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NOTES

THE INSURANCE PROBLEM IN ASBESTOSIS LITIGATION: A CASE FOR THE MANIFESTATION THEORY

Exposure to the materials and methods of this country's advanced technology has infected and disabled an alarming number of workers, consumers and bystanders.¹ Typically, personal injury arises as a result of exposure to some deleterious substance in the occupational setting,² although problems from insidious³ diseases have also been uncovered in the medical setting as a result of ingestion of certain drugs,⁴ most notably Diethylstilbestrol (DES).⁵ Undoubtedly, the full complement of medically and environmen-

¹ See *infra* note 7. Although typical latent disease cases involve injuries suffered by workers exposed to some harmful agent, see *infra* note 2 and accompanying text, it should be noted at the outset that the problem also encompasses users of products, Mehaffy, *Asbestos Related Lung Disease*, 16 FORUM 341, 351 (1980), and bystanders who may be exposed, including members of a worker's family and the public at large. 3 C. TEDESCHI, E. ECKERT & L. TEDESCHI, *FORENSIC MEDICINE* 1279 (1977) [hereinafter cited as C. TEDESCHI]; Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 861 (1980); Mehaffy, *supra*, at 350-51; Vagley & Blanton, *Aggregation of Claims: Liability For Certain Illnesses with Long Latency Periods Before Manifestation*, 16 FORUM 636, 637 (1981); Winter, *Asbestos Legal 'Tidal Wave' Is Closing In*, 68 A.B.A. J. 397, 398 (1982).

² See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976) (coal dust); *Urie v. Thompson*, 337 U.S. 163, 166 (1949) (silica dust); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081-82 (5th Cir. 1973) (asbestos), *cert. denied*, 419 U.S. 869 (1974).

³ The term "insidious" has been described as denoting a disease that "progresses with few or no symptoms to indicate its gravity." Comment, *Liability Insurance For Insidious Disease: Who Picks Up the Tab?* 48 FORDHAM L. REV. 657, 657 n.1 (1980) (quoting STEDMAN'S MEDICAL DICTIONARY 711 (4th unabr. lawyers' ed. 1976)). For the purpose of this Note, the terms "latent disease" and "insidious disease" will be used interchangeably.

⁴ See, e.g., *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 568 (3d Cir. 1976) (estrogen compound), *cert. denied*, 429 U.S. 1038 (1977); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 694, 60 Cal. Rptr. 398, 403 (Ct. App. 1967) (MER/29 (cholesterol inhibitor)); *McEwen v. Ortho Pharmaceutical Corp.*, 270 Or. 375, 381, 528 P.2d 522, 526 (1974) (oral contraceptive).

⁵ See *Transamerica Ins. Co. v. Bellefonte Ins. Co.*, 490 F. Supp. 935, 936 (E.D. Pa. 1980); *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 95 Misc. 2d 222, 222, 406 N.Y.S.2d 658, 659 (Sup. Ct. N.Y. County 1978); *infra* note 58.

tally triggered diseases has yet to be comprehended.⁶

Perhaps the most currently significant of the insidious diseases is asbestosis. Indeed, the tremendous number of people affected by the disease⁷ has sparked an overwhelming amount of litigation.⁸ At the root of the problems surrounding asbestosis litigation is the disease's extremely long period of latency.⁹ This latency has resulted in a conflict among the courts as to whether insurers' liability attaches at the point of exposure to the disease-causing substance or at the time of the disease's manifestation.¹⁰ The liability of particular insurers often hinges on resolution of

⁶ Vagley & Blanton, *supra* note 1, at 639. The potential claims for damages arising in the insidious disease context are virtually limitless. See Mansfield, *supra* note 1, at 875; Mehaffy, *supra* note 1, at 351; Rosow & Liederman, *An Overview to the Interpretive Problems of "Occurrence" in Comprehensive General Liability Insurance*, 16 FORUM 1148, 1152 (1981). Likely areas of future latent disease litigation include claims for damages resulting from: (1) radiation, see, e.g., Jaffee v. United States, 663 F.2d 1226, 1229 (3d Cir. 1981); Yannon v. New York Tel. Co., 86 App. Div. 2d 241, 243, 450 N.Y.S.2d 893, 894 (3d Dep't 1982) (microwaves); Rosow & Liederman, *supra*, at 1152, (2) pollution and toxic waste, see CONGRESSIONAL QUARTERLY, INC., ENVIRONMENT AND HEALTH 28-29 (1981) [hereinafter cited as ENVIRONMENT AND HEALTH]; Rosow & Liederman, *supra*, at 1152; and (3) Agent Orange, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 769 (E.D.N.Y. 1980); see ENVIRONMENT AND HEALTH, *supra*, at 31-33; Vagley & Blanton, *supra* note 1, at 639.

⁷ Workers in at least 14 industries have been exposed to asbestos. Vagley & Blanton, *supra* note 1, at 637. It has been estimated that approximately 9 million exposed workers are now alive. Winter, *supra* note 1, at 398 (discussing interview with Dr. Irving Selikoff, director of the Environmental Sciences Laboratory at Mt. Sinai School of Medicine); see Vagley & Blanton, *supra* note 1, at 647. It is predicted that 20,000 people will die annually in the United States from asbestos-related disease. Mehaffy, *supra* note 1, at 350; Vagley & Blanton, *supra* note 1, at 647. One commentator characterized the asbestosis situation as "the most widespread and confounding outbreak of occupational disease ever to sweep the United States." Reibstein, *The Deadly Curse of Asbestos*, Philadelphia Inquirer, Nov. 7, 1982 (Magazine), at 12, col. 3.

⁸ See Rosow & Liederman, *supra* note 6, at 1152; Comment, *supra* note 3, at 664. It was estimated that approximately 16,000 asbestos-related suits were pending in April 1982, and that the caseload was growing by 400 to 500 per month. Winter, *supra* note 1, at 397. The majority of the litigation has arisen in the federal courts, with jurisdiction based on diversity of citizenship. See, e.g., Porter v. American Optical Corp., 641 F.2d 1128, 1130 (5th Cir.), cert. denied, 454 U.S. 1109 (1981); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1040 n.10 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). Commonly named defendants include manufacturers such as Johns-Manville, Eagle-Picher, Owens-Corning, Pittsburgh-Corning, Celotex, Keene Corp., Armstrong Cork Co., and Raybestos-Manhattan. Mansfield, *supra* note 1, at 865.

⁹ E.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1040 n.9 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982); American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc., 95 Misc. 2d 222, 223, 406 N.Y.S.2d 658, 658 (Sup. Ct. N.Y. County 1978); Mehaffy, *supra* note 1, at 350; Vagley & Blanton, *supra* note 1, at 636; *infra* note 12 and accompanying text.

