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# APPORTIONMENT OF INSURANCE COVERAGE IN ASBESTOSIS CASES: COVERAGE, COVERAGE, WHO'S GOT COVERAGE?

## I. INTRODUCTION

The widespread use of asbestos has resulted in the filing of thousands of product liability suits by the victims of asbestos-related diseases. This flood of asbestos cases may financially ruin asbestos-product manufacturers and their insurers.<sup>1</sup> Asbestos-related diseases have very long latency periods,<sup>2</sup> which makes assignment of the disease to a specific insurer's coverage nearly impossible.

In order to determine which insurer must cover the claimant's bodily injury, both insurers and manufacturers are bringing declaratory relief actions to clarify their rights and duties under their insurance policies.<sup>3</sup> The critical problem in these proceedings is determining *when* the claimant's bodily injury occurred, thereby triggering insurance coverage. Of the few circuit courts of appeal addressing this issue, each has answered the "when" issue differently.<sup>4</sup>

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1. In the past twenty years, more than 24,000 asbestos workers or their survivors have filed lawsuits. L.A. Times, Feb. 13, 1984, at 1, col. 1. In 1984, The Jim Walter Corporation, an asbestos-product manufacturer, faced 15,600 asbestos-related lawsuits. *The Asbestos Albatross*, Forbes, Jan. 2, 1984, at 201. The Manville Corporation, another asbestos-product manufacturer, filed for Chapter XI Bankruptcy because its estimated \$2 billion litigation costs would have exhausted its net worth. Wall St. J., Aug. 27, 1982, at 1, col. 6. As to the insurers, one study estimates that by the end of this century, the total liability of the insurance industry will be between \$4 billion and \$10 billion. P. BRODEUR, *OUTRAGEOUS MISCONDUCT, THE ASBESTOS INDUSTRY ON TRIAL* 184 (1985).

2. The latency period of asbestosis has been estimated to range from 25-40 years. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 864 (1980); Selikoff, *Widening Perspectives of Occupational Lung Disease*, 2 PREVENTIVE MED. 412 (1973). Asbestos-related diseases, developing now, are the result of work conditions in the 1920's-1940's. *Id.* at 430-31. In the year 2000, today's exposures will be reflected in disease development. *Id.*

3. Declaratory judgments are discussed *infra* notes 40-41 and accompanying text. Defense and indemnification are discussed *infra* notes 36-39 and accompanying text.

4. In *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, which is discussed *infra* notes 56-68 and accompanying text, the Sixth Circuit held that asbestosis occurred upon exposure to asbestos hazards. 633 F.2d 1212, 1225-26 (6th Cir. 1980). In *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, discussed *infra* notes 80-91 and accompanying text, asbestosis was found to have occurred when the fully manifested disease became capable of diagnosis. 682 F.2d 12, 25 (1st Cir. 1982). The D.C. Circuit, in *Keene Corp. v. Insurance Co. of N. Am.*, which is discussed *infra* notes 93-108 and accompanying text, assumed that an occurrence of

Currently, identical injuries covered by standardized insurance contracts are treated differently under similar common law doctrines of insurance and contract law.

This comment proposes a standardized approach to the equitable apportionment of insurance coverage among the various insurers of asbestos-product manufacturers. Section II describes how the coverage conflict arises and the uncertainty that the asbestos decisions have created. Section III identifies and analyzes the problems insurers, insureds and claimants face in asbestos litigation. Finally, section IV proposes a new test which synthesizes and augments two of the leading asbestos cases to set a new, standardized and feasible approach for future asbestos litigation.

## II. HOW ASBESTOS CONFLICTS ARISE

### A. *History of Asbestos Use*

Asbestos<sup>5</sup> use has been widespread throughout this century. With its great insulating properties, asbestos use became prevalent because manufacturers found it to be an ideal material for use where fire and excessive heat threatened the safety of their products.<sup>6</sup> In 1935, commentators began calling attention to the carcinogenic properties of asbestos.<sup>7</sup> Although asbestos had long been suspected of being hazardous, its relative indestructibility provided the rationale for its continued use. Asbestos was most heavily used from 1940-1960,<sup>8</sup> and is present in many forms today, typically in products

asbestosis begins with exposure and ends with manifestation of asbestosis. 667 F.2d 1034, 1047 (D.C. Cir. 1981).

5. Asbestos is derived from the Greek *a*, meaning "not," and *bestos*, meaning "extinguishable." WEBSTER'S NEW INTERNATIONAL DICTIONARY 159 (2d unabr. ed. 1934). The term asbestos refers to several types of fibrous materials that are mineral in nature. These fibers may be spun or woven into cloth or sheets. The fibrous materials have the properties of relative indestructibility and resistance to fire. Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 342 (1980).

6. See Mansfield, *supra* note 2, at 861. The heat resistant properties and fibrous structure of asbestos make it extremely desirable as fireproofing and insulating material. *Id.* There is no one material that can out-perform asbestos in such a wide range of applications, especially where high temperatures are involved. *Id.*

7. See Lynch & Smith, *Pulmonary Asbestosis III: Carcinoma of the Lung in Asbestosis-Silicosis*, 24 AM. J. CANCER 56 (1935) (case report of carcinoma of the lung). Dr. D.C. Cooper, an expert witness for asbestos-product manufacturers, testified that in the 1930's it was known that inhaling asbestos dust caused asbestosis and that the danger could be controlled by maintaining a modest level of exposure. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1092-93 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). For a discussion of asbestos and its effects on industrial workers, see Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967).

8. Asbestos use was mandatory in the Naval shipyards during World War II. Military

where fire and excessive heat are a safety threat.<sup>9</sup> Thousands of products in daily use throughout the world today, such as toothbrushes, ironing board covers, asphalt roofing shingles, and concrete pipes, contain asbestos.<sup>10</sup>

The major diseases that result from exposure to asbestos dust are mesothelioma and asbestosis.<sup>11</sup> Mesothelioma is a neoplastic<sup>12</sup> tumor arising from the mesothelial<sup>13</sup> surface lining. In short, mesothelioma is a tumor of the membranes that line the internal body cavities. Asbestos is generally acknowledged to be the major cause of mesothelioma, but it may not be the only cause.<sup>14</sup> A slight exposure to asbestos may result in mesothelioma; however, because of its long latency period, the exposure is often overlooked in a worker's occupational history.<sup>15</sup> Asbestosis is the most common of the asbestos-related diseases. Asbestosis is a pneumoconiosis<sup>16</sup> caused by inhalation of asbestos fibers. The latency period of asbestosis may span more than twenty-five years.<sup>17</sup> It is estimated that there will be twenty thousand asbestos-related deaths per year through the year 2000.<sup>18</sup>

## B. *Asbestos Litigation*

Many asbestosis victims have already sought legal redress for their injuries. The typical underlying claim against an asbestos-product manufacturer is one brought by an industrial worker who was exposed to asbestos dust over a number of years. The long la-

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specifications required asbestos in products sold to the government until 1976. Mansfield, *supra* note 2, at 871.

9. *Id.* at 861.

10. *Id.*

11. *Id.* at 862. Pulmonary lung cancer and other carcinomas may also be causally related to asbestos exposure. *Id.*

12. An abnormal tissue that grows by cellular proliferation. *STEDMAN'S MEDICAL DICTIONARY, ILLUSTRATED* 928 (23d ed. 1976) [hereinafter *STEDMAN'S*].

13. The mesothelial relates to the single layer of flattened cells forming an epithelium (a cellular layer without blood vessels covering it), that lines the serous cavities (those which produce or contain serum). *Id.* at 856.

14. See Mansfield, *supra* note 2, at 864.

15. *Id.* For purposes of this comment, the disease of asbestosis will be the central focus of further discussions.

16. Pneumoconiosis is an inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations. *STEDMAN'S, supra* note 12, at 1109.

17. Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers In the United States*, 132 *ANNALS N.Y. ACAD. SCI.* 139 (1965).

18. See Mehaffy, *supra* note 5, at 350. Although manufacturers have not used asbestos for about 10 years, the problems will be with us for years to come. *Id.*

tency period of asbestosis allows an exposed worker to remain healthy throughout years of exposure to asbestos dust. Then, the worker's health is slowly impaired by respiratory ailments. Once a worker is diagnosed as having asbestosis, he is irreversibly sickened by the slowly devastating disease.

