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Jordan H. Liebman

Terry W. Dworkin

A FAILURE OF BOTH WORKERS' COMPENSATION AND TORT: *BUNKER V. NATIONAL GYPSUM CO.*

JORDAN H. LEIBMAN*
TERRY M. DWORKIN**

I. INTRODUCTION

Since early in the twentieth century, employees suffering sudden traumatic injury arising out of and in the course of their employment have been able to turn to their states' workers' compensation systems for relief.[1] Although only one state compensation statute originally covered health impairments caused by occupational diseases, most were later amended to include them.[2] In recent years these occupational disease compensation systems have been deluged with claims of disability, impairment, and premature death allegedly caused by a number of toxic substances that are found in the workplace;[3]

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* Associate Professor of Business Law—Indiana University.
** Associate Professor of Business Law—Indiana University.

1. The workers' compensation approach to the industrial accident problem originated in Europe. "[T]he principle of accident compensation *without respect to responsibility*" was adopted in Germany in 1883 and England in 1897. N. CHAMBERLAIN & D. CULLEN, THE LABOR SECTOR 498 (1971) (emphasis in the original). Between 1895 and 1910 most American states enacted employer's liability laws which, in differing detail, modified the common law in favor of employees. S. COHEN, LABOR IN THE UNITED STATES 441 (4th ed. 1979). In Indiana, for example, contributory negligence was made an affirmative defense to be pleaded and proved by the employer. *Id.* at 457 n.8. The first American no-fault workers' compensation law was probably Maryland's, enacted in 1902, which only provided for $1000 payments to dependents of workers killed in a very few very hazardous employments. R. HELFGOTT, LABOR ECONOMICS 401 (1974). New York passed its workers' compensation law in 1909, and by 1948 similar legilsation had been enacted in all the states and Puerto Rico. G. BLOOM & H. NORTHRUP, ECONOMICS OF LABOR RELATIONS 601 (9th ed. 1981).

2. The only state which covered occupational diseases in its original legislation was Massachusetts. Gradually political opposition to this coverage was overcome, and now all states provide compensation for at least some occupational diseases. As of 1979, thirty states provided full coverage, while twenty states provided scheduled coverage for specific diseases. *See* COHEN, *supra* note 1, at 443.

3. 68 A.B.A.J. 1075 (1982). In addition to asbestos, which has generated the most claims (*see infra* note 4), some of the other workplace substances which are having a growing impact due to their delayed manifestation injuries are formaldehyde, PVC, radiation, and microwaves. New workplace carcinogens are being identified almost monthly—newspaper ink (*see e.g.*, Hanna v. Sun Chem. Corp., No. C-81-1697 (N.D. Ohio 1981); Grady v. Sun Chemical Corp., No. C-81-1696 (N.D. Ohio 1981)), asphalt fumes (Wall St. J., Apr. 27, 1983, at 1, col. 5), and flourescent lights (Wall St. J., Apr. 12, 1983, at 26, col. 3.). It was recently discovered that wood-model makers in the auto industry are 50% more likely to develop cancer, although the specific carcinogen has not been

the industrial substance producing the greatest number of such claims in recent years has probably been asbestos.[4]

Of late, asbestos claims have generated considerable publicity and have created widespread concern for the viability of a number of manufacturing companies[5] and their compensation insurance

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identified. Wall St. J., Jan. 3, 1983, at 1, col. 6. The impact of many of these hazardous substances on the compensation systems could be as great or greater than asbestos. Suits arising from exposure to microwaves, which has occurred almost exclusively in the workplace, have been predicted to be the broadest-based product liability litigation ever. Nat'l L.J., Sept. 14, 1981, at 24, col. 1. Formaldehyde, which has been described as ubiquitous (Nat'l L.J., May 10, 1983, at 30, col. 2), is used in a wide variety of ways in the workplace. Use has been especially heavy in the forest-products industry, which uses one-half of the formaldehyde produced, and the textile industry, which uses one-fourth. Wall St. J., Aug. 27, 1982, at 1, col. 6. In all, about 1.4 million people come into contact with formaldehyde solutions in the workplace. Wall St. J., May 21, 1982, at 1, col. 6. The U.A.W., which along with 14 other unions, sued OSHA to set stricter exposure standards in factories, claims that as many as one percent of workers exposed at current levels may die of formaldehyde-related cancers. Wall St. J., Mar. 15, 1983, at 1, col. 5. The AFL-CIO cited formaldehyde as a health hazard to workers in beauty salons and barber shops where it is used as a sterilizer and in some beauty products. In addition, the union is critical of OSHA's delay in requiring the publication of a list of suspected carcinogens in the workplace. Wall St. J., Jan. 4, 1982, at 1, col. 5.

4. One study of almost 20,000 workers of the International Association of Heat and Frost Insulators and Asbestos Workers spanning a twelve-year period, showed that 36% of the workers who died of asbestos-related cancer applied for workers' compensation awards. The death rates among these workers was 37% higher than what would normally have occurred among blue-collar workers of similar ages and lifestyles. The study estimated that 18.8 million workers had had "significant" exposure to asbestos since 1940, of which 14.1 million were still living. Seven million living workers had less exposure, but were at some risk. In addition, the families of workers were at risk due to contact with the asbestos workers and their clothing. It was estimated that 200,000 of the workers at high risk will die from asbestos-related cancers by the end of the century. Many more will be disabled. Lauter, *Who Pays Asbestos Victims?*, Nat'l L.J., July 27, 1982, at 14, col. 2, citing a study of Dr. Irving Selikoff of the Environmetal Sciences Laboratory of the Mount Sinai School of Medicine.

5. The filing for reorganization of the Manville Corporation has received the most publicity. While not in current financial difficulty, Manville claimed that protection under Chapter 11 of the Bankruptcy Code was necessary because a study showed its potential liability from asbestos-related suits could reach $2 billion, and its net worth was only $1.1 billion. Some claim the Manville filing was motivated by the desire to put pressure on the federal government to shoulder some of the liability arising from exposure to asbestos during World War II shipbuilding activity. Wall St. J., Aug. 27, 1982, at 1, col. 6. At least two other firms, U.N.R. Industries, Inc. and Amatex Corp., have filed for bankruptcy due to asbestos-related claims. Wall St. J., Feb. 9, 1983, at 27, col. 2. Forty-Eight Insulations, Inc. moved its employees and manufacturing operations to another company in lieu of declaring bankruptcy. Forty-Eight was left to handle the more than 13,000 asbestos-related lawsuits against it. 68 A.B.A.J. 1559 (1982). Raybestos-Manhattan, Inc. changed its name to Raymark Corp. and

carriers.[6] For the most part this public interest has focused on product liability actions brought against manufacturers of asbestos products, rather than on workers' compensation claims brought against employers. Inasmuch as the workers' compensation concept was originally adopted because the tort system proved an ill-suited and inefficient mechanism for resolving injury and health claims arising in the workplace, one may well question why there has been this massive return by workers to dependence for relief on tort litigation.