¹⁰ See *infra* notes 42-87 and accompanying text.

this question, since employers typically change insurers several times between the initial period of exposure and the time of manifestation.¹¹ Accordingly, this Note focuses upon the insurer's liability issues raised by asbestosis litigation. After a brief discussion of the disease itself and the attendant problems in the litigation context, the Note will present the judicial views on the subject—the exposure theory, the manifestation theory, and an approach which is essentially a hybrid of the two. The Note concludes that the manifestation theory provides the most workable solution and that, combined with certain finely tuned legislation, it will promote the expeditious and equitable resolution of asbestosis claims.

I. ASBESTOSIS AND THE INSURANCE PROBLEM

Asbestosis is an incurable lung condition which results after many years of development¹² from the inhalation of asbestos fibers.¹³ These fibers embed in the lungs,¹⁴ and over time, can lead

¹¹ See *infra* notes 25-29 and accompanying text.

¹² A. HAMILTON & H. HARDY, *INDUSTRIAL TOXICOLOGY* 423-28 (3d ed. 1974). Asbestosis is generally characterized as a cumulative or progressive disease, due to the considerable amount of time that normally elapses between the initial inhalation of asbestos fibers and the point at which operation of the lungs is impaired and the disease becomes diagnosable. *Porter v. American Optical Corp.*, 641 F.2d 1128, 1133 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); A. HAMILTON & H. HARDY, *supra*, at 423; 11 J. KALISCH & H. WILLIAMS, *COURTROOM MEDICINE* § 12B.40, at 12B-9 (1982); 3 C. TEDESCHI, *supra* note 1, at 1290; see Rosow & Liederman, *supra* note 6, at 1155; Vagley & Blanton, *supra* note 1, at 638; Comment, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S.D.L. REV. 239, 240 (1982). The progressive nature of asbestosis, coupled with the ill-defined contours of the early stages of the disease, contributes to difficulty in diagnosis, A. HAMILTON & H. HARDY, *supra*, at 423; C. TEDESCHI, *supra* note 1, at 1286-87; Heppleston, *Silica and Asbestos: Contrasts In Tissue Response*, 330 ANNALS N.Y. ACAD. SCI. 725, 726 Fig. 2 (1979), and leads to great confusion in the litigation context as courts attempt to determine the point of exposure, see *infra* note 36. It should be noted, however, that certain levels of exposure to asbestos may not result in disease. See Mansfield, *supra* note 1, at 861; *infra* note 30.

¹³ Asbestos refers to a combination of mineral dusts found in a fibrous mineral material known primarily for its strength and resistance to heat. A. HAMILTON & H. HARDY, *supra* note 12, at 421; D. HUNTER, *THE DISEASES OF OCCUPATIONS* 957-58 (1962). It has been characterized as "one of the most dangerous of all natural materials." Mehaffy, *supra* note 1, at 341. In addition to asbestosis, exposure to asbestos may result in mesothelioma and bronchogenic carcinoma. 11 J. KALISCH & H. WILLIAMS, *supra* note 12, §§ 12B.90-.94, at 12B-17 to 12B-22; 3 C. TEDESCHI, *supra* note 1, at 1282-86; Berry & Lewinsohn, *Dose-Response Relationships For Asbestos-Related Disease: Implications For Hygiene Standards, Part I. Morbidity*, 330 ANNALS N.Y. ACAD. SCI. 185, 185 (1979).

¹⁴ 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.00 at 12B-2, § 12B.30, at 12B-8; 3 C. TEDESCHI, *supra* note 1, at 1279, 1282. For a general discussion of asbestosis, see *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419

to difficulty in breathing and a potentially fatal dysfunctioning of the lungs.¹⁵ While the medical community has been aware of asbestosis for quite some time,¹⁶ asbestos continued to be used in an overwhelming number of products,¹⁷ primarily during the middle of this century.¹⁸ As a result, masses of people were in a position to inhale the fiber,¹⁹ and the results of these encounters are now be-

U.S. 869 (1974); Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487, 487-92 (1967); Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANNALS N.Y. ACAD. SCI. 139, 139-47 (1965).

¹⁵ *Borel v. Fibreboard Paper Prods. Co.*, 493 F.2d 1076, 1083-85 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.30, at 12B-8; 3 C. TEDESCHI, *supra* note 1, at 1290. The prolonged presence of asbestos fibers in the lungs results in pulmonary fibrosis, leading to an inhibition of air flow. D. HUNTER, *supra* note 13, at 963; 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.30, at 12B-9. The degree of risk and development of fibrosis varies with the length and degree of exposure and the size and type of fiber. 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.00, at 12B-2; Seidman, Selikoff, & Hammond, *Short-term Asbestos Work Exposure and Long-Term Observation*, 330 ANNALS N.Y. ACAD. SCI. 61, 84-88 (1979). Accentuating the high-risk nature of asbestosis is the fact that there presently is no cure. A. HAMILTON & H. HARDY, *supra* note 12, at 428; 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.70, at 12B-16.

¹⁶ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); A. HAMILTON & H. HARDY, *supra* note 12, at 422; D. HUNTER, *supra* note 13, at 960. Although cases of asbestosis were reported in the early part of this century, the hazards of the disease generally were not recognized until the 1930's. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1083 & n.7; D. HUNTER, *supra* note 13, at 960; see Mehaffy, *supra* note 1, at 343. Suspicions regarding asbestosis were confirmed by 1965, when Doctor Irving J. Selikoff issued his definitive report. See Mehaffy, *supra* note 1, at 344; Selikoff, Churg & Hammond, *supra* note 14, at 147.

¹⁷ See Vagley & Blanton, *supra* note 1, at 637. It is estimated that there are at least 3,000 products in use today containing asbestos. *Id.*; Mansfield, *supra* note 1, at 861. Its heat resistant and flexible qualities make it ideal for a variety of commercial products including brake shoes, Mansfield, *supra* note 1, at 861, pipe coverings, air conditioning ducts, shingles and insulation, Comment, *supra* note 3, at 664 n.40. Additionally, asbestos may be present in such consumer products as hair dryers, cigarette filters, see Mehaffy, *supra* note 1, at 351, toothbrushes and ironing board covers, Mansfield, *supra* note 1, at 861.

