deal only with "ordinary" pneumoconiosis, as opposed to mixed-dust pneumoconiosis.⁴⁰⁵ Of course, if it turned out, whether by court decision or some other way, that any existing statutes were deemed to not apply to mixed-dust claims, the legislature of the various states or Congress could either pass new laws or modify the existing ones so as to correct the problem. Thus, the passing of statutes creating presumptions applicable to mixed-dust claims is one way in which the potential difficulties of proving causation in such cases, particularly those filed in tort, could be alleviated.⁴⁰⁶

2. How Courts Have Relaxed the Method of Proving Causation in Certain Types of Lawsuits

Another way that the problem of establishing causation in mixed-dust lawsuits might be lessened is through the adoption of alternative methods to

⁴⁰³ See, e.g., N.Y. WORKERS' COMP. LAW § 44-a ("The employer in whose employment an employee was last exposed to an injurious dust hazard shall be liable for the payments required by this chapter when disability or death of the employee shall be due to silicosis or other dust disease."); see also D.C. CODE ANN. § 32-1510; MONT. CODE ANN. § 39-72-303; VA. CODE ANN. § 65.2-403(B); W. VA. CODE § 23-4-8c (2003) (all containing similar provisions); *supra* note 80 and accompanying text; *supra* note 399 (discussing the "last injurious exposure" rule).

⁴⁰⁴ Many states have enacted presumptions applicable to workers' compensation programs. E.g., N.Y. WORKERS' COMP. LAW § 47 (CONSOL. 2003) (providing that exposures to certain diseases are presumed to be harmful); 77 P.S. § 413 (2003) (creating presumption that certain disabilities arise during a person's course of employment); TENN. CODE ANN. § 50-6-302 (2003) (stating that persons suffering from certain diseases are presumed to be "totally disabled," a designation that affects how much benefits they are entitled to receive); W. VA. CODE § 23-4-8c (2003) (providing that deceased persons who were exposed to certain substances for a period of at least ten out of the fifteen years preceding his death are presumed to have been suffering from a chronic respiratory disability at time of death). As for examples of similar presumptions found in the federal code, see *supra* note 103 (outlining presumptions applicable to pneumoconiosis derived from mining).

⁴⁰⁵ The difference between the two essentially has to do with how they are caused; specifically, "ordinary" pneumoconiosis is caused by one substance, whereas mixed-dust pneumoconiosis involves at least two. See *supra* note 9 and accompanying text; see generally *supra* Part I.A (describing the disease).

⁴⁰⁶ See generally Part IV (addressing some of the causation issues mixed-dust plaintiffs might face).

satisfy causation as courts have done in other settings, particularly in the toxic tort field, as, for instance, with asbestos claims. Classic examples of this type of “causation relaxation” are *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company*⁴⁰⁷ and *Summers v. Tice*.⁴⁰⁸

This legal phenomenon occurs mostly in cases where courts feel sympathetic towards plaintiffs whose injuries were almost certainly the result of the defendant(s)’s wrongdoing, but for one reason or another cannot satisfy

⁴⁰⁷ 179 N.W. 45 (Minn. 1920). In *Anderson*, the court was faced with the difficult question of whether a railroad should be held liable for the destruction of plaintiff’s property due to a fire originating from one of the railroad’s trains even though there was a good chance that another, unrelated fire of unknown origin would have destroyed plaintiff’s house just the same. *See id.* at 45-46. The defendant argued that under the circumstances, the plaintiff could not satisfy the “but-for” because it was impossible to prove that the damage to his property would not have occurred if the railroad fire had never happened. *See id.* at 46-47. The court ultimately sided with the plaintiff, and in so doing, approved of the trial court’s jury instructions, which provided in part:

If you find that other fire or fires not set by one of the defendant’s engines mingled with one that was set by one of the defendant’s engines, . . . [and if] you should find that the fire set by the engine was a material or substantial element in causing plaintiff’s damage . . . [,] the defendant is liable

Id. at 46. The rule enunciated by the *Anderson* court has come to be known as the “substantial factor” doctrine, and it has since become firmly embedded in the legal bedrock, having been adopted by the Restatement (Second) of Torts and most jurisdictions. *See* John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The “But For” Test Regains Primacy in Causal Analysis in the American Law Institute’s Proposed Restatement (Third) of Torts*, 71 *FORDHAM L. REV.* 2679, 2681-83 (2003) (discussing origin and impact of the “substantial factor” test).

⁴⁰⁸ 199 P.2d 1 (Cal. 1948). The dilemma faced by the *Tice* court was as vexing and interesting as the one presented by the facts in *Anderson*, discussed in *supra* note 407. In *Tice*, the plaintiff, a hunter, suffered injuries to his eye and mouth after having been unintentionally shot at by two of his hunting companions. *See Tice*, 199 P.2d at 2. A bench trial determined that both of the defendants had acted negligently in discharging their weapons towards the direction of the plaintiff in their misguided attempt at hunting quail, and that the plaintiff’s injuries were a “direct result” of defendants’ actions. *See id.* at 2. Furthermore, the court cleared the plaintiff of any contributory negligence. *See id.*

The problem, however, was that it was impossible to determine whether plaintiff’s injuries had been caused by only one of the men’s shots or by both, since the shots had been fired virtually simultaneously, and even if only one of the men had been responsible, the plaintiff probably could not have proven which of the two men was culpable. *See id.* This left the court with two unsavory choices: either allow causation to be proven by an alternative method, or allow the injured and innocent plaintiff to go uncompensated by the two decidedly negligent defendants. *See id.* at 2-5. The court chose the former, and concluded that for “reasons of policy and justice,” it made more sense to shift the burden of causation to the defendants, in that it was up to each defendant to exculpate himself lest they both face liability for the plaintiff’s injury; this, instead of imposing upon the plaintiff the formidable task of proving which defendant had injured him, seemed proper to the court. *See id.* The impulse to side with “innocent” plaintiffs over “guilty” defendants is not uncommon. *See, e.g., Sindell v. Abbott Laboratories*, 607 P.2d 924, 936 (Cal. 1980) (“[A]s between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.”).