State worker compensation is generally held to be the sole remedy available to workers who seek relief from their employers.[7] This principle is adhered to for the most part by reviewing courts,[8] although there has been some recent erosion of the concept in a number of jurisdictions.[9] In California, for example, the courts adopted the dual capacity doctrine, which permits product liability actions by injured workers against employers who are also manufacturers of the defective injury-causing workplace products.[10] The California Legislature, however, recently moved to halt this development by statute.[11]

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reorganized in an effort to improve its image and shield itself from some asbestos-related liabilities. Wall St. J., June 18, 1982, at 16, col. 3. In addition, the auditors of Eagle-Picher Industries, Inc. qualified the company's 1982 financial statement because of concern over asbestos-related litigation.

6. Legal Times, March 30, 1981, at 1, col. 3. It has been estimated that the insurance industry may be liable for $38.2 to $90 billion over the next 35 years due to asbestos-related diseases. Wall St. J., June 18, 1982, at 26, col. 3. A few experts have stated that some insurers may collapse due to the number of asbestos suits. Wall St. J., June 14, 1982, at 1, col. 6.

7. IND. CODE § 22-3-2-6 (1982); CONN. GEN. STAT. ANN. § 31-293 (West 1972).

8. *See e.g.,* Billy V. Consolid. Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980); Longever v. Revere Copper and Brass, Inc., 80 Mass. Adv. Sh. 1767, 408 N.E.2d 857 (1980); Cohn v. Spinks Indus. Inc., 602 S.W.2d 102 (Tex. Ct. Civ. App. 1980). For additional case authorities, *see* Utken, *Workmans Compensation, 1978 Survey of Recent Developments in Indiana Law,* 11 IND. L. REV. 340, 342 n.7 (1978).

9. *See, e.g.,* Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (1980); Knous v. Ridge Machine Co., 64 Ohio App. 2d 251, 413 N.E.2d 1218 (1979); *cf.* Kohr v. Raybestos-Manhattan Inc., 505 F. Supp. 159 (E.D. Pa. 1981) (predicting that Pennsylvania state courts would follow a dual capacity doctrine).

10. *See* Bell v. Industrial Vangas Inc., 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981). In the *Industrial Vangas* case the California Supreme Court expressly adopted the dual capacity doctrine for employers who were also product manufacturers. The basic doctrine was first recognized in California in Duprey v. Shane, 39 Cal. 2d 781, 249 P.2d 8 (1952), in a context in which a nurse was permitted a direct suit against her employer-chiropractor who had negligently treated her after a work related accident. Subsequently, the doctrine was applied by a number of intermediate appellate courts. *See e.g.,* Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 247 (1980); Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977).

11. *See* CAL. LAB. CODE § 3602 (West 1982). "[T]he fact that either the employee

The sole remedy principle of workers' compensation does not, of course, preclude third party actions against workplace product manufacturers who are not the employers of the injured workers.[12] Such claims are being pursued with increasing frequency and vigor, especially in jurisdictions where the potential recovery under the tort system is far greater than that available under workers' compensation. Indiana is such a jurisdiction. The Indiana Workman's Compensation Act and the Occupational Diseases Act only provide for $83,000 as the maximum non-medical recovery available to injured workers or to thier survivors, if they are killed on the job.[13] For incapacitating illness or injury, or for death, this amount does not begin to compensate for years of lost wages. Compensation for pain and suffering is unavailable under any state's workers' compensation system[14] although such special damages would be recoverable in a successful tort claim. Thus where the non-medical components of impairment and disability awards under workers' compensation are relatively low, the incentive to find a deep-pocket third party tort-feasor is increased, despite the additional problems the claimant must face in proving negligence[15] or the essential elements of strict liability in tort.[16]

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or the employer also occupied another or dual capacity prior to, or at the time of the . . . injury shall not permit the employee . . . to bring an action at law for damages against the employer." *Id.*

12. *See e.g.,* IND. CODE § 22-3-2-13 (1982).

13. IND. CODE § 22-3-3-22 (1983).

14. Schwartz, *Historical Overview of Workplace Compensation & Evolution of Possible Solutions,* FINAL EDITED PROCEEDINGS, WORKERS' COMPENSATION AND WORKPLACE LIABILITY 43 (1981).

15. Under negligence the plaintiff must prove the defendant breached a duty of reasonable care owed the plaintiff and the breach proximately caused legally cognizable damage. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1966).

16. In the case of a third party defendant, who is a product manufacturer, RESTATEMENT (SECOND) OF TORTS § 402A (1965) or an equivalent would apply. Section 402A provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
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> 1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> a) the seller is engaged in the business of selling such a product, and
>
> b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> 2) The rule stated in Subsection (1) applies although
>
> a) the seller has exercised all possible care in the prepara-

This article will not focus, however, on the widening gap in potential recovery between tort claims and those under workers' compensation. Instead, it will examine the case of *Bunker v. National Gypsum*,[17] in which *all* claims against the plaintiff's employer were entirely frustrated because the Indiana workers' compensation system, as well as its tort system, proved unresponsive to the delayed manifestation characteristics of the occupational disease caused by the claimant's exposure to asbestos.

The injurious delayed effects of asbestos exposure are becoming increasingly well known.[18] If victims are unable to obtain relief from either the tort or workers' compensation systems—the two legal mechanisms designed to distribute the costs of work related accidents and health impairment through the enterprises which have generated the risks—they will be forced to fall back on more diffuse compensation systems such as state and community welfare, medicaid, social security disability, and the like. Unlike the tort system and workers' compensation, these relief systems have no built-in incentives to reduce aggregate health and accident costs, and are therefore less desirable risk distribution mechanisms.[19]

In this article plaintiff Richard Bunker's effort to recover in tort will be considered first,[20] and then the history of his workers' compensation claim will be analyzed.[21] These cases raise a number of fundamental procedural, interpretative, constitutional, and public policy

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tion and sale of his product, and
b) the user or consumer has not bought the product from or entered into any contractual relations with the seller.

17. 406 N.E.2d 1239 (Ind. Ct. App. 1980) (common law negligence); 426 N.E.2d 422 (Ind. Ct. App. 1981) *rev'd.* 441 N.E.2d 8 (Ind. 1982) (review of decision of the Indiana Industrial Board).

18. *See supra* note 4. Lawscope, 68 A.B.A.J. 397 (1982); Lauter, *Who Pays Asbestos Victims?*, Nat'l L.J., July 26, 1982, at 3, col. 1; Masters, *Asbestos Liability Suits Strain Manufacturers, Court Systems,* Legal Times, Mar. 30, 1981, at 1, col. 2.

19. We assume that a social risk distribution mechanism has at least three objectives. The first is to allocate the risk and its costs to various entities in proportion to the share deemed appropriate for each as mandated under societal consensus. The second is to distribute catastrophic losses among all strata of society rather than permitting such loss to be borne entirely by unfortunate individual victims. The third is to distribute the initial catastrophic costs to parties that have the power to effect remedial change so as to motivate those parties to reduce over time the aggregate cost of accidents and health impairments. Compensation systems which ignore this third objective provide no incentives for accident reduction, and we therefore argue that they are deficient and should be triggered only as a last resort.