In the landmark case of *Borel v. Fibreboard Paper Products*,<sup>19</sup> several asbestos-product manufacturers were held strictly liable for workers' asbestosis damages resulting from exposure to the manufacturers' asbestos-containing products.<sup>20</sup> Clarence Borel, an industrial insulation worker, was exposed to asbestos dust for thirty-three years.<sup>21</sup> Although Borel thought that the asbestos dust may have been bad for him, it was a common belief among Borel and his co-workers that the dust would dissolve upon hitting their lungs.<sup>22</sup> The first time that Borel knew he had asbestosis was when his condition was diagnosed in 1969.<sup>23</sup> Borel died in 1970, and three years later his family was awarded a total of \$79,000 in damages.<sup>24</sup> Borel originally sought damages against eleven asbestos-product manufacturers,<sup>25</sup> and six of them were eventually held jointly and severally liable for Borel's total damages.<sup>26</sup>

### C. *Comprehensive General Liability Policies*

Once a manufacturer is alleged to be responsible for asbestosis damages, it turns to its insurers for defense of the lawsuit and in-

19. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

20. 493 F.2d at 1103.

21. *Id.* at 1081. In 1936, Borel began working as an industrial insulator and was exposed to the defendants' asbestos products throughout his career, which ended in 1969, when Borel was disabled by asbestosis. *Id.*

22. *Id.* at 1082.

[W]e used to talk about . . . how bad was this dust, could it give you TB, could it give you this, and everyone was saying, no that dust don't hurt you, it dissolves as it hits your lungs. . . . I knew I was working with insulation [and that it contained asbestos], but I didn't know what asbestos was.

*Id.*

23. *Id.*

24. *Id.* at 1082-83, 1102. The trial court determined that the total amount of damages was \$79,436. Four of the ten defendants had settled before trial, paying a total of \$21,902. The remaining six defendants were held jointly and severally liable for the balance of \$58,534. *Id.* at 1102.

25. Owens-Corning, Standard Asbestos Mfg., Unarco, Eagle-Picher, Combustion Engineering, Fibreboard Paper Products, Johns-Manville, Pittsburgh Corning, Phillip Carey, Armstrong Cork and Ruberoid were the eleven manufacturers. *Id.* at 1086, & n.17.

26. Borel argued that the defendants' product was inherently dangerous, and, therefore, the manufacturers should have given adequate warnings. *Id.* at 1086. The jury found six defendants strictly liable. Of the other five defendants, four settled before trial and one received a directed verdict. *Id.* at 1076.

demnification of any damages awarded. Many times the manufacturer is covered by a type of insurance policy known as a Comprehensive General Liability policy (CGL). The standardized language of CGL's provides coverage for all risks except those that are specifically excluded.<sup>27</sup> Generally, CGL policies arrange for the insurer to pay those sums that the insured manufacturer becomes legally obligated to pay because of damages sustained and caused by an occurrence.<sup>28</sup>

Under one type of CGL, the occurrence policy, coverage is broad enough to apply to both sudden accidents and injuries that develop gradually. There is general agreement among the courts that an occurrence need not be a sudden event, but may be a process.<sup>29</sup> However, not all cases of gradual harm are covered since policy definitions may be varied, thereby allowing some insurers to provide broader or narrower protection than other insurers.<sup>30</sup> Thus, under CGL's, there are many barriers to securing full protection against claims brought by asbestosis victims since their injuries occur gradually.<sup>31</sup>

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27. 2 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 11.01, at 11-2 (1986). Essentially, CGL's provide that the insurer shall:

Pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury which is caused by an occurrence. Bodily injury is an injury, sickness or disease which occurs during the policy period, including death at any time resulting therefrom. An occurrence is an accident, including continuous or repeated exposure to conditions which results in bodily injury, sickness or disease which occurs during the policy period.

Mansfield, *supra* note 2, at 875.

28. CGL's generally cover "occurrences," not "accidents." Mansfield, *supra* note 2, at 875. Accident policies are, by their terms, more restrictive than occurrence policies. Because of the long established definition of "accident" within the insurance industry, accident policies cover only sudden, fortuitous events. Forest, *Liability Insurance . . . Placement and Underwriting*, NAT'L INS. BUYER, Nov. 1959, at 10, 36. *But see* J. APPELMAN, *INSURANCE LAW AND PRACTICE* § 4492 (Berdal ed. 1979). When used without restriction or qualification, the word accident has been held to be broader than the restricted definition of a sudden, violent event. *Id.*

29. *See, e.g.*, *Deodato v. Hartford Ins. Co.*, 143 N.J. Super. 396, 402, 363 A.2d 361, 365 (1966) (contractor's declaratory judgment action against insurer regarding duty to defend). *See also* *Insurance Co. of N. Am. v. Sam Harris Constr.*, 22 Cal. 3d 409, 583 P.2d 1335, 149 Cal. Rptr. 292 (1978) (aircraft liability insurer's declaratory relief action regarding the duty to defend a negligent maintenance suit); *California Union Ins. Co. v. Landmark Ins.*, 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983) (progressively worsening damage to property due to seepage from swimming pool).

30. CGL's feature standardized language that is drafted by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. *See supra* note 27. Individual carriers may, however, vary this language to suit their needs. *See* Ingram, *Insurance Coverage Problems in Latent Injury Cases*, 12 ENVTL. L. 317, 339 (1982).

31. *See generally* D. MACDONALD, *CORPORATE RISK CONTROL* 343-44 (1966); R.

In addition, CGL policies provide that the insurer will pay all sums that the insured becomes legally obligated to pay as a result of bodily injury caused by an occurrence.<sup>32</sup> Bodily injury is defined under CGL's as bodily injury, sickness or disease that occurs during the policy period, and includes death at any time that results from that bodily injury.<sup>33</sup> An occurrence is defined as an accident, including repeated exposure to conditions, that results in bodily injury.<sup>34</sup> The phrase "including injurious exposure to conditions resulting in injury" eliminates the need to prove that the injury resulted from a sudden event.<sup>35</sup>

### 1. *The Insurer's Duty to Defend and Indemnify*

Under a CGL policy, the insurer's duty to defend arises when the asbestosis victim files a complaint asserting the asbestos-product manufacturer is liable for injuries sustained.<sup>36</sup> The duty to defend is much broader than the duty to indemnify<sup>37</sup> since a defense obligation arises whenever the claimant's complaint alleges injuries within the policy's coverage.<sup>38</sup> It is the scope of the complaint, not the truth of

KEETON, BASIC TEXT ON INSURANCE LAW § 5.4(c) (1971).

32. See *supra* note 27.

33. *Id.*

34. *Id.* The 1973 CGL policy further defined occurrence by including "injury [or] damage neither expected nor intended from the standpoint of the insured." 2 R. LONG, *supra* note 27, § 11.01, at 11-6. By combining the CGL agreement with its definitions, a rather redundant contractual agreement results:

The insurer will pay damages because of bodily injury which occurs during the policy period, caused by continuous and repeated exposure to conditions which result in bodily injury, sickness or disease which occurs during the policy period.

See Mansfield, *supra* note 2, at 875.

35. 2 R. LONG, *supra* note 27, § 11.06, at 11-40.

36. As a general rule, the allegations of the complaint are determinative of the insurer's duty to defend. Annot., 50 A.L.R.2d 458, 465 (1952). See, e.g., Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (third party's complaint sufficiently apprised insurer of its potential liability; therefore, insurer bears a defense duty); Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir. 1981) (California law requires only that the complaint allege facts which give rise to potential liability under the policy to trigger the insurer's duty to defend).

37. E.g., St. Paul Fire & Marine Ins. Co. v. Sears, Roebuck & Co., 603 F.2d 780 (9th Cir. 1979); Walters v. Marler, 83 Cal. App. 3d 1, 147 Cal. Rptr. 655 (1978). For a comprehensive discussion of the insurer's duty to defend, see Comment, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734 (1966).

38. See *supra* note 36. The result is that even if the insurer is certain no liability exists, it must still defend the suit. This result occurs because CGL language provides that the insurer will defend any suit against the insured, even if the suit is groundless, false or fraudulent; but the insurer may make investigation, negotiation and settlement of any claim. Essentially, the insurer has made a trade-off between having full control of the defense, and defending false claims. 1A R. LONG, *supra* note 27, § 5.02, at 5-19, 5-30-5-35.

its allegations, that gives rise to the insurer's duty to defend.<sup>39</sup>

Because of the various potential liabilities involved in asbestosis cases, many asbestos insurers and insureds file declaratory relief actions<sup>40</sup> to determine whether or not the insurer has a duty to defend the insured in a given case.<sup>41</sup> If the court finds that there is no obligation to defend, the insurer avoids costly defense litigation. The critical issue for resolution in these declaratory relief actions is whether or not the asbestosis victim's injury falls within the insurer's policy coverage.