The rule set forth in *Tice*, sometimes known as the “alternative liability” doctrine, is well established in American law, *see* Rue, *supra* note 407, at 2694-95, and has been applied in various factual situations. Notable instances are medical malpractice actions where an unconscious plaintiff was almost certainly injured due to the negligence of one or few of a select group involved in his treatment, *see, e.g., Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944), and products liability cases where the plaintiff was harmed by a generically defective product and cannot prove which defendant was responsible for the particular unit that caused his injuries, *see, e.g., Anderson v. Sornberg*, 338 A.2d 1 (N.J. 1975).

the traditional “but-for” causation test, i.e., that had it not been for defendant(s)’s actions, they would not have been injured.⁴⁰⁹ The courts’ dilemma in this regard is understandable, for as one commentator has noted, “[t]raditional notions of causation were developed before the existence of toxic torts was acknowledged. Applying these tests to toxic tort cases is analogous to placing a square peg into a round hole – [they] just will not fit.”⁴¹⁰

Being mindful of the similar dilemma faced by plaintiffs in toxic tort cases,⁴¹¹ courts over time have built upon the doctrines of *Anderson* and *Tice*, among others,⁴¹² to create alternative methods to proving causation that are better suited to the unique nature of toxic tort cases.⁴¹³ Among these are variants of the substantial factor test recognized in *Anderson*,⁴¹⁴ a

⁴⁰⁹ See, e.g., *Lindquist v. City of Jersey City Fire Dep’t*, 814 A.2d 1069, 1079-80 (N.J. 2003) (“[We] recognized that the need for a broader [causation] standard was due in part to the extraordinary and unique burdens facing plaintiffs who seek to prove causation in toxic-tort litigation . . .”) (internal citations and quotations omitted); Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L. 549, 628 (1995) (“The understandable judicial reluctance to preside over a plaintiff’s failure to sustain the traditional burdens of proof has led to a relaxation of causal standards.”); see generally Rue, *supra* note 407 (tracing the gradual shift in tort law from the traditional “but-for” standard to alternative causation tests employed in certain factual circumstances, and also exploring some reasons for why courts have seen fit to occasionally “bend” the rules of causation).

⁴¹⁰ Myra P. Mulcahy, Note, *Proving Causation in Toxic Torts Litigation*, 11 HOFSTRA L. REV. 1299, 1326 (1983). See Shelly Brinker, Comment, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289, 1298-1302 (1999) (outlining problems that arise when traditional notions of causation are applied to toxic tort cases). Many commentators have commended courts’ relaxation of the causation burden in toxic tort cases. See, e.g., Simcha David Schonfeld, Note, *Establishing the Causal Link in Asbestos Litigation: An Alternative Approach*, 68 BROOKLYN L. REV. 379, 399 (2002) (“[A]s a matter of public policy, a system must be adopted in which [asbestos] plaintiffs are not left entirely without recourse. These individuals suffered great harm at the hands of numerous negligent companies and should not be left to shoulder the accompanying financial burden alone.”); Development of the Law, *Toxic Waste Litigation: IX. Common Law Personal Injury Recovery*, 99 HARV. L. REV. 1602, 1603 (1986) (“[C]ourts have long recognized their obligation to do corrective justice by compensating innocent victims and . . . to deter wrongdoing by compelling those who create harms to bear the costs . . .”).

⁴¹¹ See generally Part IV (exploring some of the causation issues mixed-dust plaintiffs might encounter); see also Schonfeld, *supra* note 410, at 383 (“To allow for recovery in virtually any asbestos case, . . . courts [would have had to] relax the standard causation requirements. Noting this dilemma, many courts have done just that.”).

⁴¹² See *supra* notes 407-08 and accompanying text.

⁴¹³ See, e.g., Brinker, *supra* note 410, at 1302 (“In recognition of the uncertainty that surrounds [causation in] toxic torts . . . , a majority of courts have modified traditional common-law causation rules in the toxic tort context.”); see generally Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 LAW & CONTEMP. PROB. 107 (2001) (listing some ways in which courts have attempted to deal with the problem of causation in toxic tort cases); Brian M. DiMasi, Comment, *The Threshold Level of Proof of Asbestos Causation: The “Frequency, Regularity and Proximity Test” and a Modified Summers v. Tice Theory of Burden-Shifting*, 24 CAP. U.L. REV. 735, 738-44 (1995) (tracing the gradual development of various causation tests applicable to asbestos lawsuits).