20. *See infra* notes 29-44 and accompanying text.

21. *See infra* notes 45-99 and accompanying text.

issues. Bunker's appeal of his workers' compensation claim to the United States Supreme Court was dismissed,[22] and while the Indiana General Assembly seriously considered legislation to soften the statute of limitations constraints which led to the denial of Bunker's claims,[23] the bills as yet have failed to receive the support necessary for enactment.

When a worker suffers injury or health impairment as a direct result of his employment, and is unable to recover under either worker's compensation or tort, these systems can be said to have failed in their essential purpose. This article will consider whether the failure in *Bunker* was justified, and if not, which institution—court or legislature—should take responsibility for taking corrective action.

II. FACTS OF THE CASE[24]

Bunker was employed by National Gypsum Company in February 1949. He was exposed to asbestos fibers for about two years in his position as supervisor of a blending process for the manufacture of an acoustical product. He remained in National Gypsum's employ until 1966, but was not in close contact with asbestos after his initial exposure in 1949-50. In 1976 Bunker underwent exploratory surgery during which it was diagnosed that he was suffering from asbestosis. He brought a claim for workers' compensation under Indiana's Occupational Disease Act (hereinafter referred to as Act) in June 1978. He also filed a companion civil action against National Gypsum alleging that his employer was negligent in permitting him to be exposed to a toxic substance. Both of these claims raise interesting questions of law.

III. BUNKER'S TORT ACTION

To avoid confusion it should be noted at the outset that Bunker's tort claim against National Gypsum[25] was not a product liability action brought under some sort of dual capacity theory.[26] Although National

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22. Bunker v. Nat'l Gypsum Co., 441 N.E.2d 8 (Ind. 1982), *appeal docketed*, 51 U.S.L.W. 3567 (U.S. Jan. 24, 1983) (No. 82-11243).

23. Indianapolis Star, March ____, 1983, at 7B, col. ____ (article discusses three bills before the Indiana General Assembly which would extend the statute of limitations on asbestos claims to as long as twenty five years.)

24. The essential facts in *Bunker* are not in dispute. This summary is taken from 441 N.E.2d 9-10 (Ind. 1982).

25. *See Bunker*, 406 N.E.2d 1239 (Ind. Ct. App. 1980).

26. Needham v. Fred's Frozen Foods, Inc., 179 Ind. App. 671, 359 N.E.2d 544 (1977).

Gypsum was the manufacturer of the acoustical product containing the asbestos which Bunker alleged to be the cause of his asbestosis, Indiana has firmly rejected the dual capacity doctrine as well as other attempts by employees to maintain common-law actions against their employers under theories that the employer is more than one legal entity (*e.g.*, landowner),[27] or has committed an intentional tort against the employee.[28] The exclusivity of the workers' compensation remedy against employers is firmly established in Indiana.

Bunker's claim did not attack the exclusivity principle of workers' compensation, rather it was based on the theory that his cause of action antedated the enactment in Indiana of the sole remedy provision of the Occupational Disease Act. Prior to 1963 the Act provided "that it was applicable only to those who had affirmatively accepted it. There was no evidence presented that National Gypsum had accepted the act."[29] In 1963 the Act was amended to cover everyone unless "the employee has exempted himself from the act."[30]

Bunker noted that his exposure had occurred prior to 1963, and so his claim should be governed by the language of the Act that existed prior to the 1963 amendment.[31] Because, presumably, he had contracted the disease during the period 1949-1963 and had not discovered his illness until 1976, Bunker argued that his tort claim had occurred prior to the enactment of the amendment and should therefore be actionable.

The Indiana Court of Appeals, however, ruled that the Act as amended in 1963 would control Bunker's case because claims against employers for occupational disease became exclusive under the Act in 1963, and the date of accrual for such claims was the date of disablement—not the date the disease was contracted.[32] Bunker was first *disabled* for a short period in 1976 while his disease was being diagnosed, and thus the Act became his exclusive remedy (assuming that he otherwise qualified under the Act).

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27. Witherspoon v. Salm, 251 Ind. 575, 243 N.E.2d 876 (1969); Jarbon v. Gibson 409 N.E.2d 1236 (Ind. Ct. App. 1980).

28. *See* Cunningham v. Aluminum Co. of America, 417 N.E.2d 1186 (Ind. Ct. App. 1981). The court discussed several Indiana cases in which attempts to circumvent the Indiana Workmen's Compensation Act, by alleging intentional tortious conduct on the part of employers, were rejected. *Id.* at 1190-91.

29. 406 N.E.2d 1239, 1240 (Ind. Ct. App. 1980).

30. *Id.* at 1240-41.

31. *Id.* at 1240.

32. *Id.* at 1241.

The effect of the ruling was to extinguish in 1963 any undiscovered Indiana tort claims against employers which had accrued prior to that date. When Bunker brought his civil action against National Gypsum, there was some question whether a tort claim in Indiana accrues at the time that an injury occurs, or only when injury and "damages . . . '*susceptible to ascertainment*' "[33] concur. If the latter point in time were the rule, Bunker would have no tort claim in any event, because his cause of action would presumably have accrued only when his disease had developed to the point where damages were ascertainable, and presumably that would have been after 1963 when the Act would certainly have controlled the case. It is fairly clear now, however, that a tort action in Indiana accrues at the moment of injury, which in the case of asbestosis may mean at the time of exposure to the hazard or when disease—discoverable or not—begins to develop.[34] Therefore, Bunker's tort claim was probably actionable prior to 1963, but he lost the right to bring it as the result of his failure to initiate the tort suit prior to the 1963 amendment of the Occupational Disease Act.

Even if there were no amendment to the Act, Bunker would still have had a problem with the Indiana two year general tort statute

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33. Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 880 (S.D. Ind. 1970) (emphasis in original) (quoting Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836, 840 (7th Cir. 1957)); *see also* Montgomery v. Crum, 199 Ind. 660, 679, 161 N.E. 251, 259 (Ind. 1928); Seates v. State, 383 N.E.2d 491, 493 (Ind. Ct. App. 1978).

34. In Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981), the Indiana Supreme Court ruled that a cause of action in tort accrues when the defendant's act later proves to have been actionable, even if that moment could not have been ascertained at the time of injury. *Shideler* was a legal malpractice case in which the court relied on an occupational disease case, Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), for the proposition that a pneumoconiosis victim's cause of action accrues at the moment the employee inhales the dust which later results in his disability.