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39. 1A R. LONG, *supra* note 27, § 5.02, at 5-29. See also California State Auto. Ass'n Inter-Ins. Bureau v. Bourne, 162 Cal. App. 3d 89, 208 Cal. Rptr. 131 (1984) (the substance of the pleadings measures the insurer's defense obligation); Karpe v. Great Am. Indem. Co., 190 Cal. App. 2d 226, 11 Cal. Rptr. 908 (1961) (where allegations of the complaint show potential liability within the policy's coverage, the insurer has a duty to defend).

In a multiple insurer situation, discussed *infra* notes 42-53 and accompanying text, whether one of the carriers may discharge its defense obligation by paying out its policy limit in settlement has not been clearly decided. R. LONG, *supra* note 27, § 5.25. Several courts have reasoned that since the duty to defend is broader than the duty to indemnify and the indemnification language is contained in a separate clause, an insurer may not avoid its obligation to defend by paying out its policy limits in settlement. For example, several cases have held that, to some extent, the insurer must defend even though indemnification coverage may be exhausted. See, e.g., American Casualty Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); American Casualty Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1950); and National Casualty Co. v. Insurance Co. of N. Am., 230 F. Supp. 617 (D.C. Ohio 1964). See also Annot., 27 A.L.R.3d 1057, 1061-64 (1969).

On the other hand, several courts and commentators have found that, under current policy language, the duty to defend ends when the policy's limits have been exhausted. Moreover, one commentator has argued that it may be unethical for an insurer to continue defending upon exhaustion of the policy limits because the insurer has no financial interest in the outcome. Gowan, *Provisions of Automobile and Liability Insurance Contracts*, 30 INS. COUNS. J. 96, 97-98 (1963). Professor Keeton suggests that placing the insurer in control of the litigation after it no longer has a financial interest may be inconsistent with prohibitions against corporate practice of law. Keeton, *Ancillary Rights of the Insured Against His Liability Insurer*, 13 VAND. L. REV. 837, 854 (1960). See also Denham v. LaSalle Hotel Co., 168 F.2d 576 (7th Cir. 1948), *cert. denied*, 335 U.S. 871 (1948); Aetna Casualty & Sur. Co. v. Certain Underwriters at Lloyds, London, 56 Cal. App. 3d 791, 129 Cal. Rptr. 47 (1976).

40. A declaratory judgment declares the rights of the parties or expresses the court's opinion on a question of law. See generally Paramount Pictures Corp. v. Holden, 166 F. Supp. 684 (S.D. Cal. 1958); Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543, 122 P.2d 3 (1942). See also CAL. CIV. PROC. CODE § 1060 (Deering Supp. 1986) (any interested party may bring an action for the declaration of his rights and duties including a determination of any question of construction); 28 U.S.C. § 2201 (1983) (any court of the United States may declare the rights and other legal relations of any interested party).

41. A liability insurer may offer to defend subject to reservation of the right to disclaim coverage or may file a declaration to test its duty to defend. State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co., 9 Cal. App. 3d 508, 88 Cal. Rptr. 246 (1970). An insurer's declaratory action to establish non-liability under a policy is one of the prime purposes of 28 U.S.C. § 2201. Western Casualty & Sur. Co. v. Teel, 391 F.2d 764 (10th Cir. 1968).



## 2. Primary and Excess Insurers

A liability insurer may be either a primary or an excess carrier. A primary carrier agrees that the limits of its policy shall be exhausted first, and an excess insurer agrees to indemnify amounts over that of the primary coverage.<sup>42</sup> The insurer's purpose in including an excess clause is to limit or eliminate that insurer's liability because the insured has other coverage available.<sup>43</sup> Excess clauses have proved to be highly disfavored since courts will, where possible, construe policies to promote coverage.<sup>44</sup> Therefore, unless the insurer specifically states it is an excess carrier, the court will consider it a primary insurer.<sup>45</sup> If the coverage is excess, the excess carrier is not obligated to contribute to a damages award or settlement until the limits of the primary carrier's coverage have been exhausted.<sup>46</sup> The primary and excess insurer distinction is important in situations where the insured claims both primary and excess coverage. Since many insureds purchase both layers of coverage over many years, declaratory relief actions are then brought to determine the amount of each carrier's liability.

Where both primary and excess policies are used in settling a claim, several possibilities for apportionment of the liability exist. First, where one carrier is clearly primary and the other is clearly excess, the primary fund will be exhausted before the excess insurer will be forced to contribute.<sup>47</sup> Second, if both policies contain excess clauses, the clauses will be disregarded as being mutually repugnant

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42. Primary coverage is insurance coverage whereby, under the terms of the policy, liability attaches immediately upon the happening of the occurrence that gives rise to liability. *Olympic Ins. Co. v. Employers' Surplus Lines Ins. Co.*, 126 Cal. App. 3d 593, 597, 178 Cal. Rptr. 908, 910 (1981). Excess insurance is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. *Id.* at 598, 178 Cal. Rptr. at 910-11.

43. Excess insurance is written with the expectation that the primary insurer will conduct the defense of all of the claims until its limits are exhausted. *See Signal Co.'s, Inc. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 365, 612 P.2d 889, 893, 165 Cal. Rptr. 799, 803 (1980).

44. There are four general rules of insurance policy construction. First, the policy language should be given its clear, literal and unambiguous meaning. Second, the meaning of policy provisions can often be determined by the meaning the parties to the contract attach to its terms and that meaning may be inferred from their conduct. Third, if a provision is ambiguous, it will be construed against the insurer, and in favor of the insured. Lastly, the reasonable expectations of the insured should be honored. *Ingram*, *supra* note 30, at 342-44.

45. 1A R. LONG, *supra* note 27, § 5.24, at 5-166-5-167. *See also* *Pacific Indem. Co. v. Truck Ins. Exchange*, 269 Cal. App. 2d 501, 74 Cal. Rptr. 793 (1969).

46. *Valentine v. Aetna Ins. Co.*, 564 F.2d 292 (9th Cir. 1977); *Nabisco, Inc. v. Transport Indem. Co.*, 143 Cal. App. 3d 831, 192 Cal. Rptr. 207 (1983).

47. *See supra* note 42 and accompanying text.

thereby deeming both insurers to be primary carriers.<sup>48</sup> Third, where there are conflicting pro rata<sup>49</sup> and excess clauses, the pro rata clause is disregarded thereby making the policy primary, and the excess clause is then given full effect.<sup>50</sup> Finally, if an excess clause conflicts with an escape clause,<sup>51</sup> the general trend is to enforce the escape policy as primary to the excess insurer.<sup>52</sup>

The question of *when* the asbestosis victim was injured is the key to determining which insurers must defend and indemnify the insured because the insurance carrier at the time of the claimant's injury will be held responsible for those costs. The "when" question is the most debated issue in recent asbestos litigation. Courts have approached the "when" issue by applying one of three conflicting theories to define what constitutes an occurrence.<sup>53</sup>

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48. *Home Ins. Co. v. Certain Underwriters at Lloyds, London*, 729 F.2d 1132 (7th Cir. 1984) (mutually repugnant excess clauses disregarded and each insurer held liable for a pro rata share of liability); *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 83 Cal. App. 3d 593, 148 Cal. Rptr. 57 (1978) (conflicting excess clauses cancel each other out and the loss is prorated in proportion to coverage).

49. Pro rata clauses provide that if the insured has other insurance against the claimed loss, the insurer shall not be liable for a greater proportion of the loss than the applicable liability limit bears to the total liability limits of all insurance against the loss. 16 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 62:6 (2d ed. 1983). Thus if Insurer X carried a \$100,000 CGL containing a pro rata clause, and Insurer Y carried a \$50,000 CGL, the liability for a \$125,000 loss would be \$83,750 indemnification from Insurer X and \$41,250 from Insurer Y. This result was reached as follows: Since Insurer X's liability cannot exceed the ratio of its total liability coverage available (\$100,000 to \$150,000, or 67%), its total liability is 67% of the \$125,000 loss, or \$83,750. This then leaves \$41,250 to be indemnified by Insurer Y.

50. *Hartford Accident and Indem. Co. v. Civil Serv. Employers' Ins. Co.*, 33 Cal. App. 3d 26, 108 Cal. Rptr. 737 (1973); *Truck Ins. Exch. v. Interinsurance Exch. of Auto. Club of S. Cal.*, 33 Cal. App. 3d 984, 109 Cal. Rptr. 458 (1973).