¹⁸ See Vagley & Blanton, *supra* note 1, at 637; Comment, *supra* note 3, at 665. Over 30 million tons of asbestos have been used in the United States this century. Mehaffy, *supra* note 1, at 342; Vagley & Blanton, *supra* note 1, at 637. Most manufacturers began to curtail production of products containing asbestos toward the end of the 1960's, in response to the spiraling number of asbestosis cases reported. *E.g.*, *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215. This does not completely solve the problem, however, since asbestos fibers may be released into the atmosphere upon the removal of existing asbestos-containing installations. Mehaffy, *supra* note 1, at 351; Prust, *Future Problems to be Anticipated: Demolition, Repair, and Disposal*, 330 ANNALS N.Y. ACAD. SCI. 545, 545 (1979).

¹⁹ See *supra* note 7. The staggering number of potential asbestosis victims has provoked observers to exclaim that "the U.S. is suffering from an epidemic of mass murder by the American asbestos industry." Rotbart & Joseph, *Upbeat Ads From Manville Anger Some*, Wall St. J., Nov. 15, 1982, at 1, col. 3, at 36, col. 3. Much of the litigation to date has involved shipyard and insulation workers. See *Duty to Indemnify and to Defend—Each Insurer Which Provides Coverage During Worker's Exposure to Asbestosis is Proportion-*

ginning to manifest themselves.²⁰

As with many other disease-causing materials, there is some evidence that those responsible for the introduction of asbestos into society knew of its possible adverse effects and failed to provide that information to those who would be exposed.²¹ Consequently, courts have held these manufacturers liable for the claims of their victims.²² The courts have facilitated resolution of such claims by attempting to overcome certain inherent barriers to litigation. For example, courts generally have cleared the statute of limitations hurdle presented by the latency of the disease by adopting a "discovery" rule in determining when the cause of action accrues.²³ In addition, they have resolved the problem of identifying the culpable source of a particular substance through various judicial techniques characterized as forms of industry-wide or market-share liability.²⁴

ately and Individually Liable to Defend and Indemnify Its Insured, 26 VILL. L. REV. 1080, 1084 (1981) [hereinafter cited as *Insurer's Duty*].

²⁰ See Comment, *supra* note 3, at 665. It has been observed that the effects of exposure during the peak periods of asbestos-product use will not become evident until the 1990's. See *id.*

²¹ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1086; Mansfield, *supra* note 1, at 866; Mehaffy, *supra* note 1, at 343.

²² *E.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1096. The *Borel* decision is generally credited with triggering the asbestosis-litigation explosion. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215.

²³ Mansfield, *supra* note 1, at 868; Comment, *supra* note 3, at 659; Casenote, *Products Liability Insurance—Time of Exposure Triggers Coverage For Asbestos-Related Diseases*, 26 WAYNE L. REV. 1127, 1132 (1980); *infra* note 105.

²⁴ See, *e.g.*, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied*, 449 U.S. 912 (1980). *Sindell* involved a plaintiff who developed a malignant tumor as a result of her mother's ingestion of Diethylstilbestrol (DES). *Id.* at 594-95, 607 P.2d at 926, 163 Cal. Rptr. at 134. Since all the defendants in the case had produced identical formulas of the drug, it could not be determined which defendant had manufactured the particular brand of the drug taken by plaintiff's mother. *Id.* at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. In addressing the problem of apportioning liability, the court held that where a plaintiff names as defendants manufacturers who service a substantial share of the market of a product, the liability of such manufacturers will be measured by the percentage of the total output of the product sold by each of them unless a manufacturer demonstrates that it could not have produced the product that caused the plaintiff's injury. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

A similar theory, known as "enterprise liability," has been applied to facts similar to *Sindell*. Since this theory is premised on the notion of concerted action among the members of an industry, see *Hall v. E.I. Dupont de Nemours, Inc.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972); Note, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 995-96 (1978), liability is imposed upon all industry members, 345 F. Supp. at 378. Failing to find the requisite concerted action, however, the *Sindell* court declined to apply the enterprise theory of liability. See 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

The issue which has continued to plague the courts in asbestos-related litigation is the question of which insurer²⁵ should be made to pay for liability incurred.²⁶ The long period of latency, characteristic of asbestosis,²⁷ has resulted in several insurance companies being "on the risk" over a 20- or 30- year period.²⁸ For instance, a given insurance company may have been on the risk at the initial point of exposure to the substance, a different company may be involved at the point when the disease or disability becomes manifest, and one or more companies may be involved in the intermittent years.²⁹ The problem is further complicated by the difficulty medical experts encounter in determining precisely when the injury "occurs" within the meaning of the insurance policy.³⁰

Under both the enterprise theory and the *Sindell* market-share theory, the plaintiff is relieved of the burden of identifying the manufacturer of the product that caused the injury. See *Hall*, 345 F. Supp. at 379; *Sindell*, 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 145. Additionally, both theories require the defendant-manufacturer to prove that its product could not have injured the plaintiff in order to be relieved of liability. See *Hall*, 345 F. Supp. at 380; *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. While these theories of liability have not been adopted in the asbestos context, they potentially are applicable both to asbestos and to other latent injuries. Vagley & Blanton, *supra* note 1, at 647.

²⁵ Typically, manufacturers involved in the asbestosis controversy have insurance to protect themselves against products liability lawsuits. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215. Products liability insurance protects the insured against the imposition of damages for injuries resulting from products manufactured or sold by the insured. See 2 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 11.01, at 11-3 (1982); Shea, *Products Liability: A Continuing Process of Change*, 68 A.B.A. J. 576, 577 (1977).

²⁶ See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 16 (1st Cir.), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1982) (No. 82-1097); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1130 (5th Cir.) (describing "novelty of the issues presented with reference to insurance coverage"), *cert. denied*, 454 U.S. 1109 (1981); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1039 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1213 (6th Cir. 1980) ("novel and important question of insurance law"), *cert. denied*, 454 U.S. 1109 (1981). One observer has been prompted to characterize asbestosis litigation as "the insurance industry's 'liability nightmare.'" Winter, *supra* note 1, at 399 (quoting Dr. Irving Selikoff).

²⁷ See *supra* notes 9 & 12 and accompanying text.

²⁸ See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 15; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215; 3A L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 50.01C, at 19-60.1 (1982); Comment, *supra* note 3, at 666.

²⁹ See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 16; Comment, *supra* note 3, at 662.