Recently, the rule in *Schmidt* was upheld in the context of an asbestos case in Steinhardt v. John's Manville Corp., 446 N.Y.S.2d 244, 54 N.Y.2d 1008, 430 N.E.2d 1297 (1981). The dissent in *Steinhardt* noted that mere inhalation of asbestos dust may never give rise to a cause of action if disease ultimately fails to develop. Therefore, the date of accrual should be moved up to at least that moment when disease, *i.e.*, injury, begins to develop, and determining that moment is a jury question. *Id.* at 246 (Fuchsberg, J., dissenting). The dissent pointed out that the New York Legislature had adopted that reasoning in its Agent Orange legislation. *Id.* at 246 n.2. It is not entirely clear which accrual date Indiana has adopted—the time of invasion of the plaintiff's body, or the metaphysical moment when ultimate manifestation of disease becomes for the first time inevitable. But in any event, the Indiana Supreme Court, after *Shideler*, has definitely rejected an accural date for tort actions which would begin only when the plaintiff's condition became apparent to him. *See also*, Pitts v. Unarco Indus., 712 F.2d 276 (7th Cir. 1983). In this recent asbestos product liability suit decided under Indiana law the court stated: "Passive silence, however, is insufficient to trigger the fraudulent concealment doctrine." *Id.* at 278.

of limitations.[35] With accrual of his action commencing at the onset of his exposure to asbestos, or at the beginning of his undiscovered disease, the statute would presumably have run out before he discovered his developing illness. He might, however, have alleged that the dangers of asbestos had been *fraudulently concealed* from him by his employer, and therefore the statute of limitations should have been tolled until he discovered the fraud, i.e., learned of his illness.[36] It is unlikely, however, that the employer's concealment of asbestos dangers would have been enough for his claim to survive the 1963 amendment. Even the California Supreme Court has ruled that concealment of the dangers of asbestos would be insufficient to overcome the exclusivity of the workers' compensation remedy under a rubric of intentional tortious conduct by an employer.[37] It is necessary, the California court held, to allege and prove that the employer knew and concealed from the employee that the employee *had actually contracted* asbestosis in order for an action at common law to lie.[38]

The tort system, then could provide no relief for Bunker, or for workers similarly situated, without the existence of a culpable non-employer, third party. This result is consistent with the objective of workers' compensation, which is to provide certain, albeit partial, no-fault relief for those injured out of and in the course of their employment, as a substitute for common law tort actions against employers.[39] Bunker's experience, however, suggests that workers' compensation is not all that certain.

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35. IND. CODE 34-1-2-2 (1982).

36. *See* French v. Hickman Moving & Storage, 400 N.E.2d 1384, 1398 (Ind. Ct. App. 1980) (alleged fraudulent concealment of conversion); Cordial v. Grimm, 169 Ind. App. 58, 68, 346 N.E.2d 266, 272 (1976) (alleged legal malpractice).

37. *See* Johns-Manville Prod. Corp. v. Rudkin, 27 Cal. 3d 465, 474-75, 612 P.2d 948, 954, 165 Cal. Rptr. 858, 864 (1980).

38. *Id.* at 477, 712 P.2d at 955-56, 165 Cal. Rptr. at 865.

In a recent diversity case decided under Indiana law, *Braswell v. Flinkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) the *Shideler* doctrine was held aplicable to determining the accrual date of an asbestos-related product liability claim. *Id.* at 531-33. The court held that the existence of undiscovered personal injury was sufficient in Indiana to complete the accrual of a tort claim, but it noted that "Indiana courts have not explicitly held that the 'wrongful act' or 'impact' rule of accrual applies specifically in product liability actions against asbestos manufacturers." *Id.* at 532. The court noted that in *Shideler* the New York cases were cited with approval, but it was not perfectly clear whether the citation of authority was to adopt the New York "impact" rule or merely to reject the "susceptible of ascertainment" rule which a line of Indiana cases prior to *Shideler* had supported. *See* Leibman, *Worker's Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 *Ind. L. Rev.* 453, 467-68 n.116 (1983). The court concluded, despite a strong dissent by Judge Swygert, that, when Indiana plaintiffs do contract an occupational disease, their cause of action accrues no later than their last exposure to the disease causing agent. *Id.* at 533.

39. *See* F. MARSHALL, A. KING & V. BRIGGS, LABOR ECONOMICS 467 (4th ed. 1980).

IV. BUNKER'S WORKERS' COMPENSATION CLAIM

Following exploratory surgery in 1976, in which Bunker's asbestosis was first diagnosed, Bunker filed for compensation under Indiana's Occupational Diseases Act.[40] Prior to this operation, Bunker was employed by the Grain Processing Corporation in Iowa, and he returned to that job shortly thereafter. He is still employed by that company.[41] He claims that he was disabled for a brief period in 1976 because of asbestosis caused by his early Indiana employment and is therefore eligible for compensation under the Indiana Occupational Diseases Act.[42]

Bunker's claim was denied by the Indiana Industrial Board on the theory that it was not timely filed.[43] The Act provides that "no compensation shall be payable . . . in cases of occupational diseases caused by the inhalation of silica dust, coal dust, or asbestos dust . . . (3) years after the last day of the last exposure to the hazards of such disease."[44] The Act also provides,

> [t]hat in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as herein defined, occurs within two (2) years from the date on which the employee had knowledge of the nature of his occupational disease or, . . . should have known of the existence of such disease and its causal relationship to his employment.[45]

The Board ruled that Bunker's "last exposure to the hazards of" asbestos dust was in 1950, and the Act's statute of limitations had run against him.[46] Bunker mounted three arguments in opposition to the Board's ruling. They can be described as his continuing exposure argument,[47] his equal protection argument,[48] and his due process argument.[49]

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40. *Bunker*, 441 N.E.2d 8, 9-10 (Ind. 1982).
41. *Id.* at 16 (Hunter, J., dissenting).
42. IND. CODE §§ 22-3-7-1 through 22-3-7-38 (1982).
43. *Bunker*, 441 N.E.2d 8.
44. IND. CODE § 22-3-7-9(f) (1982).
45. *Id.*
46. *Bunker*, 426 N.E.2d 422 (Ind. Ct. App. 1981).
47. *See infra* notes 55-67 and accompanying text.
48. *See infra* notes 67a-84 and accompanying text.
49. *See infra* notes 85-99 and accompanying text.

A. Continuing Exposure

Bunker submitted medical evidence to the Industrial Board maintaining that once a person inhales asbestos dust *his exposure to asbestos continues indefinitely.*[50] The asbestos fibers remain in the blood stream providing continuous irritation to the lung tissue which ultimately results in the scarring effect known as asbestosis, a disease which seriously impairs respiratory function.[51] The interaction of asbestos particles with the victim's lungs and gastrointestinal system can also lead to a form of cancer known as mesothelioma.[52] But, to date, Bunker claims only to be a victim of asbestosis.[53]

Significantly, the Industrial Board did not reject the validity of Bunker's medical evidence. It conceded that "Plaintiff's exposure may be a *continuing one*,"[54] but even if that were true, the Board's findings stated, "the legislature cannot be said to have intended the term 'last exposure' to mean other than 'last expousre' during and 'in the course of employment.' "[55] Bunker's last exposure during and in the course of employment was in 1950.