51. Escape clauses, also known as no liability clauses, provide that the policy is void if there is another policy applicable to that loss. *Continental Casualty Co. v. Pacific Indem. Co.*, 134 Cal. App. 3d 389, 394, 184 Cal. Rptr. 583, 585 (1982). It is, however, well established that no liability clauses are less favored under law than pro rata or excess clauses. *Argonaut Ins. Co. v. Transport Indem. Co.*, 6 Cal. 3d 496, 508, 492 P.2d 673, 680, 99 Cal. Rptr. 617, 624 (1972); *Employer's Reins. v. Mission Equities Corp.*, 74 Cal. App. 3d 826, 831, 141 Cal. Rptr. 727, 731 (1977).

52. *Continental Casualty Co. v. Pacific Indem. Co.*, 134 Cal. App. 3d at 398, 184 Cal. Rptr. at 586 (escape clause not to be given effect because excess insurers did not adequately cover the insured); *Home Indem. Co. v. Mission Ins. Co.*, 251 Cal. App. 2d 942, 961, 60 Cal. Rptr. 544, 558 (1967) (public policy which strikes down escape clauses does not require excess clauses to be stricken down).

53. After *Borel* allowed for recovery against asbestos-product manufacturers, several approaches have been urged for attaching insurance coverage to the manufacturers' damages payments. One approach, discussed *infra* text accompanying notes 54-77, attaches liability to the carriers who provided coverage at the time of the claimant's initial exposure to asbestos hazards. A second approach, which is discussed *infra* text accompanying notes 78-91, attaches liability to the insurers providing coverage when the claimant's asbestos-related disease becomes manifest. A third theory, discussed *infra* text accompanying notes 92-108, holds the

## D. *The Conflicting Theories*

### 1. *The Exposure Theory*

One of the three conflicting theories is the exposure theory which assumes there is an occurrence when the claimant first comes into contact with the asbestos hazards.<sup>54</sup> The claimant's exposure typically occurs at his place of employment where he is in frequent contact with asbestos dust. Thus, under the exposure theory, insurance coverage is triggered by the policy in effect during the claimant's exposure to asbestos hazards, regardless of when the disease is subsequently diagnosed.<sup>55</sup> In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,<sup>56</sup> the Sixth Circuit Court of Appeals held that those insurers providing coverage at the time of the claimant's exposure were liable for defense and indemnification costs.<sup>57</sup> The court of appeals in *Forty-Eight* upheld the district court's adoption of a pro rata theory.<sup>58</sup> Under the pro rata theory, defense and indemnification costs are to be prorated among each of the manufacturer's insurers providing coverage at the time of the claimant's exposure.<sup>59</sup> Manufacturers who were uninsured during periods in which a claimant was exposed to asbestos hazards are to be included within the apportionment formula under this theory.<sup>60</sup> Therefore, if an asbestos-product manufacturer was uninsured for ten of its fifty years of production, it would be liable for its pro rata share, or one-fifth of the total liability.

Underlying the court's holding was the fact that *Forty-Eight*, now uninsured, would have otherwise been unable to provide a remedy for its claimants. Thus, the exposure theory was the most appropriate solution under the circumstances.<sup>61</sup> The court in *Forty-*

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insurers providing coverage from exposure through manifestation liable for defense and indemnification costs.

54. Mansfield, *supra* note 2, at 876.

55. Some insurers argue that manifestation of asbestosis has nothing to do with when a bodily injury occurred, and, therefore, those insurers providing coverage when the claimant's disease is diagnosed are to be disregarded. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1217 (6th Cir. 1980).

56. 451 F. Supp. 1230 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *reh'g granted in part*, 657 F.2d 814 (6th Cir. 1981).

57. *Forty-Eight*, 633 F.2d at 1225-26. *Forty-Eight* was a declaratory relief action between the manufacturer, *Forty-Eight Insulations*, and several insurers. Since *Forty-Eight* involved no asbestosis victims as parties, the court's decision concerns only the insurers' defense and indemnification duties in future suits.

58. *Id.* at 1224.

59. *Id.*

60. *Id.* at 1224-25.

61. See *infra* note 68 and accompanying text.

*Eight* viewed the conduct of the insurer to be significant in determining liability as well. For example, prior to disclaiming its indemnification and defense duties,<sup>62</sup> the Insurance Company of North America (INA) considered exposure, not manifestation, to be the determining factor for its defense and expense contributions.<sup>63</sup> Moreover in each of the last 150 asbestos lawsuits defended by INA without objection or reservation, the claimant's manifestation date<sup>64</sup> came *after* INA's coverage expired.<sup>65</sup> Since the meaning of contract terms may be inferred from a party's conduct, the court interpreted INA's conduct regarding those lawsuits as inferring that its policies *required* application of the exposure theory.<sup>66</sup> Additionally, the court feared that *Forty-Eight's* insurance coverage would be rendered illusory unless the court adopted the exposure theory,<sup>67</sup> since *Forty-Eight* would, in effect, be deprived of coverage it had previously paid for, and would be unable to secure coverage in future cases.<sup>68</sup>

One year after the Sixth Circuit decided *Forty-Eight*, the Fifth Circuit, in *Porter v. American Optical Corp.*,<sup>69</sup> followed the rationale of *Forty-Eight* and held those insurers providing coverage at the time of the claimant's initial exposure liable for the claimant's injuries.<sup>70</sup> Charles Porter brought suit for injuries resulting from his twenty-five years of employment with National Gypsum.<sup>71</sup> The defendant, American Optical, was the manufacturer of a respirator and filter, used by Porter during his employment, which were defectively designed and therefore failed to protect Porter from asbestos hazards.<sup>72</sup> Consistent with the rationale in *Forty-Eight*, the *Porter* court apportioned the insurance liability among those insurers who provided coverage at the time Porter was exposed to the asbestos

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62. In 1977, the Insurance Company of North America (INA) advised *Forty-Eight* of its disclamation of all defense and indemnification duties with respect to any asbestos-caused injuries which became manifest after October 31, 1972, the date INA's final policy expired. *Forty-Eight*, 451 F. Supp. at 1236.

63. *Id.* at 1239.

64. The manifestation date is the date at which the claimant's asbestos-related disease becomes reasonably capable of being diagnosed. See *infra* note 81 and accompanying text.

65. *Forty-Eight*, 451 F.Supp at 1239.

66. *Id.* "The meaning the parties themselves attach to the terms of the contract can be inferred from their conduct." *Id.* See *supra* note 45.

67. 451 F. Supp. at 1240.

68. *Id.* "If the manifestation theory is adopted, *Forty-Eight* would be effectively deprived of coverage it paid for and might be unable to secure coverage for liability in future cases where manifestation occurs after coverage is not available." *Id.*

69. 641 F.2d 1128 (5th Cir. 1981).

70. See *supra* notes 58-60 and accompanying text.

71. 641 F.2d at 1130-31, 1133.

72. *Id.* at 1131, 1136-37.

hazards.<sup>73</sup> The key time period used for apportionment of defense and indemnification costs in *Porter* was the entire twenty years of Porter's exposure.<sup>74</sup>

The Fifth Circuit did not set any guidelines for apportioning the defense and indemnification costs<sup>75</sup> other than fixing the relevant time period to be used in apportionment as the years in which the asbestosis victim was exposed to the asbestos hazards.<sup>76</sup> *Porter* is simply a reaffirmance of the exposure theory and its rationale. It did not answer significant questions regarding apportionment of costs between primary and excess insurers, nor did it give guidance as to the effect of "other insurance" clauses which attempt to limit liability, and may have been in the policies in question.<sup>77</sup>

## 2. *The Manifestation Theory*

In contrast to the exposure theory, the manifestation theory attaches liability to those insurers providing coverage when the claimant's disease physically manifests, i.e. when the claimant knows he is suffering from asbestosis or is diagnosed as having asbestosis.<sup>78</sup> Consequently, the manifestation theory denies coverage during those periods of asbestos exposure in which asbestosis was not diagnosable.<sup>79</sup>

The leading case adopting the manifestation theory is *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*<sup>80</sup> In *Eagle-Picher*, the First Circuit held that the pertinent date for determining the insurer's liability is the date at which the asbestos-related disease becomes reasonably capable of diagnosis.<sup>81</sup> *Eagle-Picher In-*

73. *Id.* at 1145.