⁴¹⁴ See, e.g., *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1105 (5th Cir. 1974) (in a suit against an asbestos manufacturer, court held that causation could be satisfied with a showing that defendant’s products “contributed substantially” to plaintiff’s injuries); *supra* note 392 and accompany-

shifting of burden similar to that employed in *Tice*,⁴¹⁵ the application of the “market-share liability” test,⁴¹⁶ the “frequency-regularity-proximity” test,⁴¹⁷ the “inference of exposure” test,⁴¹⁸ the “job site” test,⁴¹⁹ the “fiber-drift” theory,⁴²⁰ and the “role in the occurrence of plaintiff’s injuries” test.⁴²¹ In addition to these, many commentators have proposed the adoption of tests that are either variations of the above, or different altogether.⁴²²

ing note (applying similar causation standard); see also DiMasi, *supra* note 413, at 741-43 (describing the development of the substantial factor test in toxic tort cases, and attributing the origin of the test to asbestos cases). Perhaps coincidentally, a comparable, if somewhat weaker, test exists under the FAIR Act’s no-fault compensation scheme to make out a claim for certain diseases. See *supra* note 296 (noting that for many types of diseases, the FAIR Act requires a claimant to show that there was “exposure” to asbestos).

⁴¹⁵ See DiMasi, *supra* note 413, at 744-48 (outlining the employment of burden-shifting in toxic tort cases); see also *supra* note 403 (describing *Tice* test).

⁴¹⁶ See, e.g., *Wheeler v. Raybestos-Manhattan*, 11 Cal. Rptr. 2d 109 (Cal. Ct. App. 1992) (allowing plaintiffs suing for injuries related to asbestos exposure to rely on the market share liability doctrine). The market share liability doctrine, first recognized by the California Supreme Court in *Sindell*, 607 P.2d 924, allows plaintiffs who have been harmed as a result of certain types of defective products but who cannot trace their injuries to a specific manufacturer to sue all of the manufacturers who could have produced the defective product at issue at the relevant time period. See *Sindell*, 607 P.2d at 936-37. Damages would then be assessed against the defendants in an amount proportionate to their share of the market of the defective product. See *id.* at 937.

While the market share liability doctrine has been recognized by many other courts since then, see, e.g., Peter H. Schuck, Symposium, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 981 (1995) (stating that “many courts have adopted [the doctrine]”), most courts have been dubious of the propriety of its employment in toxic tort cases. See, e.g., Schonfeld, *supra* note 410, at 387 (“[E]ven among those jurisdictions that have considered market share liability in [certain] cases, there has been great reluctance to expand its application to asbestos litigation.”); see also Shirley H. Fang, Comment, *Santiago v. Sherwin-Williams Co.: Rejection of Market Share Liability in Lead-Based Paint Litigation*, 43 BUFFALO L. REV. 725, 740-42 (1995) (describing courts’ reluctance to apply market share liability in other contexts, including asbestos suits).

⁴¹⁷ See *supra* note 394 and accompanying text (describing test and providing an example of an asbestos case in which the court used it).

⁴¹⁸ See, e.g., *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 817-18 (9th Cir. 1992) (adopting test in asbestos case that allows a plaintiff to recover damages by relying on an “inference of exposure,” which can be demonstrated by introducing enough evidence suggesting that the products of a particular defendant were present at the plaintiff’s worksite, and thus that those products might have contributed to his injuries).

⁴¹⁹ See, e.g., *Lockwood v. A C & S, Inc.*, 722 P.2d 826 (Wash. Ct. App. 1986) (allowing plaintiff who allegedly had gotten ill from exposure to asbestos in the workplace to survive motion for directed verdict, even though he had no direct evidence as to which products caused his injuries, or who made them.).

⁴²⁰ See *supra* note 393 and accompanying text (explaining test).

⁴²¹ See *Ingram v. Acands, Inc.*, 977 F.2d 1332, 1344 (9th Cir. 1992) (asbestos case in which the court held that if “the plaintiff presents evidence that the defendant’s asbestos was present in the workplace, it is the jury’s task to determine if the presence of that asbestos played a role in the occurrence of the plaintiff’s injuries”).

⁴²² See generally Schonfeld, *supra* note 410 (advocating a four-pronged alternative approach to causation in asbestos cases); Berger, *supra* note 345 (proposing new model for toxic tort cases whereby plaintiff would only have to prove that a defendant failed to develop and disclose information needed to assess latent risks, rather than that the defendant caused plaintiff’s injuries); Andrew G. Celli, Jr., Note, *Toward a Risk Contribution Approach to Tortfeasor Identification and Multiple Causation Cases*, 65

a) *Applicability of Causation Standards Used in Other Types of Toxic Tort Cases to Mixed-Dust Claims.* The applicability of these numerous tests to mixed-dust claims, like the applicability of pneumoconiosis statutes to mixed-dust claims,⁴²³ is uncertain. One obvious reason for this is that courts have not yet had many opportunities to apply these tests to mixed-dust claims, given the relatively scant number of tort cases alleging mixed-dust diseases filed thus far.⁴²⁴ Another reason is that some courts have demonstrated a reluctance to make any further inroads into the already “relaxed” causation rules⁴²⁵ that are employed in toxic tort cases.⁴²⁶