³⁰ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216. While the medical community is certain that inhalation of excessive levels of asbestos does lead to disease, several uncertainties exist regarding the actual development of the illness, which have proven problematic in the litigation context. See *id.* at 1214-16; Comment, *supra* note

The standard Comprehensive General Liability Policy (CGL),³¹ utilized by industries associated with a high risk of occupational disease, provides for coverage of "bodily injury"³² caused by an "occurrence"³³ during the policy period.³⁴ In the normal insurance liability context, application of this policy language should be fairly simple.³⁵ When dealing with diseases of a progressive nature, however, courts inconsistently have marshalled the medical evidence in determining the point at which injury occurs.³⁶

12, at 242. In addition to the progressive nature of the disease, *see supra* note 12, diagnosis of asbestosis is made difficult by the variance in pathological changes occurring in asbestosis victims, depending on the kind and quality of fibers inhaled and the length of exposure. *See* A. HAMILTON & H. HARDY, *supra* note 12, at 424; D. HUNTER, *supra* note 13, at 963. These variables, coupled with the effects of outside influences, such as cigarette smoke and other carcinogens, workplace ventilation, and the effects of personal stress, render difficult any attempt at a retrospective assessment of the nature of exposure. A. HAMILTON & H. HARDY, *supra* note 12, at 421-24. Moreover, a disagreement exists in the medical literature regarding whether fibrosis of the lungs progresses after cessation of exposure. *See id.* at 424-25; 4A R. GRAY, ATTORNEY'S TEXTBOOK ON MEDICINE § 205C.60, at 205C-18 (1982). Finally, it is not known what levels of exposure are required to cause asbestosis, or indeed whether exposure to asbestos fibers will result in asbestosis at all in a given case. *See* A. HAMILTON & H. HARDY, *supra* note 12, at 422, 428.

³¹ Typically, the manufacturers in the insidious-disease controversy are covered under a Comprehensive General Liability (CGL) policy. Comment, *supra* note 12, at 243; *see, e.g.*, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1216. The CGL policy is designed to remedy the problems faced by an insured seeking complete coverage under the former separate-policy system. *See* R. RIEGEL, J. MILLER & C. WILLIAMS, INSURANCE PRINCIPLES AND PRACTICES—PROPERTY AND LIABILITY 443 (6th ed. 1976). The CGL policy covers all risks which are not specifically excluded. 2 R. LONG, *supra* note 25, § 11.01, at 11-2.

³² "Bodily injury" is typically defined as "sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1216.

³³ "Occurrence" is customarily defined as "an accident, including injurious exposure to conditions which results, during the policy period, in bodily injury . . ." Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1216.

³⁴ Comment, *supra* note 12, at 243; *see, e.g.*, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d at 17; Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1039; Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1216.

³⁵ *See* Rosow & Liederman, *supra* note 6, at 1150. Normally, there is little difficulty in determining the point of occurrence because the act of the insured and the alleged injury occur simultaneously. *Id.*

³⁶ Comment, *supra* note 12, at 241. Compare Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1222 (injury occurs at exposure) with Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d at 25 (injury occurs at manifestation). It generally is conceded that injuries with long latency periods do not fit clearly within the CGL policy language. *See* Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1216; 3A L. FRUMER & M. FRIEDMAN, *supra* note 28, § 50.01C, at 19-60.1; *Insurer's Duty*, *supra* note 19, at 1086.

II. JUDICIAL APPROACHES TO THE INSURANCE PROBLEM IN ASBESTOSIS LITIGATION

Two general approaches to the liability problem have emerged in asbestosis litigation—the exposure theory³⁷ and the manifestation theory.³⁸ Insurance companies have tended to embrace the theory that best represents their interests in a particular case.³⁹ Briefly, the manifestation theorists contend that bodily injury does not occur until the point at which the disease is clinically manifest, and thus, the insurer on the risk at that point is the one liable.⁴⁰ The exposure theorists, on the other hand, maintain that the bod-

³⁷ See *infra* notes 42-57 and accompanying text; see also *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502, 506 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977); *Union Carbide Corp. v. Travelers Indem. Co.*, 399 F. Supp. 12, 16 (W.D. Pa. 1975). The courts in both *Champion* and *Union Carbide* adopted theories of liability analogous to the exposure theory determining that damage occurs at the time injury is caused rather than at the point of manifestation of its effects. See *Champion*, 546 F.2d at 506; *Union Carbide*, 399 F. Supp. at 16. It should be noted, however, that the resultant damages in both *Champion* and *Union Carbide* were capable of being traced to a single identifiable event. See *Champion*, 546 F.2d at 505 (delivery date of defective goods); *Union Carbide*, 399 F. Supp. at 21 (date insured made decision to allow contaminant to remain in chemical that ultimately harmed consumers is date of occurrence in products liability action). Presumably, the long latency period involved in asbestosis, see *supra* text accompanying notes 9-11; note 12 and accompanying text, makes it difficult to identify the actual date of "exposure," rendering mechanical application of the exposure theory of liability problematic. It is for this reason that the exposure theory has been criticized as contrary to traditional insurance and tort law principles that impose liability only when damage becomes apparent. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1229 (Merritt, J., dissenting).

³⁸ See *infra* notes 40 & 58-77 and accompanying text. The manifestation theory of liability historically has been applied in a variety of factual contexts. See, e.g., *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982) (sex discrimination class action); *Tijsseling v. General Accident Fire & Life Assurance Corp.*, 55 Cal. App. 3d 623, 626, 127 Cal. Rptr. 681, 683 (Ct. App. 1976) (misrepresentations relative upon sale of property); *Remmer v. Glens Falls Indem. Co.*, 140 Cal. App. 2d 84, 85, 295 P.2d 19, 21-22 (Ct. App. 1956) (rock slide caused by grading operation); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 169 Ind. App. 1, 3, 345 N.E.2d 267, 270 (1976) (defective bricks); *Mutual v. Newark Ins. Co.*, 289 So. 2d 237, 246 (La. Ct. App. 1973) (collapse of wall); *Singsaas v. Diederich*, 307 Minn. 153, 155, 238 N.W.2d 878, 880 (1976) (negligent repair of grain elevator). Typically, the manifestation theory is applied in the products liability context, where loss occurring during the policy period is deemed to be covered, notwithstanding the fact that it is the result of a defect in existence in a prior term of insurance coverage. 11 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 44:393, at 567 (2d ed. 1982).

³⁹ Casenote, *supra* note 23, at 1128. An insurer who is on the risk at the time of initial exposure will urge the manifestation theory of liability, while an insurer on the risk at the point at which the injury becomes apparent will tend to promote the exposure theory of liability. *Id.*

⁴⁰ See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216; *Mansfield*, *supra* note 1, at 876; Comment, *supra* note 12, at 244; Casenote, *supra* note 23, at 1128; *Insurer's Duty*, *supra* note 19, at 1086.

ily injury triggering insurance coverage occurs at a point just after the initial inhalation of the fibers.⁴¹

A. *The Exposure Theory*

The exposure theory was adopted in one of the first cases to arise in the asbestosis-insurance litigation context. *Insurance Company of North America v. Forty-Eight Insulations, Inc.*⁴² involved liability resulting from the manufacture of products containing asbestos by Forty-Eight Insulations, Inc., between 1923 and 1970.⁴³ During that period, at least five insurance companies were on the risk at various times.⁴⁴ One of these insurers brought a declaratory judgment action to determine the point at which insurer's liability attached.⁴⁵

The Michigan district court adopted the exposure theory of liability,⁴⁶ relying primarily on a finding that the injury in asbestosis cases occurs at the point of inhalation of the asbestos fibers.⁴⁷

⁴¹ See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1217; *Mansfield*, *supra* note 1, at 876. In addition to the manifestation and exposure theories, an approach which is a hybrid of the two has been applied. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041. In *Keene*, the court held that each insurer on the risk between exposure and manifestation was liable. *Id.*; see *infra* notes 83-87 and accompanying text.