74. *Id.*

75. *Id.* The court realized that exact proration would be complicated by "other aspects of the insurance policies." *Id.* The court, however, evaded prorating the exact amount of liability by concluding that other CGL clauses, not in issue, may affect the proration. *Id.*

76. *Id.*

77. *See supra* note 75.

78. Mansfield, *supra* note 2, at 876. Under the manifestation theory, coverage attaches when the asbestos-related condition becomes known, should have become known, or is actually diagnosed. *Id.*

79. Comment, *Insurance Coverage of Asbestos Claims — Running for Cover or Coverage*, 32 EMORY L.J. 901, 931 (1983). Since under the manifestation theory, liability attaches upon diagnosis, coverage under periods of exposure to asbestos hazards is disregarded. *See also supra* note 55.

80. 523 F. Supp. 110 (D. Mass. 1981), *modified on reh'g*, 682 F.2d 12 (1st Cir. 1982).

81. 682 F.2d at 24-25. The court interpreted the policy language to require that exposure result in injury that is *reasonably capable* of diagnosis, not that the injury be *actually* diagnosed during the policy period. *Id.* at 24-25. On the other hand, the statute of limitations is usually tolled until a plaintiff discovers his injury. *Urie v. Thompson*, 337 U.S. 163 (1949).

dustries had been mostly uninsured during the longest exposure periods, and the claims arising from periods in which Eagle-Picher was insured were rapidly increasing.<sup>82</sup> In 1978, Eagle-Picher sought declaratory relief to determine what obligation its various insurers had to defend and indemnify in the 5000 asbestos cases pending against Eagle-Picher.<sup>83</sup> The district court held that manifestation of asbestosis, and not exposure to asbestos hazards, equates with bodily injury.<sup>84</sup>

The court based its reasoning upon medical evidence and basic tenets of insurance law.<sup>85</sup> Medical evidence produced at trial showed that, in most instances initial exposure may not lead to asbestosis.<sup>86</sup> To produce asbestosis, a substantial amount of exposure over a lengthy period of time is required.<sup>87</sup> The court in *Eagle-Picher* applied the general rule of insurance law, that unambiguous contract terms be given their ordinary meaning, to the policy terms "bodily injury, sickness and disease."<sup>88</sup> The district court's result was that the manifestation theory should apply because the underlying claims were based, not on a *process* of exposure, but on fully *manifested* asbestosis.<sup>89</sup> On appeal, the First Circuit affirmed, stating, first, that application of the manifestation theory was required because the policies in effect clearly distinguished between exposure and the resulting injury or disease; and, second, that the common meaning of the policy language supported the manifestation theory.<sup>90</sup>

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82. 682 F.2d at 23. Eagle-Picher was uninsured prior to 1968, the period of greatest exposure. *Id.* Eagle-Picher purchased CGL coverage in 1968, and continued to purchase it in increasing amounts through the 1970's even though it stopped producing asbestos-containing products in 1971 or 1972. *Id.*

83. 523 F. Supp. at 111.

84. *Id.* at 115.

85. *Id.* at 115-16.

86. A medical expert testified that 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop asbestosis. *Id.*

87. The effects of excessive inhalation of asbestos dust are both time and dose related. Therefore, there *may* be levels of exposure that will not result in any increased risk of disease. Mansfield, *supra* note 2, at 861.

88. 523 F. Supp. at 115-16.

89. *Id.* at 116. The manifestation proponents argue that all of the underlying claims against Eagle-Picher alleged fully manifested asbestosis, not subclinical cellular injuries. The court saw the layperson's understanding of asbestosis to be a symptomatic, diagnosable disease. *Id.*

90. 682 F.2d at 19. The court used Webster's Dictionary to define "injury" as hurt or damage sustained, and thereby concluded that asbestosis results when one has symptoms that impair their sense of well-being, or when a doctor could make a prognosis that manifestation is inevitable. *Id.*

The court also discussed the fact that other asbestos-related diseases, e.g., mesothelioma, are apparently not cumulative like asbestosis; therefore, given the desirability to similarly treat

The fact that Eagle-Picher was, for the most part, uninsured during the heaviest periods of exposure<sup>91</sup> was a major factor in the court's reasoning since public policy urges coverage of the insured in order to compensate the victims of asbestos-related diseases. If the exposure theory had been applied, Eagle-Picher would not have been able to pay the thousands of uninsured claims brought against it. The court in *Eagle-Picher* was forced to choose between applying the manifestation theory which would allow recovery by asbestosis victims, or applying the exposure theory which would have left thousands of victims without a remedy.

### 3. *The Exposure In Residence Theory*

The exposure in residence theory is a hybrid of the exposure and manifestation theories. Under the exposure in residence theory, each insurer, from the period of initial exposure through manifestation, is required to indemnify and defend the insured.<sup>92</sup>

Adopting the exposure in residence theory, the Court of Appeals for the D.C. Circuit, in *Keene Corp. v. Insurance Co. of North America*,<sup>93</sup> relied upon the expectations of the insurer and the insured to arrive at a contract interpretation which would be equitable, feasible and consistent with contract principles.<sup>94</sup> The exposure in residence theory assumes that an occurrence of asbestosis involves an injurious process that begins with exposure and ends with manifestation.<sup>95</sup> Following this rationale, *Keene* held each insurer providing coverage from the time of initial exposure through manifestation liable for the insured's defense and indemnification costs.<sup>96</sup> Writing for the majority, Judge Bazelon reasoned that the exposure theory would characterize the subsequent development of disease as a consequence of the original exposure, thereby denying additional

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all asbestos-related diseases, the manifestation theory is "more compatible with the medical evidence and the policy language." *Id.* at 19 n.3.

91. The court noted that unlike Eagle-Picher, Forty-Eight, to whom the exposure theory applied, carried insurance during a substantial period of exposure to its products. *Id.* at 23 n.9.

92. Obremski, "Toxic Tort" *Litigation and the Insurance Coverage Controversy*, 34 *FED'N OF INS. COUNS. Q.* 3, 20 (1983) (called the "continuous trigger" theory by the author).

93. 513 F. Supp. 47 (D.D.C.), *aff'd*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

94. 667 F.2d at 1041.

95. *Id.* at 1047.

96. *Id.* At the time, Keene had been named as a co-defendant in over 6,000 lawsuits that alleged injury caused by exposure to its asbestos products. *Id.* at 1038.

coverage for the resultant disease.<sup>97</sup> In effect, the exposure theory was thought to undermine the certainty which is reasonably expected from insurance agreements. Under the exposure theory, the insured would be held liable for those latent asbestos injuries whose development began with exposure prior to the policy period, whereas the insured would not be liable, under identical facts, if the manifestation theory were applied.<sup>98</sup>

The court in *Keene* saw this discrepancy between the exposure and manifestation theories as an unfair, "either-or" approach.<sup>99</sup> Accordingly, the court concluded that asbestos-related diseases continually trigger coverage under CGL's. Thus, pursuant to the *Keene* rationale, each stage of asbestosis development triggers coverage under a CGL: the initial exposure, exposure in residence (disease development), and manifestation.<sup>100</sup> In sum, bodily injury was interpreted by the *Keene* court to mean any part of the single injurious process from which asbestos-related diseases develop.<sup>101</sup>

The *Keene* court rejected application of a pro rata approach to defense and indemnification costs,<sup>102</sup> and instead held each insurer liable for the entire amount of liability.<sup>103</sup> The insured, Keene, was not allowed to "stack" the liability limits of the applicable policies.<sup>104</sup> Rather, Keene was told to select the one policy under which it was to be indemnified.<sup>105</sup> Pursuant to *Keene*, after the insured chooses the applicable policy, that insurer may require indemnifications from the other insurers in proportion to their liabilities, subject to the

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97. *Id.* at 1044.

98. A manufacturer who purchased CGL coverage would not bear the risk of liability for diseases that occurred due to exposure during the covered period. It would, however, bear the risk for diseases that manifest themselves during the covered period, but occurred due to exposure during an uninsured period. *Id.*

99. Obremski, *supra* note 92, at 19.

100. 667 F.2d at 1047.

101. *Id.*

102. *See supra* text accompanying notes 59-60. The Keene Corporation's insurer argued that Keene should bear its pro rata share of liability costs for periods of exposure during which Keene was uninsured. The insurer based its argument on its characterization of asbestos-related diseases as constituting a multitude of discrete injuries. Because the court declined to rely on that characterization to determine when coverage is triggered, it also declined to rely on it to determine the extent of coverage. 667 F.2d at 1047.

103. 667 F.2d at 1047.