Indiana courts do not recognize official legislative history. Minutes of committee hearings and records of legislative debates on the floor of the General Assembly are inadmissible for the purpose of interpreting enacted Indiana law.[56] It is nevertheless unlikely that individual legislators in 1937,[57] while considering the original asbestos dust limitation bill before them,[58] were contemplating the possibility of a continuing exposure to an irritant taking place within a victim's body. However, it is appropriate to presume that the legislators at that time were contemplating the enactment of a limitation provision which would be consistent with the objectives of the underlying

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50. *See* Brief for Appellant at 7, Bunker v. National Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981) [hereinafter cited as Appellant's Court of Appeals Brief].

51. *Bunker* 426 N.E.2d at 424 (discussing the medical studies of Dr. Irving Sellikoff and others).

52. *Id.* at 424 n.4.

53. *Id.* at 422.

54. Appelant's Court of Appeals Brief, *supra* note 50, at 3 (quoting Award from Industrial Board of Indiana, Dec. 26, 1979).

55. *Id.*

56. Dague v. Piper Aircraft Corp., 513 F. Supp. 19, 20 (N.D. Ind. 1980).

57. "[T]he legislature imposed the three-years-from-exposure limitation in 1937 . . . ." *Bunker*, 426 N.E.2d at 425.

58. "[T]he initial version of the Indiana act expressly recognized asbestosis and imposed the three-year-from-exposure limitation . . ." *Id.* at 424.

legislative scheme of workers' compensation.[59] The basic idea which drives the workers' compensation system is that of providing a no-fault insurance mechanism which will cushion the employee from the health and safety risks of the workplace, risks which he is unable to bear himself.[60] When an employee is injured or suffers health impairment which definitely arises out of and in the course of his or her employment and is unable to recover from the compensation system, the system clearly suffers a failure. When Bunker argued that with respect to the statutory phrase "last exposure" the Board "should have applied a literal reading . . . consistent with . . . liberal construction to effectuate the purpose [of the legislative scheme],"[61] he was invoking a well established guideline which courts have generally followed in applying workers' compensation law.

Yet if Bunker's interpretation of the phrase "last exposure" is correct, so as to encompass coverage of continuing exposures, the result would be a compensation system with no practical time limitation for a large number of cases. Many toxic materials gain their toxicity by their resistance to the body's efforts to excrete them. Although Bunker is correct that the purpose of workers' compensation "is the humane one of compensation,"[62] it is also clear that the Indiana General Assembly intended that effectuating this purpose should be subject to some reasonable set of time limitations. His constitutional arguments, in which he claims that the limitation provisions actually chosen by the Indiana legislature have, over time, proven to be unreasonable, advance his thesis with more force than his continuing exposure argument.

B. Equal Protection

Bunker argued that the statute of limitation provision of the Indiana Occupational Diseases Act denied him equal protection of the laws as guaranteed him under the United States[63] and Indiana Constitutions[64] because the Act creates one invidious class distinction

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59. "The objective of these statutes was to assure benefits to workers and their families in the event of work-related injuries or death while, at the same time, limiting the actual liability of employers to the size of the worker compensation payment." MARSHALL, KING & BRIGGS, *supra* note 39, at 467.

60. *See* CHAMBERLAIN & CULLEN, *supra* note 1, at 498-99.

61. Appellant's Court of Appeals Brief, *supra* note 50, at 8.

62. *Id.*

63. U.S. CONST. amend. XIV, § 1 states in pertinent part: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

64. IND. CONST. art. I, § 23 states: "The General Asembly shall not grant to any

on its face and another in its operation, neither of which is justified on any rational basis.[65]

As noted, the Act provides that radiation victims are permitted to bring claims within two years from the time they discover their illness,[66] while asbestos victims have three years from the date of their last exposure to the hazard,[67] without regard to whether or not illness is discovered, or is even discoverable. The other class distinction identified by the claimant is that between victims continuously exposed to a workplace environment containing asbestos fibers, and those who employment exposure to asbestos was cut off by some later circumstance, but was sufficient for the disease to have taken root and manifested itself many years later. The former group of victims would presumably show symptoms of disease while still within the limitation period, but the latter group, in most cases, would not.

National Gypsum's reply to both class distinctions was that Bunker had failed to prove that the classifications were irrational.[68] Thus, to have prevailed in the first case, the plaintiff would have had to show that radiation and asbestos victims were similarly situated and that one class had been granted a privilege denied the other.[69] Specifically, the plaintiff had to show that both types of disease have a latency period following exposure, and that the latency periods for both hazards are the same in order to claim that the limitation periods should be made the same.[70] That the General Assembly had ample opportunity over the years to align the two classes, and had opted not to do so, was presented by the defendant as evidence that the resulting classification had a rational basis.[71]

The failure of a legislature to act affirmatively to align classes which it has created, perhaps inadvertently in response to the political pressures of particular times, is, of course, scant evidence that such class distinctions are reasonable ones. While an affirmative act of a legislature must be given a strong presumption of constitutionality, the failure of it to act should not be accorded the same weight. The

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citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

65. Appellant's Court of Appeals Brief, *supra* note 50, at 21-22.

66. *See supra* note 50 and accompanying text.

67. *See supra* note 49 and accompanying text.

68. Brief of Defendant—Appellee, Bunker v. Nat'l. Gypsum Co., 426 N.E.2d 422 (Ind. Ct. App. 1981), at 29-30 [hereinafter cited as Appellee's Court of Appeals Brief].

69. *Id.* at 30.

70. *Id.*

71. *Id.*

enactment in 1937 of the three year limitation period for exposure to silica dust and asbestos[72] was undoubtedly a humane response to the prevailing medical knowledge of the time and a political response to the labor agitation of the 1930's. The amendment providng for a discovery rule in the case of radiation exposure, which was enacted in 1961, was a humane response to newly recognized medical information about the nature of radiation sickness.[73] That the legislature did not, and has not yet, adopted a discovery rule for asbestos, or has not yet seen fit to increase the three year limitation period running from date of exposure to asbestos, does not indicate an essential dissimilarity between the delayed manifestation characteristics of asbestos expsoure and radiation exposure.

The response to National Gypsum's assertion that the claimant has failed to prove that asbestos victims and radiation victims are similarly situated and so cannot demand that the classes should be treated identically, was that the defendant had refuted more than was claimed. Bunker argued that asbestos exposure, like radiation exposure, often leads to a latent period before the symptoms of disease are discoverable.[74] He did not claim that the latent periods for the two hazards are always, or ever, the same—only that they are both frequently of many years' duration. The general time limitation scheme that is appropriate to one type of exposure is probably appropriate to the other, but there is no insistence here on identical treatment—only that the underlying characteristic of delayed manifestation should be treated with equal fairness in both cases.