Finally, putting aside the somewhat normative question of whether courts *should* “borrow” causation tests used in toxic tort cases to resolve mixed-dust tort claims, it is not clear whether at least some of the tests *could* logically be applied to mixed-dust claims. For instance, the propriety of employing tests modeled after the market share liability doctrine⁴²⁷ or on the alternative liability theory recognized in *Tice*⁴²⁸ in mixed-dust claims might be called into question, since both of these tests require that plaintiffs be able to at least identify the defendants *possibly* responsible for their injuries,⁴²⁹ and this may not always be feasible in mixed-dust claims because of

N.Y.U.L. REV. 635 (1990) (outlining risk-apportionment and risk-contribution approaches to asbestos cases, under which defendants could be liable for “risk creative behavior,” i.e., making choices that created unreasonable risks of harm to plaintiffs); Brinker, *supra* note 410 (describing advantages and disadvantages of several alternative methods to traditional causation in toxic tort cases, including variations of the market share liability and burden-shifting doctrines); *see also supra* note 410 and accompanying text (noting other examples of commentators urging or applauding alternative ways to establish causation in toxic tort cases).

⁴²³ *See supra* notes 404-06 and accompanying text.

⁴²⁴ *See supra* note 62 and accompanying text.

⁴²⁵ *See, e.g., supra* notes 411-21 and accompanying text (providing examples of how courts have adopted more lenient causation standards in toxic tort cases).

⁴²⁶ *See, e.g.,* Toby M. Tonaki, Comment, *Latent Disease and Toxic Torts in Hawaii: Analysis of the Statute of Limitations, the Rule Against Splitting Causes of Action and Nonidentification Theories of Liability*, 15 HAWAII L. REV. 137, 174 (1993) (stating that “[some c]ourts are . . . reluctant to apply [the alternative liability] theory to toxic tort products liability [cases] because plaintiffs must join all possible tortfeasors in court, and plaintiffs have had trouble proving that they joined all the possible tortfeasors”); Jordan, *supra* note 350, at 479 n.38 (noting that “in the past, [some] courts have been reluctant to rely [solely] upon epidemiological studies to determine causation in toxic tort cases”); Diane Schmauder, *An Analysis of New Jersey’s Increased Risk Doctrine*, 25 RUTGERS L. J. 893, 901 (1994) (recognizing that “[a number of] courts have been [somewhat] reluctant to relax the traditional causation inquiry in the toxic tort context”); Christopher J. Maley, Survey, *Toxic Torts: Class Actions in United States and England*, 19 SUFFOLK TRANSNAT’L L. REV. 523, 526 (1996) (stating that “[h]istorically, [many] judges have been reluctant to certify class actions in mass toxic tort cases”); *supra* note 416 (describing some courts’ reluctance to allow market share liability to be used in asbestos cases, a type of toxic tort case). *Contra supra* note 411-13 and accompanying text (recognizing that many courts are more than willing to relax causation requirements in certain types of cases).

⁴²⁷ *See supra* note 416 (explaining the doctrine and its use).

⁴²⁸ *See supra* note 408 (providing information on the test and its applications).

⁴²⁹ *See* Richardson, *supra* note 345, at 311 n.170 (listing examples of asbestos cases rejecting the validity of the market share liability doctrine where plaintiffs could not pinpoint neither the products that allegedly caused their injuries nor the manufacturers of the products); DiMasi, *supra* note 413, at

the potential difficulty in tracing the origins of plaintiffs' diseases.⁴³⁰ A similar issue might arise if a plaintiff in a mixed-dust case attempted to prove causation by relying on the "fiber-drift" theory, since that would require that the substances responsible for the plaintiff's injury be identified, a task perhaps easier said than done.⁴³¹

In light of these potential problems in applying causation models previously used in toxic tort cases to mixed-dust claims, only time will tell whether and how those tests will impact future cases involving mixed-dust disease. However, in considering the likelihood that these tests will one day be applied to mixed-dust claims, one should be mindful of the courts' powers to adapt, if need be, existing legal rules and tests to make them better suited for the relatively unique situation of mixed-dust claims,⁴³² much as legislatures could change existing ordinary pneumoconiosis statutes to ensure that they would apply to mixed-dust pneumoconiosis as well.⁴³³ One thing is practically certain: without any sort of leniency by the courts on the causation requirement, mixed-dust plaintiffs suing in tort would likely face a very heavy burden in winning their cases.⁴³⁴

3. Reducing or Eliminating the Problem of Causation in Mixed-Dust Claims By Using Settlements or Alternative Methods of Compensating Victims

One final way through which the potential causation problems facing would-be mixed-dust plaintiffs might be reduced, or even eliminated entirely, would be to bypass the litigation process altogether, either through the use of settlements or the creation of statutory or judicially-created compensation schemes. These alternatives to litigation are neither new nor un-

756-57 (describing an asbestos case in which the court "refused to adopt alternative liability . . . because the plaintiff was unable to identify *any* of the defendant-manufacturer's products at [his] work site") (emphasis in original); *see also supra* note 416 and accompanying text (discussing some courts' reluctance to apply alternative methods of proving causation in toxic tort cases). *But see Somberg*, 338 A.2d 1, and *Sindell*, 607 P.2d 924, discussed at *supra* notes 408 and 416, respectively (both examples of the majority dismissing dissents' and defendants' concerns that not all of the parties that might have caused plaintiffs' injuries had been joined as defendants in the actions).

⁴³⁰ *See, e.g., supra* note 373 and accompanying text; *see generally* Part IV (analyzing some of the causation issues mixed-dust plaintiffs might face).