104. The term "stacking" refers to a recovery under more than one policy by placing one policy upon another and recovering from each until either all of the damages are satisfied or the limits of all of the policies are exhausted. *Lopez v. Foundation Reserve Ins. Co.*, 98 N.M. 166, 646 P.2d 1230 (1982). Therefore, if Keene were allowed to stack its liability limits, it would have been entitled to full indemnity for each injury up to the sum of the limits provided by the applicable policies.

105. 667 F.2d at 1049-50.



"other insurance" clauses in the policies.<sup>106</sup> This in effect, places the burden upon insurers to either determine apportionment of coverage consensually among themselves or adjudicate the issue in a subsequent lawsuit.<sup>107</sup> Under the *Keene* approach, where a manufacturer was uninsured during some periods of exposure, that manufacturer may escape its pro rata share of the total liability for periods of exposure in which it was uninsured since the total liability is placed with the one insurer that the manufacturer selected.<sup>108</sup>

### E. *No Clear Path Has Been Set For Future Litigation*

The cases discussed above are examples from the few jurisdictions that have answered the question of which insurer is obligated to defend and indemnify asbestos claims brought against the manufacturer insureds.<sup>109</sup> However, none of these cases have shown a preference for any single theory. Unless a uniform theory is promulgated, there are a number of possible outcomes for future asbestosis cases. Recent federal and California cases illustrate the problems created by the conflicting judicial rationales adopted by various courts deciding insurance apportionment cases.

Applying California law, a recent Ninth Circuit case, *Hancock Laboratories v. Admiral Insurance Co.*,<sup>110</sup> rejected application of both the *Keene* and *Eagle-Picher* theories in favor of applying *Forty-Eight's* exposure theory.<sup>111</sup> *Hancock* was a declaratory relief action

106. *Id.* at 1050. "Other insurance" clauses, such as excess, pro rata and escape clauses, provide for the insurer's share of liability when there are other policies that apply to the same loss. See *supra* notes 42-52 and accompanying text.

107. 667 F.2d at 1051.

108. See *id.* at 1048-50. It is, however, unclear under *Keene* whether the insurer may seek indemnification from the manufacturer as a self-insured in subsequent litigation among insurers with regard to apportionment.

109. *Forty-Eight* was decided in the Sixth Circuit; *Porter*, in the Fifth Circuit; *Eagle-Picher* was decided in the First Circuit; and *Keene* is a District of Columbia Circuit case.

To date, there are no other circuit court of appeals cases or state supreme court cases on this issue which hold *Forty-Eight* as controlling. As to the manifestation theory, Ohio has adopted the manifestation theory only as to when a claimant's cause of action arises for statute of limitations purposes, not insurer liability. *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983). The Third Circuit follows *Keene*. *ACandS Inc. v. Aetna Casualty & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985) (commercial insulator's declaratory relief action against all liability insurers). The California Supreme Court has not yet addressed this issue specifically.

110. 777 F.2d 520 (9th Cir. 1985) (interpreting California law).

111. *Id.* at 525. Judge Reed, writing for the court, noted that the California Supreme Court had not yet decided this issue, and then went on to find that, under the circumstances, it was "probable that the California Supreme Court would find the reasoning and results of . . . *Forty-Eight* to be correct." *Id.* Another Ninth Circuit case, *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983), applied the manifestation theory to an asbestos case. *Todd*

between Hancock and its insurers with respect to a case involving a progressive injury due to the implantation of a contaminated porcine aortic valve.<sup>112</sup> Although the *Hancock* court looked to *Forty-Eight, Eagle-Picher* and *Keene*, the leading asbestosis cases, the type of injury presented to the Ninth Circuit was not substantially similar to those found in asbestosis cases. It was relatively simple for the *Hancock* court to determine that bodily injury took place upon implantation of the contaminated valve. As the court pointed out, only six months had elapsed between the injured party's exposure and manifestation of his injury,<sup>113</sup> whereas asbestosis does not develop for many years.<sup>114</sup> Thus, the *Hancock* court also declined to follow a recent California appellate court decision that discussed insurance coverage apportionment.<sup>115</sup>

In an earlier California court of appeal case, *California Union Insurance Co. v. Landmark Insurance Co.*,<sup>116</sup> two liability insurers sought declaratory relief to determine their respective liabilities for property damage that took place over a sixteen month period.<sup>117</sup> In June 1979, a swimming pool was built on the subject property.<sup>118</sup> Later, it was discovered that the pipes to the swimming pool, and possibly the pool itself, leaked, causing progressive saturation resulting in the damage.<sup>119</sup> The insurers both agreed that all of the damage, from July 1979 through November 1980, was caused by the swimming pool.<sup>120</sup> California Union Insurance Company, as the successor insurer, filed a declaratory relief action<sup>121</sup> asking for a de-

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*Shipyards*, however, was decided pursuant to 33 U.S.C. §§ 901-50 (The Longshoreman's & Harbor Workers Compensation Act (LHWCA)) which requires application of the manifestation theory. 717 F.2d at 1286. Pursuant to the LHWCA's "last covered employer rule" the last employer covered by the LHWCA who causes or contributes to an occupational injury is *completely* liable for the injury even if the employee incurred the injury, in part, while subsequently working for an employer who is not covered by the Act. *Id.* at 1287.

112. A porcine aortic valve is taken from a pig's heart, sterilized and placed in humans as a replacement valve in the aorta. 777 F.2d at 521 n.2. *See also* STEDMAN'S, *supra* note 12, at 1280, 114, 1734.

113. The porcine valve was implanted on December 15, 1976, and the contaminated valve had to be replaced six months later. 777 F.2d at 521-22.

114. *See supra* note 2.

115. 777 F.2d at 525 n.10. The circuit court did not feel bound by the California appellate cases because, *inter alia*, the circuit court is not bound by California court of appeal cases and the court viewed the appellate cases as applying the law incorrectly. *Id.*

116. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

117. *Id.* at 464-67, 193 Cal. Rptr. at 461-64.

118. *Id.* at 466, 193 Cal. Rptr. at 462-63.

119. *Id.* at 466, 193 Cal. Rptr. at 463.

120. *Id.* at 467, 193 Cal. Rptr. at 464.

121. *See supra* notes 40-41 and accompanying text.

termination of its liability under a CGL with respect to the earlier insurer, Landmark Insurance Company.<sup>122</sup>

The court discussed the similarities between asbestosis cases and the present situation involving gradual harm.<sup>123</sup> The main similarity was found to be the fact that the CGL's were being applied to single accident/occurrence, continuing damage claims.<sup>124</sup> Citing *Forty-Eight* and *Keene* with approval, the court combined the rationales of the two cases in order to apportion the liability of the two insurers,<sup>125</sup> noting that in cumulative injury cases apportionment has long been the rule in California.<sup>126</sup> The combination resulted in a variation of the *Keene* and *Forty-Eight* approaches, which the court applied to find both insurers liable for the full amount of the damages.<sup>127</sup>

*Hancock* and *California Union* are current examples of the inconsistent application of apportionment theories under identical legal principles. Given this inconsistency, each court is, apparently, free to apply any theory of liability apportionment to CGL insurers. Future courts considering this issue must choose a test to be applied. Each of the conflicting tests has its strengths and weaknesses, proponents and opponents.

### III. EXAMINATION OF THE CONFLICTING THEORIES

Generally, manufacturers approve of the exposure theory and insurers disapprove of it.<sup>128</sup> Insurers consider the exposure theory to be unfair because the theory binds them to policies that expired long ago and are considered closed by the insurer.<sup>129</sup> Manufacturers, on the other hand, approve of the exposure theory because, as a result of spreading losses back over numerous years of coverage, the manufacturer will not be faced with increased liability costs.<sup>130</sup>

122. 145 Cal. App. 3d at 468, 193 Cal. Rptr. at 464.

123. *Id.* at 477-78, 193 Cal. Rptr. at 470.

124. *Id.* at 478, 193 Cal. Rptr. at 471.

125. *Id.* at 478, 193 Cal. Rptr. at 470-71.

126. *Id.* at 478, 193 Cal. Rptr. at 471. See generally *City of Torrance v. Workers' Comp. Appeals Bd.*, 32 Cal. 3d 371, 650 P.2d 1162, 185 Cal. Rptr. 645 (1982) (employee's compensation award for cumulative injury apportioned between successive insurers); CAL. LAB. CODE § 5500.5 (Deering Supp. 1986) (apportionment of employer's liability for occupational disease or cumulative injury).