⁴² 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

⁴³ 633 F.2d at 1214. Nearly a decade after Forty-Eight had discontinued the manufacture of products containing asbestos, there were over 1000 lawsuits filed against it by workers suffering from diseases allegedly caused by asbestos inhalation. See *id.* at 1215. The district court noted, however, that Forty-Eight's liability for asbestos-related injuries did not cease at the point at which such manufacturing was discontinued, since it was foreseeable that actions would be brought in connection with past exposure, as well as exposure resulting from the release of asbestos fibers from the demolition of existing structures. *Id.* at 1223.

⁴⁴ *Id.* at 1215. Forty-Eight was insured by the Insurance Co. of North America (INA) from October 31, 1955 to October 31, 1972. *Id.* Upon termination of the INA policy, Forty-Eight was covered by the Affiliated FM Insurance Company (from October 31, 1972 to January 10, 1975), by the Illinois National Insurance Company (from January 10, 1975 to January 12, 1976), by the Travelers Indemnity Company of Rhode Island (from January 12, 1976 to November 8, 1976), and by the Liberty Mutual Insurance Company (from November 8, 1976 to date). *Id.* Since any insurance records alleged to exist for the period prior to 1955 had been lost or destroyed, Forty-Eight was deemed to have been self-insured for that period. *Id.* at 1215 & n.4.

⁴⁵ *Id.* at 1216. Insurance companies commonly employ the declaratory judgment action in an attempt to resolve coverage disputes. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 n.8; see Comment, *supra* note 12, at 240 n.8.

⁴⁶ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1242 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

⁴⁷ 451 F. Supp. at 1239. The court opined that, based upon the medical evidence, an

The Sixth Circuit affirmed,⁴⁸ agreeing that the exposure theory was supported by the medical testimony.⁴⁹ The court reasoned that application of the exposure theory in asbestosis cases is consistent with the parties' expectations⁵⁰ and with the court's desire to promote coverage.⁵¹ Liability, the court concluded, should be prorated among all of the insurers on the risk during the time of exposure.⁵² The court conceded, however, that an insurer might disclaim liability by showing that no asbestos exposure occurred during certain years while it was on the risk.⁵³

The exposure theory promulgated in *Forty-Eight* was subsequently adopted by the Fifth Circuit in *Porter v. American Optical Corp.*⁵⁴ Although it appeared that a clear trend toward the ex-

occurrence takes place shortly after inhalation, notwithstanding the fact that some individuals who have been exposed to asbestos never incur tissue damage. *Id.*

⁴⁸ Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

⁴⁹ 633 F.2d at 1218. The circuit court noted with approval the district court's rationale that asbestosis is a progressive disease involving an injury which occurs shortly after inhalation. *Id.* While the court conceded that the manifestation theorists correctly argue that "compensable bodily injury," and not tissue damage, is what matters under the contract, *id.* (emphasis supplied by court), it nonetheless observed that "there is universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred," *id.* at 1219.

⁵⁰ *Id.* at 1219. The court noted first that liability in the asbestos cases is premised upon the continued inhalation of asbestos fibers by workers following the manufacturer's failure to warn. The court reasoned that since the purpose of CGL policies is to provide the manufacturer with coverage against product liability lawsuits, "[t]he contracting parties would expect [such] coverage to parallel the theory of liability." *Id.*

⁵¹ *Id.* Reasoning that the policy terms were inherently ambiguous in the latent disease context, the court resorted to the maxim of construing doubts in favor of the insured. *Id.* at 1222.

⁵² *Id.* at 1225. The court asserted that only questions of contract law are involved in the allocation of liability, characterizing the insurer's liability as "individual and proportionate" rather than "joint and several." *Id.*

⁵³ *Id.* An insurer might disclaim liability by showing that no injury could have occurred in a given period by reason of the worker's use of a respirator. *Id.* The Sixth Circuit recognized that the insured generally carries the burden of showing coverage. Because an injured asbestos worker need only prove that the products of a particular manufacturer contributed at any time to his injury to subject that manufacturer to liability, the court deemed it "appropriate to presumptively view each manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis." *Id.* at 1225 n.27 (emphasis supplied by court).

⁵⁴ 641 F.2d 1128, 1145 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981). In *Porter*, an asbestosis victim sued a manufacturer who had supplied respiratory masks at an asbestos-cement products plant at which he was employed. *Id.* at 1131. During most of the worker's exposure, the respiratory mask manufacturer was covered under various products liability insurance policies. *Id.* at 1142-43. The *Porter* court initially noted that the principles involved in cases where the insured is an asbestos-products manufacturer are equally applica-

posure theory was emerging,⁵⁵ subsequent decisions adopted either the manifestation theory⁵⁶ or a hybrid approach.⁵⁷

B. *The Manifestation Theory*

The manifestation theory was first adopted in the insidious-disease context in a case involving the liability of a DES⁵⁸ manufacturer's insurance company for injuries resulting from ingestion of the drug.⁵⁹ The court imposed liability on the insurer on the risk at the point of manifestation of cervical cancer, maintaining that "coverage is predicated not on the act which might give rise to ultimate liability, but upon the result."⁶⁰ The manifestation theory was subsequently adopted, albeit impliedly,⁶¹ in a case involving

ble where the insured is a manufacturer of respiratory masks. *Id.* at 1144.

⁵⁵ Shea, *Product Liability: Recent Changes Are Leading Toward National Legislation*, 54 N.Y.S.B.J. 524, 525 (1982). In addition to the Fifth Circuit, the District of Columbia District Court, in *Keene Corp. v. Insurance Co. of N. Am.*, 513 F. Supp. 47 (D.D.C.), *modified*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), adopted the exposure theory promulgated in *Forty-Eight*. See 513 F. Supp. at 51. On appeal, the District of Columbia Circuit modified the opinion, adopting essentially a hybrid approach. 667 F.2d at 1047; see *infra* notes 78-87 and accompanying text.