⁴³¹ *See supra* note 393 (describing test). As was addressed earlier, mixed-dust cases always involve at least two substances. *See, e.g.,* text accompanying *supra* note 5.

⁴³² *See generally* Part IV (describing how the process of proving causation has changed over time, and related issues thereto).

⁴³³ *See supra* notes 404-05 and accompanying text.

⁴³⁴ *See, e.g., supra* note 345 and accompanying text; *supra* note 409 (both capturing the magnitude of how high an obstacle causation is to some toxic tort plaintiffs, including those who might be considering filing mixed-dust claims).

usual, particularly in the field of “mass torts,”⁴³⁵ a category to which mixed-dust might one day belong to.⁴³⁶

a) *Using Settlements as an Alternative to Mixed-Dust Litigation.* As far as settlements are concerned, it is well known that the vast majority of cases filed end up being settled as opposed to going to trial,⁴³⁷ and in fact, among the most notable settlements ever entered into occurred in the field of “mass torts,”⁴³⁸ including the celebrated 1998 agreement between tobacco companies and various states worth hundreds of billions of dollars.⁴³⁹

⁴³⁵ As it concerns this Comment, the term “mass tort” refers to a single product or event by one or more defendants that causes widespread injury to many parties. See Barbara Frederick, Comment, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Method or Madness?*, 27 CONN. L. REV. 237, 257 n.137 (1994); see Steven L. Schultz, *Mass Torts: In Re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of the Federal Common Law in Mass Tort Class Actions*, 58 BROOKLYN L. REV. 553, 554 n.3 (1992) (defining mass torts and grouping them into different categories). There are many who feel that ordinary litigation is just not well suited to mass torts, and thus advocate special or alternative solutions to the problem. See, e.g., Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2017 (1999) (“[T]he traditional tort system simply does not work in mass tort.”); see generally Anita Bernstein, *Formed by Thalidomide: Mass Torts as a False Cure for Toxic Exposure*, 97 COLUM. L. REV. 2153 (1997) (providing at least eight reasons for why traditional rules of litigation are ill-suited to the unique characteristics of mass torts); Joseph M. Guzzardo & Jennifer L. Monachino, Note, *Gulf War Syndrom—Is Litigation the Answer?: Learning Lessons From In Re Agent Orange*, 10 ST. JOHN’S J.L. COMM. 673 (1995) (highlighting problems that plaintiffs face in mass tort litigation, using the Agent Orange litigation as background); cf. *supra* note 410 and accompanying text (noting examples of commentators who share the belief that ordinary litigation rules should not be used in toxic tort cases, but who advocate changes to the rules, rather than the altogether replacement of mass tort litigation by the adoption of alternative systems of compensation). But see John A. Siliciano, Symposium, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1012 (1995) (analyzing the supposed problems with mass tort litigation in American law, and concluding that “[t]he ‘crisis’ of mass torts may, in the end, [simply] be a crisis of faith”).

⁴³⁶ Even though mixed-dust claims, at least those filed in tort, are relatively few in number today, see *supra* note 62, it is possible that mixed-dust claims might one day belong to the category of mass torts, as the two might share some characteristics, see generally Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845 (1987) (outlining the “legal characteristics” of mass torts). Specifically, two factors that mixed-dust claims might one day have in common with mass torts is the potential for there to be a large number of claims filed, see generally *supra* Part III (examining potential future increase in the filing of mixed-dust claims), and the uncertainty about what legal standards and rules would apply in connection with proving causation, see generally Part IV (analyzing issues related to standards of causation potentially applicable to mixed-dust claims). See also *supra* note 15 (positing how the class-action lawsuit filed by Ground Zero workers may lead to an increase in the number of mixed-dust claims filed).

⁴³⁷ See, e.g., Stephen N. Subrin, *A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better than I Thought*, 3 NEV. L.J. 196, 222 (2002-03) (“[M]ost cases settle or are otherwise terminated without trial.”); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 93 (1997) (“[T]he vast majority of cases—probably over 95%—will terminate or settle prior to trial with or without case management.”).

⁴³⁸ See generally Erichson, *supra* note 435 (describing settlements, some of which were ultimately unsuccessful, that arose in mass tort cases involving injurious breast implants and asbestos-related injuries).

⁴³⁹ See *McClendon v. Ga. Dep’t of Cmty. Health*, 261 F.3d 1252, 1253-56 (11th Cir. 2001) (providing background and details on the agreement). Interestingly, this agreement was “the largest settle-

Among the factors that might make the use of settlements a desirable way to deal with a potential future influx of mixed-dust claims⁴⁴⁰ are that they reduce the private and social cost of litigation⁴⁴¹ and sometimes allow parties to avoid the hassles of litigation altogether,⁴⁴² that they serve to prevent the judicial system from being more backlogged than it already is,⁴⁴³ that they allow the parties to reach finality in a mutually satisfactory manner while foregoing the risks associated with trial,⁴⁴⁴ and that they help companies avoid unwanted negative publicity that is often associated with a public trial.⁴⁴⁵

Of course, not every aspect of settlements are positive; in fact, depending on the circumstances, both the parties involved and society as a whole can be hurt through settlements if they are used inappropriately.⁴⁴⁶ For instance, it is not uncommon for wealthy defendants to purposely prolong the litigation process, particularly through the use of discovery, in order to pressure who is likely to be a poorer plaintiff to settle.⁴⁴⁷ At the other end of the spectrum, there are those who feel that it is *defendants* who are some-

ment of a civil lawsuit in history." Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 518 (2000).