127. 145 Cal. App. 3d at 478, 193 Cal. Rptr. at 471.

128. See *Mansfield*, *supra* note 2, at 860, 876-77.

129. See Comment, *supra* note 79, at 931. A rule of law that binds a carrier to a policy that expired many years ago and is actuarially unrealistic is unfair. *Id.*

130. *Mansfield*, *supra* note 2, at 877. The general economic effect of the exposure theory is to spread losses back over numerous years of primary coverage. *Id.*

Commentators have used policy arguments to both support and oppose adoption of the exposure theory. Some assert that liability placed upon early insurers may make it more likely that the potential harm may be discovered earlier, and therefore the public could be warned earlier.<sup>131</sup> A similar argument insists that application of the exposure theory will help minimize accident costs by placing the burden upon manufacturers, the parties best able to evaluate the risks of hazardous activities.<sup>132</sup> Moreover, the increased CGL premiums that would follow will give manufacturers an incentive to maintain safer workplaces.<sup>133</sup>

On the other hand, there are competing policy interests with respect to those insurers who are held liable under the exposure theory. For instance, it may be unfair to hold insurers liable under policies that were extinguished many years before the claimant's loss, and are now considered obsolete by the insurer. By looking back to the time the claimant was exposed to asbestos hazards, the exposure theory may "resurrect claims that the insurer wrote-off many years ago."<sup>134</sup> Moreover, where a manufacturer was insured only during the early periods of production, the insurer would have to bear the burden of indemnifying a claim at today's prices, that is based on a policy generated decades ago.<sup>135</sup> Coverage paid on a claim based on today's figures which arose under a forty-year-old premium would be so disproportionate and unpredictable that many insurers may be financially ruined.

The manifestation theory is not as strongly supported by public policy as is the exposure theory because its application may discourage insurers from underwriting these types of policies.<sup>136</sup> If the manifestation theory were applied, few insurers would contract to protect a company that had exposed thousands of workers to asbestos hazards which are now manifesting. The courts, in interpreting CGL's, prefer to spread losses in a manner that results in fairness to all concerned parties;<sup>137</sup> therefore, the manifestation theory of liability will most often be rejected in favor of another theory.

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131. *Forty-Eight*, 633 F.2d at 1231 (Merritt, J., dissenting).

132. 26 VILL. L. REV. 1080, 1099 (1981).

133. *Id.*

134. Comment, *supra* note 79, at 931.

135. *Id.*

136. *Id.* An insurer might escape liability by cancelling or declining to renew coverage before manifestation results. *Id.*

137. It is a paramount principle of insurance policy construction that a policy should be interpreted to give effect to the intent of the parties. *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422, 427 (9th Cir. 1980).

Uniform adoption of either the exposure or manifestation theory is unlikely since both suffer from too many internal flaws. For example, where a manufacturer was insured twenty to forty years ago, but is presently uninsured, an asbestosis victim will have a complete remedy under the exposure theory, but no remedy whatsoever under the manifestation theory. Where the exposure theory is applied, the long latency period of asbestosis places a huge burden on insurers to defend and indemnify policies that, in all reasonableness, should be considered obsolete. The manifestation theory stands to be the least equitable solution since most manufacturers, now uninsured, would leave thousands of claimants completely without a remedy.<sup>138</sup> While application of the exposure and manifestation theories were required in their individual settings to provide coverage for the insured and redress for the asbestosis victim, they are prime examples of the maxim, "hard cases make bad law," and should not be applied to future asbestosis cases.

Although common law principles of insurance and contract law are similar throughout the states, and CGL's incorporate standardized terms in an attempt to reduce litigation regarding those terms, similar claims under similar policies interpreted under similar law have resulted in an array of resolutions. All concerned parties, the asbestosis victim, the insured manufacturer, and the insurer, are subject to protracted and expensive litigation to determine their rights and duties before any type of settlement can be reached.<sup>139</sup> Money that could be available for the asbestosis victim is spent on deciding who is to ultimately pay for the victim's harm.

Although each major asbestosis case has set forth an entirely different approach, the United States Supreme Court has not agreed to hear arguments on this issue.<sup>140</sup> With different jurisdictions applying different standards for apportioning liability, insurers and insureds can anticipate nothing more than different standards applied to identical issues. Presently, trial court judges are forcing settlements between asbestosis victims and manufacturers in an attempt

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138. In the mid-1970's, the insurance industry changed its policies which, in effect, left most asbestos-product manufacturers unable to obtain insurance, and brought about an end to adequate coverage of asbestosis victims. See Comment, *supra* note 79, at 912 n.12.

139. See also *infra* note 142. The Rand Corporation's Institute for Civil Justice released a study that shows asbestos victims have received \$236 million in compensation, their lawyers have received \$164 million, and defense attorneys earned \$600 million. L.A. Times, Feb. 13, 1984, at 10, col. 1.

140. The Supreme Court denied certiorari to Keene and its four insurers. 455 U.S. at 1007.

to reduce the huge backlog of asbestos cases.<sup>141</sup> Those asbestosis victims who are willing to go to trial have no way of predicting whether a judgment in their favor will lead to payment on their claim.<sup>142</sup> This uncertainty throughout the country may lead insurers, insureds and claimants to forum shop for a favorable outcome.<sup>143</sup> Until the courts adopt a more standardized approach, the only certainty in asbestos litigation is uncertainty.

#### IV. AN EQUITABLE AND FEASIBLE APPORTIONMENT THEORY FOR FUTURE ASBESTOSIS CASES — THE COMPREHENSIVE APPROACH

The most practical solution to this asbestos litigation problem is to adopt a comprehensive approach for apportionment. This approach involves an expansion of the *Keene* court's exposure in residence theory<sup>144</sup> for determining which insurers are liable for contribution, and to incorporate the *Forty-Eight* court's pro rata theory which apportions that liability among the insurers.<sup>145</sup> Although each of the three approaches set forth by the circuit courts have serious failings,<sup>146</sup> the *Keene* approach can be modified to best protect the intent and interests of all parties.

The court in *Keene* held that the limits of one CGL policy subject to "other insurance" provisions would apply to each injury.<sup>147</sup>

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141. One of the consequences of the asbestos litigation flood is the attempt by judges to dispose of the huge backlog of claims by forcing settlements. Winter, *The Asbestos Legal Tidal Wave Is Closing In*, 68 A.B.A. J. 397 (1982). Judges have openly admitted that because of the growing backlog, they impose stringent pretrial orders and otherwise pressure asbestos lawyers in an attempt to expedite litigation. *Id.*

142. In the past 20 years, 24,000 asbestos workers have filed lawsuits but only 4,000 have received compensation. L.A. Times, *supra* note 139, at 3, col. 1. Of the \$1 billion that asbestos-product manufacturers and their insurers have spent in compensation and legal expenses, asbestos victims have received only 37 cents of every dollar. N.Y. Times, Feb. 6, 1984, at A18, col. 2.

143. The Supreme Court's denial of insurers' appeals has been characterized as forcing "state-by-state" asbestos battles between insurers and insureds. N.Y. Times, March 9, 1982, at D7, col. 1. One result of the state-by-state battle could be that decisions from different jurisdictions will vary because of their divergent interpretations of insurance and contract law. *Id.*

144. See *supra* text accompanying note 92.

145. See *supra* text accompanying notes 59-60.

146. The exposure theory will bar recovery from asbestos-product manufacturers where the victim's disease manifests after the manufacturer is uninsured. See *supra* note 55 and accompanying text. On the other hand, the manifestation theory would bar recovery where the victim's disease became capable of diagnosis but the manufacturer was uninsured. See *supra* note 79 and accompanying text. The inconsistency in the exposure in residence theory is that it allows uninsured manufacturers to escape their pro rata share of liability. See *supra* text accompanying note 108.

147. 667 F.2d at 1049-50.

The time of the injury was determined to be a process that occurs throughout the periods of initial exposure, exposure in residence, and manifestation of asbestosis.<sup>148</sup> The *Keene* case takes into consideration the lengthy latency period of asbestosis and the underlying policy that encourages recovery for the asbestosis victim. By taking into account the protracted latency period of asbestosis that can span several coverage periods, *Keene* allows for a recovery that is the most equitable of all the asbestos decisions to date.