The defendant asserted that Bunker's second alleged class distinction—that between victims with continuous exposure during employment, and those with early but discontinued exposure—has not led to dissimilar treatment because both classes are subject to the same three year limitation period running from date of last exposure.[75] Bunker argued, however, that it is not the last exposure which produces the disease, but rather there is a threshold exposure which varies with individuals, beyond which the ultimate development of disease becomes likely even without continued exposure. Thus, continuing exposure to asbestos fibers in the work environment beyond the threshold exposure has for many victims only one primary effect,

72. Coal dust exposure was added to the three year limitation period class in 1974. *Bunker*, 441 N.E.2d at 14.

73. *Id.*

74. Appellant's Court of Appeals Brief, *supra* note 50, at 22.

75. Appellee's Court of Appeals Brief, *supra* note 68, at 31.

a legal one: it creates eligibility for recovery under the Act which is denied those who are cut off from exposure during the disease's gestation period.[76] This period is likely to run more than three years before the onset of symptoms,[77] and is even more likely to run three years before the worker is in fact disabled, disablement being the trigger point for recovery under the Act.[78]

In response, the defendant asserted that longer exposure increases the likelihood that disease will in fact be contracted, and therefore a limitation scheme which reflects these probabilities is an equitable one and is consistent with the principles of equal protection.[79] Ultimately the reviewing courts had to address the question whether the Act's limitation period was so short as to deny Bunker the protections it was designed and enacted to provide[80] regardless of the level of protection the Act affords to other classes of victims—a due process review as opposed to an equal protection analysis.

C. Due Process

On appeal from the Industrial Board, the Indiana Court of Appeals, in a 2-1 decision,[81] ignored Bunker's continuing exposure argument and that part of his equal protection argument dealing with radiation victims. In a footnote, however, the court agreed with Bunker that there was no rational basis for dividing "exposed workers for

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76. Appellant's Court of Appeals Brief, *supra* note 50, at 25. Bunker failed in his brief to develop fully this argument, a lack which apparently caused the Indiana Court of Appeals to investigate medical sources outside the record. *See Bunker*, 426 N.E.2d at 424-25.

77. *See Id.* at 425 n.6 and accompanying text. The medical evidence reviewed by the court demonstrated that initial exposure to asbestos does not produce even abnormal x-rays, let along symptoms, in the vast majority of cases of ultimate disease victims until many years after their exposure.

78. IND.CODE § 22-3-7-9 (f) provides that "no compensation shall be payable unless disablement . . . occurs . . . within three [3] years after the last day of the last exposure to the hazards of such disease [exposure to asbestos dust]." Sub-section (e) (new) states that "[t]he term 'disablement' means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease. . . ." Clearly, an employee can become aware of incipient disease, yet not be disabled as defined under the Act. As the Indiana Court of Appeals pointed out, such an employee who also was no longer being exposed to the asbestos dust hazard would see his workers' compensation claim evaporate while he was still earning full wage but knowing he ultimately would become disabled. *Bunker*, 426 N.E.2d at 424.

79. Appellee's Court of Appeals Brief, *supra* note 68, at 31.

80. *See infra* note 81-95 and accompanying text (Due Process).

81. *Bunker*, 426 N.E.2d 422 (Ind. Ct. App. 1981) (Hoffman, J. dissenting).

purposes of coverage into those continually exposed for the necessary 20 to 30 year gestation period and those not."[82] But the court, in reversing the dismissal of Bunker's claim by the Industrial Board, based its decision primarily on the ground that he had been denied due process of law.[83]

In substance, the court was persuaded by medical evidence published by Dr. Irving Sellikoff and others during the 1960's and 1970's which demonstrated conclusively the delayed manifestation characteristics of asbestosis and mesothelioma.[84] The court noted that, even if exposed parties were looking for evidence of the disease before the onset of its symptoms, they would probably be unsuccessful, because a study of "asbestos insulation workers revealed chest x-ray abnormality in only 10% of those whose exposure began less than ten (10) years before the study. . . ."[85] Thus, there could be no way that the majority of parties such as Bunker, parties whose exposure to asbestos was not continuous, could ever recover compensation under the limitation provision of the Indiana statute.[86] That the provision was enacted in 1937 before these medical facts were widely known, accepted, and digested by the public was reason to believe the three year ban was not recognized by the legislature as being unusually short. But now, the court held, "it appears to us that the statute can no longer stand. To impose its ban is to violate the classic constitutional mandate, because to do so amounts to a practical denial of the very right to recovery that the statute was intended to provide."[87]

In dissent, Judge Hoffman, pointed out that while three years might be less than generous, permitting Bunker to recover would be tantamount to ratifying a twenty-eight year limitation period, clearly

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82. *Id.* at 425 n.7.

83. U. S. CONST. amend. XIV, § 1 states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Bunker had argued that IND.CODE § 22-3-7-9 (e) (now f) not only abrogated his fourteenth amendment due process rights, but also violated IND.CONST. art. I. § 12 which states: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law." *See* Appellant's Court of Appeals Brief, *supra* note 50, at 16. The state and federal provisions are not entirely congruent, yet neither the court of appeals nor the Supreme Court made clear which constitutional provision they were addressing. It seems reasonsable, however, to conclude that in a statute of limitations context the excessive shortening of a limitation period can be thought of as both a denial of remedy and a denial of legal process. Thus both the state and federal protections would be at issue.

84. *Bunker*, 426 N.E.2d at 424-25.

85. *Id.* at 424.

86. *Id.*

87. *Id.* at 425.

a much longer period than would be necessary to pass constitutional muster.[88] The legislature must be permitted to draw the line at some point which would protect the defendant's right to be confronted with fresh evidence. On balance, Judge Hoffman found that the provision as enacted "clearly states the wishes of the Legislature. It is neither unreasonable nor unconstitutional."[89]

On transfer to the Indiana Supreme Court,[90] the court focused on the presumption of constitutionality that must be afforded acts of the legisature. In reversing the court of appeals, the supreme court emphasized that plaintiffs challenging statutes of limitation have a heavy burden, and that the statutes would be upheld "unless the time allowed is so short that the statute amounts to a practical denial of the right itself and becomes a denial of justice."[91] That result is what the majority of the court of appeals determined had occurred in *Bunker*.

The supreme court ruled that a practical denial of Bunker's rights had not occurred because there was evidence that the three years from date of last exposure limitation period was reasonable when enacted, and might very well be reasonable today.[92] The court held that the legislature could have found that relatively short periods of exposure to asbestos were unlikely to develop into asbestosis; and therefore, in balancing the repose interests of employers against the interests of the few claimants like Bunker who actually developed the disease after less than two years exposure, the repose interest should, in justice, be permitted to prevail.[93]

The court's reasoning probably focuses too narrowly on the specific *Bunker* facts. If Bunker had been exposed for a ten year period and then had left National Gypsum, or had been transferred within the company to a job where he was not exposed to asbestos, he would still probably have been denied compensation. That such a result is likely is borne out by the same medical study relied on by the court of appeals.[94] Only 44 percent of the asbestos victims whose exposure began 10 to 19 years before being x-rayed showed any abnormalities, and those abnormalities were minimal.[95]

88. *Id.* at 425-26 (Hoffman, J., dissenting).
89. *Id.*
90. *Bunker*, 441 N.E.2d 9 (Ind. 1982).
91. *Id.* at 12-13 (quoting Wright-Backman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E.2d 713 (1965)).
92. *Id.* at 14.
93. *Id.*
94. *Bunker*, 426 N.E.2d at 424-25.
95. *Id.* at 425.