⁴⁴⁰ See generally *supra* Part III (addressing potential increase in the number of mixed-dust claims filed).

⁴⁴¹ See, e.g., Thomas F. Cotter, *Refining the "Presumptive Illegality" Approach to Settlements of Patent Disputes Involving Reverse Payments: A Commentary on Hovenkamp, Janis & Lemley*, 87 MINN. L. REV. 1789, 1790, 1795 (2003) (noting that settlements are "viewed as [a] social good because [they] reduce[] the private and social costs of litigation").

⁴⁴² See Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 754-55 (2000) (outlining some of the unpleasant aspects associated with litigating disputes).

⁴⁴³ See R. Bryan Morrison, Case Note, *To Seal Or Not To Seal? That Is Still the Question: Arkansas Best Corp. v. General Electric Capital Corp.*, 49 ARK. L. REV. 325, 344 n.131 (1996) ("[O]ur civil justice system could not bear the increased burden that would accompany reducing the frequency of settlement. . . . If a large percentage of our cases did not settle, the backlog in our courts would become totally intolerable.") (internal citations and quotations omitted).

⁴⁴⁴ See Neil Vidmar & Jeffrey Rice, Symposium, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U.L. REV. 89, 99 (1991) ("Parties in personal injury disputes often attempt a settlement [because t]hey want to . . . decrease transaction costs, avoid the risks of trial, and have a final resolution as early as possible."); see also *supra* note 334 (noting the preference for settlements that risk-averse parties have).

⁴⁴⁵ See, e.g., Andrew K. Craig, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORTS L. 527, 548 n.202 (1994) (documenting the controversy surrounding the settlement agreement entered between Michael Jackson and a boy that had accused him of sexual molestation, and noting that many believed Jackson's settlement amounted to "buying the silence of his accuser").

⁴⁴⁶ See generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (outlining positive and negative aspects of using settlements from a legal, as well as sociological, point of view).

⁴⁴⁷ See Ethan A. Heinz, Comment, *The Conflicting Mandates of FRE 412 and FRCP 26: Should Courts Allow Discovery of a Sexual Harassment Plaintiff's Sexual History?*, 1999 U. CHI. LEGAL F. 519, 529-31 (1999) (explaining how some lawyers abuse discovery to "force an unfair settlement or withdrawal from the suit," and providing the example of such practices in sexual harassment suits).

times unfairly pressured to settle due to the threat of massive class action lawsuits, particularly in mass torts, a practice labeled by one court as “judicial blackmail.”⁴⁴⁸

b) *Compensation Schemes as an Alternative to Mixed-Dust Litigation.* As with settlements, the use of programs that either change or eliminate traditional concepts of litigation have been around for a long time⁴⁴⁹ and continue to flourish today, as demonstrated by some compensation schemes that were addressed earlier, such as those in the Black Lung Benefits Act,⁴⁵⁰ states’ workers’ compensation programs,⁴⁵¹ and the FAIR Act.⁴⁵² Other notable examples of attempts at curbing mass tort litigation by creating alternative methods of compensation include the now-defunct National Swine Flu Immunization Program, through which the federal government “accepted primary responsibility for injuries caused by the manufacture, distribution, or administration of this swine flu vaccine”;⁴⁵³ the National Childhood Vaccine Program Injury Act, which established a no-fault compensation program for injuries associated with vaccinations;⁴⁵⁴ and the agreement reached in the Agent Orange litigation,⁴⁵⁵ which was facilitated through the use of the federal Multi-District Litigation Panel.⁴⁵⁶

⁴⁴⁸ See, e.g., Paul V. Niemeyer, Comment, *Remarks to the Institute for Law and Economic Policy*, 39 ARIZ. L. REV. 719, 719-720 (1997) (noting that “[in certain situations,] companies faced even with the threat of a class action [see] settle[ments] as the only economic alternative”); see generally T. Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nationwide Mass-Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit Is a “Novel” Claim or Injury*, 49 BAYLOR L. REV. 817 (1997) (explaining the compromising situation that defendants are sometimes put in due to class action suits, and noting that the Fifth Circuit Court of Appeals has labeled settlements achieved as the result of threats of expensive and prolonged litigation as “judicial blackmail”).

⁴⁴⁹ See generally Perry H. Apfelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope*, 8 CORNELL J. L. & PUB. POL’Y 591 (1999) (outlining development of tort reforms through legislation in the United States). Another excellent, but somewhat more theoretical, examination of the issues surrounding legislative tort reform may be found in Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOKLYN L. REV. 1 (2002).

⁴⁵⁰ See generally *supra* Part II.B.2 (describing the act).

⁴⁵¹ See generally *supra* Part II.B.1 (explaining the procedures that must be followed in Kentucky to initiate a workers’ compensation pneumoconiosis claim there).

⁴⁵² See generally *supra* Part II.D.2 (describing the FAIR Act).

⁴⁵³ *In re Swine Flu Immunization Prods. Liab. Litig.*, 89 F.R.D. 695, 699 (1980). For more information on the program, see *id.* and Erichson, *supra* note 435, at 2020 n.216.