However, the *Keene* case has inconsistencies which, if left intact, will not help resolve asbestos litigation problems. First, *Keene* failed to set an adequate apportionment formula. The court in *Keene* found all of the insurers throughout the injurious process to be fully liable for defense and indemnification costs.<sup>149</sup> Not all of the insurers contribute to the defense and indemnification costs however, since the insured picks one policy to apply to that claim.<sup>150</sup> The second flaw in *Keene* is that the court allowed the Keene Corporation to escape liability for periods in which it was uninsured by holding that "each policy provides Keene with the right to be free of liability. . . ."<sup>151</sup> This proves to both be unfair to insurers and to provide a further incentive for insurers to refuse all future coverage to manufacturers. The manufacturer should not expect future insurance carriers to defend and indemnify it for those periods in which it was uninsured.<sup>152</sup>

The apportionment formula that would be the most fair to all parties is the pro rata method used in *Forty-Eight*.<sup>153</sup> Under a combination of *Keene* and *Forty-Eight*, defense and indemnification costs would be apportioned among all insurers providing coverage during the entire injurious process of the claimant's disease. In keeping with *Keene*, the "other insurance," excess insurance, and all other CGL clauses affecting the insurer's duty to defend and indemnify are to be taken into account when apportioning costs. In apportioning costs, a manufacturer who was uninsured during part of the injurious process will bear its share of the costs. Inclusion of uninsured manu-

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148. *Id.* at 1047.

149. *Id.* at 1048-49.

150. *Id.* at 1049.

151. *Id.* at 1048. Nothing in CGLs provide for a reduction in the insurer's liability if the injury occurs while Keene was uninsured. *Id.* at 1048-49. "Even if we had the authority [to consider Keene self-insured], what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies. . . ." *Id.*

152. However, in more recent years where insurers have completely stopped insuring asbestos-product manufacturers, public policy may urge the courts to allow the uninsured manufacturer to avoid inclusion in liability apportionment.

153. 633 F.2d at 1224. See *supra* text accompanying notes 56-60.

facturers into the apportionment formula is the most equitable solution for the insurers, manufacturers and claimants. This proposed comprehensive approach is a much more flexible and applicable test than those previously used. This approach will not result in an all or nothing application of a theory. Rather, this approach will spread losses equitably and practicably among all carriers, apportioning the total loss throughout the injurious process of asbestosis development.

To illustrate application of this proposed approach, the following hypothetical situation will be used. Manufacturer X produced asbestos-containing products from 1930 through 1980. An employee of Manufacturer X was exposed to asbestos hazards for twenty years. In the employee's suit against Manufacturer X, the defense costs and damages award totals \$1,500,000. Manufacturer X has now turned to his insurance carriers for defense and indemnification.

Throughout the fifty years that Manufacturer X was producing asbestos-containing products, four insurance carriers provided coverage, and, for five of those fifty years, Manufacturer X was uninsured. The following table shows the insurers, their policy periods, applicable "other insurance" clauses, and the policy limits.

Carrier	Policy Period	"Other Insurance" Clauses	Policy Limits
Insurer A	1935-1950	Primary Insurance	\$500,000
Insurer B	1956-1970	Pro Rata Clause	\$500,000
Insurer C	1961-1970	Excess Insurance	\$500,000
Insurer D	1966-1975	Escape Clause	\$500,000

First, there is some coverage overlap due to the varying policy periods. To manage this overlap, the total period of the worker's exposure to asbestos hazards (20 years) may be divided equally into four 5 year segments.<sup>154</sup> The total liability is then divided among those segments, resulting in a total liability for each 5 year segment of \$375,000. Next, the liability is apportioned among the carriers based upon the respective length of their policy periods and the effect of the applicable "other insurance" clauses. The total liability for defense and indemnification costs is to be apportioned as follows: No contribution from Insurer A; \$500,000 contribution from Insurer B;

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154. Here, for purposes of simplicity, the hypothetical has been designed to be divisible into four equal segments. In other situations, the apportionment may require division on a different basis, most likely yearly. For example, instead of dividing the total liability of \$1,500,000 into four segments of \$375,000, it may be divided yearly, throughout the twenty years of exposure, into segments of \$75,000 each.



\$250,000 contribution from Insurer C; \$375,000 from Insurer D; and \$375,000 contribution from Manufacturer X. The following table shows the resultant apportionment.

Time Period	Carriers Providing Coverage During This Period	Amount of Liability
1951-1955	Uninsured	\$375,000*
1956-1960	Insurer B	\$375,000
1961-1965	Insurer B	\$125,000
		\$250,000
1966-1970	Insurer B	None
	Insurer C	None
	Insurer D	\$375,000

\*This amount is to be paid by Manufacturer X since it was uninsured for one-fourth of the total exposure period.

Since Insurer A did not provide coverage during any of the twenty years of the employee's exposure it has no liability, and thus is not required to contribute to the defense and indemnification costs. Next, since Manufacturer X was uninsured for the years 1951-55, or one-fourth of the employee's exposure period, it must bear its pro rata share of the costs which equals \$375,000. As to the 1956-60 period, Insurer B was the only carrier providing coverage, thus, it is fully liable for that period. As to the 1961-65 period, there are two carriers, Insurer B and Insurer C, who must contribute. Since Insurer B's pro rata clause conflicts with Insurer C's excess clause, the pro rata clause is to be disregarded, thereby making Insurer B's policy primary and giving full effect to Insurer C's excess clause.<sup>155</sup> Therefore, Insurer B will be liable up to its policy limit of \$500,000. Insurer B, however, is already responsible for \$375,000 from the 1956-60 period, thereby leaving Insurer B a balance of \$125,000 of primary coverage responsibilities from the 1961-65 period. The remaining \$250,000 from the 1961-65 period will be paid by the excess carrier, Insurer C. With respect to the 1966-70 period, Insurer D must indemnify the \$375,000 liability. This is because Insurer D's escape clause conflicts with Insurer C's excess clause, and, following the general trend, Insurer D's escape policy will be enforced as primary to Insurer C's excess policy.<sup>156</sup> Since Insurer D is then deemed the primary carrier for this period, the entire costs for

155. See *supra* notes 49-50 and accompanying text.

156. See *supra* notes 51-52 and accompanying text.

that period, \$375,000, will be paid under the obligations of its policy.

As the hypothetical shows, the comprehensive approach is both equitable and feasible. Here, Insurer A did not provide coverage during the relevant time period, and thus, is not liable for any of the defense and indemnification costs. Insurer B, however, provided the longest period of coverage, and is considered a primary carrier. Thus, in all fairness, Insurer B carries the heaviest burden. Insurer C, having included a valid excess clause, carries the least responsibility for defense and indemnification costs, and Insurer D carries its fair share as a primary carrier. Furthermore, Manufacturer X, being uninsured for one-fourth of the claimant's total exposure period, must contribute its pro rata share of the costs. As illustrated above, this comprehensive approach can and should be utilized in future cases.

This comprehensive approach to apportionment, although new to the area of asbestos litigation, does not urge the California courts to take a radical step by adopting it. Rather, this approach, in substantially similar form, has already been applied in other contexts. The California Supreme Court, in *Sindell v. Abbott Laboratories*,<sup>157</sup> adopted what is commonly referred to as the "enterprise and market share" theory of liability. The court, in adopting this theory, imposed liability on each of eleven manufacturers of the drug DES, who were joined in the lawsuit, for their *proportionate share* of the victims' damages that were attributable to DES.<sup>158</sup> Similarly, under the apportionment formula proposed in this comment, an insurer's liability would be based on its proportionate share of the total coverage. In *Sindell*, apportioning liability based upon the defendants' proportionate market shares was the most feasible and equitable solution to allow redress for the claimants' injuries. Although the *Sindell* case deals with the liability of manufacturers of a fungible good, the same basic rationale applies with respect to insurance apportionment in asbestosis cases. Moreover, in *California Union Insurance*, a California appellate court has already taken a step towards adopting this apportionment formula for determining insurers' liability for coverage.<sup>159</sup> It is, therefore, reasonable to urge the California courts to adopt the comprehensive apportionment formula as discussed above. The similarities between the rationales and applica-

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157. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

158. *Id.*

159. See *supra* text accompanying notes 116-27.

tions of the proposed apportionment formula and the *Sindell* and *California Union* cases are great enough so that adoption of this formula is consistent with California legal principles.

## V. CONCLUSION

Until one theory of insurance coverage apportionment is applied to all asbestosis claims, the courts of California and every other state are free to apply different standards to similar cases. In each state that has yet to determine the insurance coverage issues in asbestos litigation, the asbestosis victim has no way of knowing whether his injury will be redressed. The comprehensive approach discussed within this comment is the most economically feasible standard for all of the victims of asbestos litigation — the insurer, the insured and the asbestosis victim.

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