⁵⁶ See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 16 (1st Cir.), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1982); *infra* notes 58-75 & 77 and accompanying text.

⁵⁷ See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *infra* notes 78-87 and accompanying text.

⁵⁸ *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 95 Misc. 2d 222, 227, 406 N.Y.S.2d 658, 659 (Sup. Ct. N.Y. County 1978). Diethylstilbestrol (DES) is a synthetic estrogen which was prescribed to millions of women in the United States from the late 1940's until 1971, under the belief that it would prevent miscarriages. See Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 718 (1982); Note, *supra* note 24, at 963-64. In 1971, after medical evidence revealed a statistically significant link between the use of DES and adenocarcinoma of the vagina and uterus, the Food and Drug Administration contraindicated the drug's use for prevention of miscarriages. Robinson, *supra*, at 718; Note, *supra* note 24, at 964-67.

⁵⁹ 95 Misc. 2d at 223, 406 N.Y.S.2d at 659. The drug manufacturer was sued by three women whose mothers had ingested DES during pregnancy in 1952, 1953 and 1961, respectively. *Id.* The court conceded that the exposure occurred at the time the drugs were ingested. *Id.* The women discovered in 1970, 1971, and 1975, respectively, that they had developed cervical cancer. *Id.* The American Motorist Insurance Company, which did not begin bearing the risk until 1968, contended that the injuries were not covered under its policy. *Id.*

⁶⁰ *Id.* at 224, 406 N.Y.S.2d at 659. The court noted that a result-oriented approach to predicated coverage is consistent with the various commentary that surrounded the adoption of the CGL policy language. *Id.*, 406 N.Y.S.2d at 660. Thus, the court held that the insurer on the risk at the point of manifestation was liable. *Id.* at 226, 406 N.Y.S.2d at 661.

⁶¹ See *Michigan Chem. Corp. v. Travelers Indem. Co.*, 530 F. Supp. 147, 154-55 (W.D. Mich. 1982). In *Michigan Chemical*, a manufacturer of the toxin known as polybrominated biphenyl (PBB), see *infra* note 62, was the subject of hundreds of suits by Michigan farmers who claimed that they were damaged by the spread of the toxin when Michigan Chemical

the toxin polybrominated biphenyl (PBB).⁶² Significantly, the theory was also embraced in the most recent decision in the asbestos-insurance controversy, *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*⁶³

In the wake of over 5,500 asbestos-related lawsuits,⁶⁴ Eagle-Picher Industries, Inc., filed a declaratory judgment action to determine the liability of its insurers.⁶⁵ In adopting the manifestation theory of liability,⁶⁶ the Massachusetts District Court noted that the language of the insurance policies explicitly focused upon the

Corp. mistakenly shipped it in place of the requested feed supplement. 530 F. Supp. at 148. The PBB was fed to dairy cattle across the state, causing a decrease in milk production, *id.* at 149, and exposing approximately 9 million Michigan residents to the toxin through their normal diet. ENVIRONMENT AND HEALTH, *supra* note 6, at 33. See generally Grzech, *PBB*, in WHO'S POISONING AMERICA 60-84 (R. Nader ed. 1981).

Michigan Chemical's primary coverage over the period was under an "occurrence" policy with the Traveler's Indemnity Company. Additionally, however, the company had a complicated scheme consisting of excess layers of insurance and reinsurance involving several companies, including Lloyd's, London, Aetna Casualty and Surety Company, Insurance Company of North America, and American Mutual Reinsurance Company. 530 F. Supp. at 149. As the policies generally provided for payment at fixed sums on a per-occurrence basis, the question in the case was whether there was more than one occurrence and, if so, when these occurrences took place. *Id.*

In the declaratory judgment action brought to determine which of the several insurance companies involved was liable, the court reserved judgment on the manifestation-exposure dilemma, due to the lack of medical evidence of damage resulting from PBB ingestion and the lack of evidence regarding the time of exposure. *Id.* at 155. The court implicitly adopted the manifestation approach, however, by its construction that the occurrence took place at the time of the resultant property damage, rather than at the time of the shipment of the toxin. *Id.* at 154-55.

⁶² 530 F. Supp. at 148. The various chemicals which fall under the heading PBB are highly toxic substances used primarily as fire retardants. ENVIRONMENT AND HEALTH, *supra* note 6, at 30. While the full toxic effects of PBB are unknown, it has been medically linked with such problems as loss of memory and sleep, muscular weakness, abdominal pain, and, possibly, cancer. *Id.* at 33.

⁶³ 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1983) (No. 82-1097).

⁶⁴ *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 111 (D. Mass. 1981), *aff'd*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1983) (No. 82-1097). In *Eagle-Picher*, the insurance controversy centered around the underlying liability of Eagle-Picher Industries, Inc. (Eagle-Picher) which manufactured asbestos-containing insulation products during the period from 1931 to 1971. *Id.*

⁶⁵ *Id.* Eagle-Picher was not insured for asbestos-related claims prior to 1968. It was covered by a policy with Liberty Mutual Insurance Company from 1968 to 1978. *Id.* Additionally, the coverage of Eagle-Picher over the period from 1973 to 1979 was from one to two layers of excess insurance involving a multitude of American- and London-based insurance companies. *Id.* at 111-12. The companies disagreed as to the appropriate theory under which liability should have attached. *Id.* at 111. While the parties stipulated that the language of the policies was clear and unambiguous, they did not agree as to its meaning. *Id.* at 113.

⁶⁶ *Id.* at 118.

resulting disease, not on its cause.⁶⁷ Construing the policy language from a layman's point of view,⁶⁸ the court noted that the phrase "results in personal injury" referred not to "sub-clinical cellular changes,"⁶⁹ but to the manifestation of "clinically evident disease."⁷⁰ The court also indicated that the manifestation theory would best promote coverage in the case before it.⁷¹

On appeal, the First Circuit affirmed as modified the holding of the district court.⁷² The reviewing court agreed that the manifestation theory is the best approach to the insurance problem,⁷³ noting that since exposure does not inevitably result in asbestosis, the medical evidence could not be read to indicate that disease occurs at the point of exposure.⁷⁴ The court observed, based upon the contract language, that "each occurrence is made up of two components, the exposure and the resulting bodily injury."⁷⁵ The First Circuit parted with the district court as to the definition of manifestation, holding that a disease is manifest "when it becomes reasonably capable of medical diagnosis"⁷⁶ rather than on the date of actual diagnosis.⁷⁷

⁶⁷ *Id.* at 114. The court observed that although the policies commonly refer to "occurrence during the policy period," their definition of occurrence also links the resulting injury, not the exposure to conditions, to the policy period." *Id.*

⁶⁸ *Id.* at 116. The court observed that traditional insurance law requires that unambiguous contract terms be given their ordinary meaning. *Id.* at 115-16.