Clearly, Bunker belongs to a substantial class of asbestos victims, a class which could not have been envisioned by a legislature which acted before the long latency period of asbestos related diseases became fully understood as a result of Dr. Sellikoff's studies completed in the past two decades. If in fact there is now compelling evidence that this forty-five year old statute of limitations is cutting off a far greater portion of potential workers' claims than was originally intended by the legislature, we must then inquire whether the courts have a constitutional duty to act.

V. THE ROLE OF THE COURTS

The Indiana Supreme Court has repeatedly deferred to the Indiana General Assembly on statute of limitation questions.[96] It upheld the special time limitation of the Indiana Malpractice Act which shortened the general limitation period.[97] It also upheld the ten year repose provision of the Indiana Product Liability Act of 1978,[98] and in 1958, in the context of a silica dust case, it upheld the same statute of limitations that was before it in *Bunker*.[99] In each of these cases the court emphasized the repose interests of statutes of limitation, rather than the other basic purpose of these statutes, which is to motivate parties to exercise their *known* rights promptly on pain of losing them. But, if the Indiana General Assembly were to begin tomorrow to enact generous limitation periods with statutory discovery provisions, it is likely that the supreme court would uphold their constitutionality because Indiana's high court has traditionally disapproved of judicial activism once the Indiana General Assembly has spoken.[100]

It should be noted that in *Bunker* the Indiana Court of Appeals did not hold that the legislature had acted improperly or unconstitutionally when it *originally* enacted the three year limitation period for asbestos exposure—only that increasing medical knowledge now required the updating of the statute of limitations if the statute is to retain its original constitutionality. The supreme court position, however, clearly places responsibility for such updating with the legislature. And, until the legislature acts, the 1937 limitation statute is to retain the force of law. The high court has consistently granted

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96. *Bunker*, 441 N.E.2d at 11.

97. *Id.* at 13 (discussing Johnson v. St. Vincent's Hospital, Inc., 404 N.E.2d 585, 603, which upheld IND. CODE §§ 16-9.5-1-1 through 16-9.5-10-5 (Burns Supp. 1982)).

98. Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

99. *Bunker*, 441 N.E.2d at 13 (discussing Woldridge v. Ball Brothers Co., Inc., 129 Ind. App. 420, 150 N.E.2d 911 (1958), *trans. denied*).

100. *See* discussion and authorities cited, *Bunker*, 441 N.E.2d at 11-13.

the acts of the Indiana General Assembly a very strong presumption of constitutionality.[101]

In the hope of finding a more activist sentiment on the United States Supreme Court, Bunker filed an appeal [102] under 28 U.S.C., Section § 1257(2) which gives a losing party who has challenged the constitutionality of a state statute a right of direct appeal when the highest court of the state rules against him by holding that a state statute is consistent with the United States Constitution.[103] In Bunker, however, the Indiana Supreme Court added an additional state ground for its decision which may have played some part in its ultimate disposition. The court ruled that the court of appeals below "had erred by its use of (medical) evidence" which was found outside the record.[104] The court of appeals' reversal of the Industrial Board had relied heavily on that court's own independent review of medical research which led it to conclude that the legislature had acted as it did in 1937 because adequate medical knowledge of the risks of asbestos exposure did not yet exist or was inconclusive.[105]

Bunker's direct appeal to the United States Supreme Court was dismissed for want of a "substantial federal question."[106] And although the Supreme Court has consistently declined to decide state statute of limitations or repose statute cases on federal constitutional grounds,[107] the procedural issue, that of the Indiana Court of Appeals going beyond the record for evidence, may have reinforced its decision to dismiss.

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101. *Id.*

102. Bunker v. Nat'l Gypsum Co., 441 N.E.2d 8 (Ind. 1982), *appeal docketed*, 51 U.S.L.W. 3567 (U.S. Jan. 24, 1983) (No. 82-1243).

103. 28 U.S.C. § 1257 (1976) states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

104. *Bunker*, 441 N.E.2d at 11.

105. *See supra* notes 84-87 and accompanying text.

106. 43 S.Ct. Bull. (CCH) B 1801 (Apr. 18, 1983).

107. *See e.g.*, Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed* (for want of a substantial question), 401 U.S. 901 (1971); Howell v. Burk, 90 N.M. 688, 568 P2d 214 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979), *appeal dismissed sub nom* Woodward v. Burnham City Hosp., 449 U.S. 807 (1980).

In any event the United States Supreme Court's dismissal ended the dispute in *Bunker* with the Indiana Supreme Court's reading of the Fourteenth Amendment and equivalent state constitutional provisions regarding equal protection and due process quickly becoming firm precedent in Indiana. In *Woodworth v. Lilly Industrial Coatings, Inc.*,[108] the claimant argued that the general occupational disease two year "last exposure rule"[109] (rather than the three year rule governing dust diseases),[110] was an unconstitutional denial to him of due process because it unreasonably barred his claim for leukemia allegedly contracted after he was exposed to various carcinogens in his employment. Relying on *Bunker*, the Indiana Court of Appeals affirmed the dismissal of the claim.[111]

In *Braswell v. Flinkote Mines, Ltd.*,[112] the plaintiffs attacked the repose provision found in the Indiana Product Liability Act[113] which bars claims against a product seller ten years after the product has been delivered to an initial user or consumer.[114] The plaintiff asbestos workers argued that a statute which could run against them before they could possibly know that they were injured was a denial to them of due process of law. The Seventh Circuit Court of Appeals pointed out that it was the Indiana general personal injury tort statute of limitations,[115] which runs two years from the time the cause of action accrues,[116] that was at issue and not the ten year outer cutoff of the Product Liability Act. The problem for the plaintiffs was the same, however, because Indiana has rejected a discovery rule for its general tort limitation statute.[117] This interpretation, in the context of an occupational disease tort claim, means that the cause of action accrues no later than the plaintiff's most recent exposure to the disease-causing substance, even though the plaintiff may be unaware of incipient

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108. 446 N.E.2d 646 (Ind. Ct. App. 1983).

109. IND. CODE § 22-3-7-9 (f) (1982) provides in pertinent part: "No compensation shall be payable for or on account of any occupational diseases unless . . . disablement occurs within two (2) years after the last exposure to the hazards of the disease. . . ."

110. *See* IND. CODE § 22-3-7-9 (f) (1982) quoted in text accompanying n. 44.

111. *Woodworth*, 446 N.E.2d at 648.

112. 723 F.2d 527 (7th Cir. 1983).

113. *Id.* at 529, discussing IND. CODE §§ 33-1-1.5-1 to -8 (1981).

114. IND. CODE § 33-1-1.5-5 (1981).

115. *Braswell*, 723 F.2d at 529 (referring to IND. CODE § 34-1-2-2 (1976)).