⁴⁵⁴ See Dan L. Burk & Barbara A. Boczar, Symposium, *Biotechnology and Tort Liability: A Strategic Industry at Risk*, 55 U. PITT. L. REV. 791, 852-54 (1994); Erichson, *supra* note 435, at 2020 n.216 (both providing information on the act). The current version of the act may be found in Title 42, Sections 300aa-34 of the United States Code (2003).

⁴⁵⁵ See generally Guzzardo, *supra* note 435 (providing background information on Agent Orange litigation, which centered around war veterans’ claims that chemicals used by the military had caused them various injuries, and why it seemed destined to end in a form other than trial). In the end, the makers of Agent Orange settled with the veterans for \$180 million. See *id.* at 686 n.86.

⁴⁵⁶ See *id.* at 684. In 1968, Congress, through the passage of Title 28, Section 1407 of the United States Code (2003), created federal multi-district litigation panels, often referred to as “MDLs,” ostensi-

And just as with settlements,⁴⁵⁷ the use of programs or schemes as an alternative to mixed-dust claims would have its own advantages and disadvantages.⁴⁵⁸ Thus, while one could certainly say that such a strategy would always be surrounded by controversy, perhaps the more pertinent, as well more unpredictable, question related to the potential future use of settlements and similar programs as alternatives to mixed-dust claims is whether the issue is ripe enough to be fully considered at this point.

Finally, although it is the author's opinion that the potential for a future increase in mixed-dust claims is certainly real,⁴⁵⁹ mixed-dust claims are still in a nascent stage,⁴⁶⁰ and so it is hard to predict to what extent, or even whether, settlements and other alternative programs to litigation, including legislation like the FAIR Act,⁴⁶¹ will apply to mixed-dust claims. Thus, as with the earlier predictions concerning the impact that existing statutes dealing with pneumoconiosis⁴⁶² and the alternative causation tests employed in toxic tort cases⁴⁶³ would have on mixed-dust claims, perhaps it could best be said that the question of how or whether settlements and other alternatives to litigation will apply to mixed-dust claims can only be answered with time.

bly to facilitate pre-trial proceedings in multi-district litigation (usually meaning class actions), but as it so happens, cases that are transferred to MDLs usually end up being resolved there. See Judith Resnik et al., Symposium, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U.L. REV. 296, 299-300 (1996) (providing background information on the creation and purpose of MDLs); *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) (outlining some of the functions of MDLs). MDLs have proven influential in many monumental cases, including Agent Orange litigation, see Guzzardo, *supra* note 435, asbestos cases, see *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991), and tobacco-related lawsuits, see *In re Tobacco/Governmental Health Care Costs Litig. v. Phillip Morris, Inc.*, 76 F. Supp. 2d 5 (D. D.C. 1999).

⁴⁵⁷ See *supra* notes 441-448 and accompanying text (addressing some positive and negative aspects of settlements).

⁴⁵⁸ Compare Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993) (suggesting that administrative compensation schemes for mass torts are appropriate under certain circumstances) with *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 405 (1993) (questioning the use of such schemes, and concluding that a "review of the experience and design of administrative compensation alternatives did not persuade us that this option had a marked advantage over collective judicial processes, at least for the general run of injuries"); see also *supra* note 435 (recognizing conflicting opinions on the use of alternatives to litigation to address problem of mass tort cases).

⁴⁵⁹ See generally *supra* Part III (examining potential future increase in the number of mixed-dust claims filed).

⁴⁶⁰ See *supra* note 62. But see *supra* note 15 (recognizing the potential influx of mixed-dust claims stemming from Ground Zero).

⁴⁶¹ See generally *supra* Part III.B (addressing how the passage of the FAIR Act might influence the filing of mixed-dust claims).

⁴⁶² See generally Part IV.E.1.a (discussing the applicability of such statutes to mixed-dust claims).

⁴⁶³ See generally Part IV.E.2.a (examining the possibility that existing causation tests used in toxic tort cases might also be employed in mixed-dust claims).

V. CONCLUSION

Mixed-dust pneumoconiosis is a pulmonary disease of predominantly occupational origins that occurs after a person has been exposed to at least two or more organic or inorganic toxic substances over an extended period of time. Cases alleging various forms of this disease have been around since the 1960s, but the greater portion of the reported cases thus far have been in the nature of workers' compensation claims, and not tort lawsuits. There are definite parallels between the way mixed-dust pneumoconiosis and asbestos-related diseases are contracted. In addition, existing or pending legislation aimed at curbing the asbestos problem, as well as insurance exclusion policies that purport to limit insurers' liability in terms of defending or indemnifying asbestos-related claims, may have an impact on whether and how much a person may recover for asbestos-related diseases.

Mainly because of these factors, the author posits that in the future, a significant number of would-be asbestos plaintiffs, whose sheer numbers have created a backlog in the courts and whose verdicts have led to many companies declaring bankruptcy, might choose to file their lawsuits under the rubric of mixed-dust claims in an attempt to bypass unfavorable insurance policies or legislation aimed at solving the asbestos problem. This conclusion is tempered somewhat by the fact that although mixed-dust claims have been sporadically filed for several decades, there has yet to be a boom in the number of such claims filed.