⁶⁹ *Id.* at 115. The court declined to adopt the view that exposure produces instantaneous injury, noting that most fibers which are inhaled are later removed, and that even when some do embed in, or scar, the lungs, there is no certainty that disease or death will result. *Id.*; see *supra* note 30.

⁷⁰ 523 F. Supp. at 115. The court defined manifestation as "the date of actual diagnosis or, with respect to those cases in which no diagnosis was made prior to death, the date of death." *Id.* at 118.

⁷¹ *Id.* at 118. It should be noted that Eagle-Picher was uninsured prior to 1968. See *supra* note 65. Thus, the court was reluctant to adopt the exposure theory, for the consequence of such a ruling would be to effectively leave Eagle-Picher without insurance coverage. 523 F. Supp. at 115.

⁷² *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1982) (No. 82-1097).

⁷³ *Id.* at 16.

⁷⁴ *Id.* at 18-19.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* at 25. While observing that the district court's holding was designed to promote easily ascertainable coverage, the court concluded that "administrative convenience, however desirable, cannot override the principles of construction . . ." *Id.* at 24.

⁷⁷ *Id.* at 25; see *supra* note 70.

C. A Hybrid Approach

The District of Columbia Circuit was confronted with the issue of liability of various insurers⁷⁸ of an asbestos manufacturer⁷⁹ in *Keene Corp. v. Insurance Co. of North America*.⁸⁰ The court avoided the analytical conflict between the manifestation and exposure approaches in a broad articulation of insurers' liability that essentially adopted both theories.⁸¹ The lower court in *Keene* held that liability should be apportioned among those insurers on the risk during the period of exposure.⁸² In combining the manifestation and exposure theories,⁸³ the circuit court declared itself to be interpreting the reasonable expectations of the parties to the insurance contract,⁸⁴ and referred to its obligation to effectuate "the policies' dominant purpose of indemnity."⁸⁵ These considerations, reasoned the court, give way to the conclusion that insurers' liability should attach at the point the disease manifests⁸⁶ as well as at all points during the period of exposure.⁸⁷

⁷⁸ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). Keene Corporation was covered during the period from 1948 to 1959 by the Pennsylvania Manufacturers' Association Insurance Company. A dispute as to whether that policy included products liability coverage is the subject of another case. *Id.* at 1038-39 n.5; *see Keene Corp. v. Pennsylvania Mfrs.' Assoc. Ins. Co.*, 513 F. Supp. 47 (D.D.C. 1981), *remanded*, No. 81-1248 (D.C. Cir. Oct. 1, 1981). Subsequently, Keene was covered by the Insurance Company of North America (1961-1968), Liberty Mutual Insurance Company (1967-1968 and 1974-1980), Aetna Casualty and Surety Company (1968-1971), and the Hartford Accident and Indemnity Company (1971-1974). 667 F.2d at 1038.

⁷⁹ Keene Corporation and its subsidiaries primarily manufactured and sold asbestos-containing thermal insulation products during the period from 1948 to 1972. 667 F.2d at 1038 & n.1. Accordingly, Keene has been named in over 6,000 lawsuits, primarily involving insulation workers who allege injury as a result of exposure to the insulation. *Id.* at 1038.

⁸⁰ 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

⁸¹ *Id.* at 1047; *see infra* note 83.

⁸² *Keene Corp.*, 513 F. Supp. at 51.

⁸³ 667 F.2d at 1047. The court stated that "inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies." *Id.*

⁸⁴ *Id.* at 1041; *see Comment, supra* note 12, at 252-58; *infra* notes 134-45 and accompanying text.

⁸⁵ 667 F.2d at 1041; *see* 7 S. WILLISTON, LAW OF CONTRACTS § 900, at 18 (Jaeger 3d ed. 1959). According to Couch, "presumably it is the intention of the insurer to have the insured understand that in the event of loss, he will be protected to the full extent that any fair interpretation will allow." 1 G. COUCH, *supra* note 38, § 15:41, at 721-22 (2d ed. 1959).

⁸⁶ 667 F.2d at 1044. The court reasoned that the manifestation approach is consistent with the notion that an insured would expect to be covered for liability resulting from a latent condition of which it could not be aware. *Id.*

⁸⁷ *Id.* at 1045. The court observed that a consequence of the manifestation theory is that insurers will terminate future coverage for a given class of injuries following manifestation of a few initial claims. *Id.* at 1046. To avoid such a possibility, the court reasoned that

III. RESOLVING THE CONFLICT

Given the judicial conflict,⁸⁸ the volume of litigation,⁸⁹ and the effect on the rates and availability of coverage of asbestos-related claims,⁹⁰ it is imperative that a comprehensive resolution of the insurer liability question be reached.⁹¹ Recognizing that there are both advantages and disadvantages to each approach, it is submitted that the manifestation theory is the preferable approach to insurer liability.

A. *The Manifestation Theory Will Simplify Asbestosis Litigation*

An initial advantage of the manifestation theory is that it relieves courts of the burden of analyzing the medical evidence in a given case.⁹² As previously noted, a major difficulty facing courts in asbestosis litigation is the question of proper interpretation of the medical evidence.⁹³ The exposure theorists argue that the medical

those insurers on the risk during the period of exposure to asbestos should also be liable. *Id.* at 1046.

⁸⁸ *E.g.*, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d at 25 (manifestation theory); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1047 (both manifestation and exposure trigger liability); Porter v. American Optical Corp., 641 F.2d at 1131 (exposure theory); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1223 (exposure theory); see Comment, *supra* note 12, at 241. In the face of the obvious split among the circuit courts, the Supreme Court continues to deny certiorari. *Justices Again Refuse To Settle Asbestos Case*, N.Y. Times, Mar. 8, 1983, at D1, col. 1; see, *e.g.*, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 16 (1st Cir. 1982), *cert. denied*, 51 U.S.L.W. 3650 (U.S. Mar. 7, 1983) (No. 82-1097); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981); see Rosow & Liederman, *supra* note 6, at 1162; Shea, *supra* note 25, at 578.

⁸⁹ See *supra* note 8.

⁹⁰ 3A L. FRUMER & M. FRIEDMAN, *supra* note 28, § 50.01C, at 19-60; Mansfield, *supra* note 1, at 875. It has been stated that asbestosis litigation will affect the rates and availability of coverage in cases involving a multitude of carcinogens. *Id.* For a cursory discussion of insurance rate-making policy, see R. RIEGEL, J. MILLER & C. WILLIAMS, *supra* note 31, at 443-44.