116. IND. CODE § 34-1-2-2 (1976) provides: "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued . . .(1) For injuries to person . . . within (2) years."

117. *See supra* notes 33-34 and accompanying text.

disease development at the time.[118] The federal court noted that "[t]he reasonableness of [such] statutes of limitation was recognized by the Supreme Court of Indiana in *Bunker v. National Gypsum Co.*"[119]

In *Pitts v. Unarco Industries*,[120] a diversity case decided prior to *Braswell*, the plaintiff had also argued that the repose provision of the Indiana Product Liability Act, which barred her wrongful death claim, was a denial to her of due process. Her theory was that her spouse, an asbestos insulation mechanic, was exposed to asbestos dust before enactment of the statute of repose, and that implementing the act's provisions would now deprive her of the property right which resided in her wrongful death cause of action. The court ruled that, as to her, the wrongful death claim had not yet accrued, and there was no property right in an unaccrued claim.[121]

Under the rule reiterated in *Braswell*, it should be noted that the mechanic himself would have had an accrued claim for personal injury at some point in time after his first exposure to the asbestos dust which ultimately caused his occupational disease.[122] Presumably, each additional exposure could produce a new claim,[123] but after his final exposure to the deleterious dust the two year personal injury statute of limitations ran against him even though he had not yet discovered, nor could have discovered, the asbestos-related disease developing in his body. The ten year outer cutoff of the Product Liability Act would not have affected this personal injury claim because that statute applies only to causes of action accruing after June 1, 1978.[124] Nevertheless, failure to discover his illness within two years of his last exposure would have been sufficient to bar him under the general tort limitation statute.

With respect to the widow's wrongful death claim, the court stated further that even if she did have a property right in the cause of action, the Product Liability Act section which barred it was not

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118. 723 F.2d at 529, 531-33.

119. *Id.* at 531.

120. 712 F.2d 276 (7th Cir. 1983).

121. *Id.* at 279.

122. *See supra* note 38 (discussion of application of the *Shideler* doctrine to *Braswell*).

123. The "impact" or "wrongful act" rule would find every exposure to asbestos dust on actionable event. Also, under the view that there must first be some harm to the claimant each additional exposure to asbestos following the beginning of the latent disease would presumabley constitute an actionable aggravation.

124. IND. CODE § 33-1-1.5-8 (1982).

a denial of due process.[125] The court cited *Bunker* for the proposition that the constitutionailty of repose provisions should be upheld as encouraging the prompt presentation of claims.[126]

Mrs. Pitts also raised a Fourteenth Amendment, equal protection argument, based on the allegedly irrational distinction between users of old and new products.[127] *Bunker* was again cited as authority for upholding the federal equal protection constitutionality of the statute.[128] Finally, the *Bunker* case was cited as authority to reject Pitt's argument that the Indiana Constitution's "privileges and immunities" clause had been violated, "even though Justice Hunter thought application [of the occupational disease statute of limitations] would 'defy . . . the privileges . . . and immunities guaranteed our citizens.' "[129]

Justice Hunter, in his dissent in *Bunker*,[130] was particularly concerned about the court's deciding an important constitutional issue without adequate development of the facts. He noted that the constitutional question had only been raised after an administrative hearing in which Bunker had presented only his continuing exposure argument. Thus, only a meager record reached the high court. Hunter argued that either Bunker should be granted a trial de novo on the constitutional issues, or the case should be decided for National Gypsum on a finding that Bunker was never disabled according to the meaning of the Act. With that finding, the constitutioinal questions could be deferred to another day, when presumably, action by the Indiana General Assembly or the United States Congress would make the issue moot. However, Bunker's temporary but total disablement in 1976 was pressed by the claimant, and was recognized by the Industrial Board, the court of appeals, and a majority of the supreme court. Therefore, the fate of a substantial number of asbestos victims will rest on a constitutional decision derived from an administrative record not adequately developed.[131]

VI. CONCLUSION

It is apocryphal that hard cases make bad law. Richard Bunker experienced a relatively short exposure to asbestos over thirty years

125. *Pitts*, 712 F.2d at 279.
126. *Id.* at 279-80.
127. *Id.* at 280.
128. *Id.*.
129. *Id.* at 280, *quoting Bunker*, 441 N.E.2d at 18 (Hunter, J., dissenting) (referring to IND. CONST. art. I, § 23).
130. *Bunker*, 441 N.E.2d 8, 14 (Hunter, J., dissenting).
131. *Id.* at 17.

ago. There is no question but that he has contracted asbestosis, yet he remains gainfully employed, and neither he nor his family are currently destitute. There was no doubt a natural reluctance to put the workers' compensation system or the tort system at his disposal.

Nevertheless, medical evidence suggests that Bunker is likely to become permanently disabled and impaired earlier than he might have been but for his exposure to asbestos in 1949-50. Other victims simiarly exposed are likely to fare much worse. The impairments these people will suffer clearly arises, at least in part, from an agent encountered out of and in the course of their employment. The workers' compensation system was enacted to provide relief in such cases, and the tort litigation system exists to provide relief in those instances where a third party defendant has either caused injury by negligent conduct, or by permitting a defective injury-causing workplace product to enter the stream of commerce. When neither system is able to provide assistance to the impaired worker, a system failure must be recognized.

Bunker had no third party claim, nor was he permitted to maintain a direct action for negligence against his former employer. If a worker must be subject to the exclusivity principle of the workers' compensation system, that system should remain highly responsive to his legitimate claims. A workers' compensation statute of limitations which cuts off a substantial number of meritorious claims through no fault of the claimants must be branded as a failed provision.

The remaining question is whether the courts should take responsibility for remedying such defects. The answer should come from the judicial traditions of the jursidiction. In Indiana, responsibility for repairing legislative errors is usually left with the legislature.[132] Although a good deal of suffering may take place before the legislature acts, a tradition of judicial restraint in judicial review cases is a policy meriting respect, if it is not carried too far.

Before deciding whether a judicial remedy was appropriate in the *Bunker* case, we should perhaps recognize that the public policy issues raised in the case are part of a larger problem. Nationally, our health and accident compensation systems are badly in need of direction and coordination. The mission of each such system should be directed at two goals: the first is the providing of basic compensation from the many who benefit from the enterprise to the relatively few victims of its activities—an insurance concept; the second is the creation of incentives, to all parties who can, to find ways to reduce the

132. *See supra* notes 101-105 and accompanying text.

aggregate costs of accidents and health impairments, costs which include the expense of administration and dispute settling.[133]

These latter cost components have been outrageously exacerbated by the lack of coordination among tort, workers' compensation and welfare systems. At this point in the development of American health and accident compensation systems there seems little reason for Richard Bunker to have been shunted from one system to another, eventually winding up empty handed, while he diligently pursued a claim for injury sustained out of and in the course of his employment. But the task of rebuilding and recoordinating our network of health and accident systems to provide the desired efficiencies and incentives is clearly a legislative task. Whether judicial intervention will advance or retard the process is not all clear.

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133. *See generally*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970).