In addition, it is hard to predict in a vacuum how or whether courts might apply a particular insurance policy to any given set of facts, especially since the language of policies frequently change. A similar challenge exists as it relates to predicting the role that legislation dealing with asbestos, pneumoconiosis, and the like might have on the filing of mixed-dust claims. Some legislation, like the Fairness in Asbestos Resolution Act, or FAIR Act for short, has not been passed yet, so an obvious obstacle exists in assessing its impact; as for existing laws, many of them, such as those dealing with "ordinary" pneumoconiosis, are perhaps only tangentially related to mixed-dust, so estimating how, or even if, they would apply to mixed-dust claims is tricky. Of course, it is true that legislatures could create new laws or change those already in the books to ensure that they would apply to mixed-dust pneumoconiosis as well.

Making an accurate prediction concerning the number of asbestos suits that might be filed as mixed-dust claims is also made more difficult by the fact that the small number of mixed-dust claims filed in tort means that the applicable legal doctrines, particularly those concerning the plaintiff's burden of proof as it relates to causation, are not yet well-settled. In the past, courts have not been remiss to adapt traditional ways of proving causation in exceptional cases, such as those involving toxic tort claims where a plaintiff cannot pinpoint the specific defendant(s) responsible for his inju-

ries among a group of many, in order to allow that plaintiff to have his day in court. At the same time, however, some courts have demonstrated a reluctance to adopt "relaxed" methods of proving causation in certain types of cases, or against certain types of defendants. Given this, it is likely that the law concerning mixed-dust tort claims will only be prone to exact ascertainment after a more substantial number of such claims are filed.

Finally, assessing the full magnitude of mixed-dust claims vis-à-vis the legal system is complicated by the possibility that alternatives to litigation, such as court-sanctioned settlements or administratively based compensation schemes, might be adopted in the area. These alternative ways to compensate injured persons are neither new nor unusual, particularly in the field of "mass torts," to which mixed-dust claims might one day belong. Nonetheless, the impact that such techniques would have on mixed-dust claims is far from certain, particularly since there are many who question the propriety or wisdom of them. The author further posits, in connection with the adoption of alternatives to litigation, that unless courts or legislatures act to reduce some of the burdens that mixed-dust plaintiffs would face in pressing their claims, the mighty obstacle of causation might act to temper any eventual increase in the number of mixed-dust claims filed.

In arriving at this conclusion, the author began by providing, in Part I, a brief medical background of mixed-dust claims, namely in terms of what they are and how they are brought about. Among the topics discussed in that light was how and where mixed-dust diseases are typically contracted, as well as some of the varieties of the affliction and the physical effects that the diseases can have on those affected.

In the next section, Part II, the author examined some workers' compensation claims involving both ordinary pneumoconiosis and mixed-dust pneumoconiosis, and in doing so, noted similarities in how courts resolve the two types of claims, including the very deferential standard that is shown to lower tribunals' factual determinations. He then examined state and federal statutes dealing with ordinary pneumoconiosis and mixed-dust pneumoconiosis, including a discussion of some of the features these statutes share. The focus of Part II then shifted to the potential impact that insurance law, particularly pollution exclusion clauses, might have on mixed-dust claims. Within that context, the author analyzed some of the key interpretative issues that courts might struggle with in dealing with the applicability of these policies to particular sets of circumstances. Finally, in Part II, the author addressed some of Congress' attempts at finding a legislative solution to the asbestos litigation problem in America, particularly the FAIR Act. Specifically, some of the Act's key features that might influence the number of mixed-dust claims filed were examined.

Part III's emphasis was predicting how today's and tomorrow's insurance law, particularly ever-broadening pollution exclusion clauses, as well as possible future legislation dealing with asbestos, namely the FAIR Act,

might impact the number of mixed-dust claims filed. In connection with the insurance aspect, the author paid special attention to exclusion clauses that specifically deal with asbestos, as well as how those and other types of exclusion clauses affect the duties of insurance carriers in terms of defending or indemnifying claims against insureds. As for the possible ramifications that legislation like the FAIR Act would have on the filing of mixed-dust claims, the author tackled the issue by focusing primarily on certain key aspects of the FAIR Act that might influence whether and how some asbestos plaintiffs might proceed. Among these are that the Act would serve as the only means by which persons suffering from asbestos-related ailments could receive compensation, and that some claimants whose injuries were caused or influenced by substances other than asbestos might not be eligible for recovery under the Act.

In Part IV, the author addressed the role that causation could play in tort suits or workers' compensation claims involving mixed-dust diseases, in part by comparing the elements of causation that might be implicated in mixed-dust tort claims to those typically encountered in traditional toxic tort cases, as well as by addressing the central causation hurdles that mixed-dust tort plaintiffs might face. Some time was also devoted to likely evidentiary issues that mixed-dust plaintiffs might encounter in their attempts to introduce scientific and medical evidence pertinent to their case. The author next discussed some techniques and strategies that a plaintiff seeking to make out a mixed-dust claim might rely on, including the use of a scanning electron microscope, and then presented examples of how some courts grappling with mixed-dust claims, both in workers' compensation and tort, have addressed the issue of causation. The author then addressed some ways in which legislatures, mainly through the creation of alternative compensation schemes, and courts, largely by "relaxing" traditional methods of establishing causation, have made it possible for certain persons to recover monetary relief for their injuries. In this connection, the applicability of these existing schemes and judicial doctrines to mixed-dust claims is addressed. In the remainder of Part IV, the author explored the feasibility and desirability of adopting alternatives to litigation, including settlements and no-fault compensation schemes, as a way of dealing with mixed-dust claims.