⁹¹ The one point upon which parties involved in asbestos-related litigation agree is the need for an administratively workable solution. See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1218; *Insurer's Duty*, *supra* note 19, at 1090.

⁹² See *infra* notes 98-99 and accompanying text.

⁹³ See, *e.g.*, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1217; Michigan Chem. Corp. v. Travelers Indem. Co., 530 F. Supp. at 155; Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 523 F. Supp. at 115; Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. at 1236; Rosow & Liederman, *supra* note 6, at 1155; Comment, *supra* note 3, at 693; *supra* note 30 and accompanying text.

evidence in continuing-injury cases, such as asbestosis, indicates that the condition "occurs" upon or shortly after inhalation, and thus well before manifestation.⁹⁴ This reasoning is problematical, however, since it cannot be determined whether the presence of asbestos fibers in an exposed individual's lungs will in fact lead to asbestosis.⁹⁵ Moreover, if such an individual does contract asbestosis, the length and degree of exposure which actually caused the disease cannot be determined with any degree of precision.⁹⁶ It is contended, therefore, that the concept of exposure fails to provide a medically or legally useful point of reference in asbestosis cases and, further, that these failures justify looking to the point of manifestation as the proper theory for determining liability.⁹⁷

A related virtue of the manifestation theory, on a practical level, is its administrative expediency. As noted, use of this theory avoids the necessity of each court evaluating extensive medical evidence to determine the point of occurrence.⁹⁸ By eliminating complex questions of pathological cause and effect, resort to the manifestation theory would serve to reduce the costs and delays of asbestosis litigation.⁹⁹

⁹⁴ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218 (medical testimony strongly supports exposure theory); see *Mansfield, supra* note 1, at 86; *Rosow & Liederman, supra* note 6, at 1159; *Comment, supra* note 12, at 245; *Casenote, supra* note 23, at 1137. In *Forty-Eight*, the Sixth Circuit noted approvingly that the district court had deemed injury to occur upon inhalation based upon the evidence that "each . . . inhalation of asbestos fibers results in the build-up of additional scar tissue in the lungs" *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218.

⁹⁵ *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 18; 11 J. KALISCH & H. WILLIAMS, *supra* note 12, § 12B.31, at 12B-9. One medical expert has noted that "over 90% of all urban city dwellers have some asbestos-related scarring, but only a tiny percentage of those exposed will ever develop clinical asbestosis." *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. at 115 (testimony of Dr. Bernard Gee, research scientist and clinician).

⁹⁶ See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 18; *supra* note 30. One court noted that the cumulative nature of the development of the disease, combined with such factors as "variations in ventilation, moisture in the air, and an exposed person's health at the time of any exposure" make it nearly impossible to determine the level of exposure necessary to cause disease. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. at 1237.

⁹⁷ *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 18, 22; see *Comment, supra* note 12, at 244-45.

⁹⁸ Interpretation of the medical evidence is unnecessary under the manifestation approach. *Comment, supra* note 12, at 245.

⁹⁹ Although theoretically it might be deemed desirable to review the medical evidence in each case in order to determine the point at which the injury occurs, the cost of such a procedure would be prohibitive. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218; *Rosow & Liederman, supra* note 6, at 1158. It should be noted that

B. *The Manifestation Theory Is Supported by Analogous Insurance Law Precedent*

Viewed in a broader perspective, adoption of the manifestation theory in asbestosis litigation appears to be consistent with insurance law precedent. Indeed, manifestation theorists draw support from such diverse sources as cases construing statutes of limitations and worker's compensation law principles in the insidious disease context,¹⁰⁰ as well as case law involving health insurance contracts and traditional insurance contract interpretation.¹⁰¹

Traditionally, insidious disease cases have raised troublesome issues with respect to statutes of limitations. Since, under conventional analysis, the statute would begin to run from the point of exposure, a victim would be barred from bringing his claim long before he could ever be aware of his injury.¹⁰² Although the purpose behind the concept of a statute of limitations is one of repose, designed to protect a defendant from stale claims made by those who have "slumbered on their rights,"¹⁰³ an unduly harsh application of the bar to those who are "blamelessly unaware of any injury" has been recognized as inherently unfair.¹⁰⁴ Thus, the discovery rule applied in occupational disease cases to overcome this unfairness¹⁰⁵ is viewed by manifestation theorists as supportive of

the added litigation costs involved in determining the level of exposure in each year of the total period and in studying the medical pathogenesis of each disease, combined with the already staggering costs, would result in further delay to the settlement of claims. *But see* Comment, *supra* note 3, at 691-93 (advocating a case-by-case review of the evidence). *See generally* Reibstein, *supra* note 7, at 36, col. 4 (legal expenses exceed victim compensation).

¹⁰⁰ *See infra* notes 102-09 and accompanying text.

¹⁰¹ *See infra* notes 116-45 and accompanying text.

¹⁰² *See, e.g.*, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1043 n.17; Comment, *supra* note 3, at 659.

¹⁰³ *United States v. Kubrick*, 444 U.S. 111, 117 (1979). In *Kubrick*, the Supreme Court stated:

[A]lthough affording plaintiffs what the legislature deems a reasonable time to present their claims, [statutes of limitations] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

Id.

¹⁰⁴ *See, e.g.*, *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949); *Tijsseling v. General Accident Fire & Life Assurance Corp.*, 55 Cal. App. 3d 623, 628, 127 Cal. Rptr. 681, 684 (Ct. App. 1976); Comment, *supra* note 3, at 659 n.9.

¹⁰⁵ *E.g.*, *Urie v. Thompson*, 337 U.S. 163, 171 (1949) (silicosis); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 116 (D.C. Cir. 1982) (asbestosis); *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1158 (6th Cir. 1981) (asbestosis); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975) (asbestosis); *Borel v. Fibreboard*

the manifestation theory in the insurance liability context.¹⁰⁶

Similarly, a type of manifestation theory has been identified in worker's compensation cases.¹⁰⁷ The "last employer pays"¹⁰⁸ rule in the context of worker's compensation is rooted primarily in the strong policy of promoting administrative expediency in handling

Paper Prods. Corp., 493 F.2d 1076, 1101-02 (5th Cir. 1973) (asbestosis); Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497, 499 (Ky. 1979) (mesothelioma). Generally, courts which have adopted the discovery rule in occupational disease cases have noted that there is little difference between statutes of limitations in latent disease cases and those in medical malpractice cases, where the statutes begin to run at a point where the injury is reasonably discoverable. See, e.g., Borel v. Fibreboard Paper Prods. Corp., 493 F.2d at 1102; Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 889, 159 Cal. Rptr. 113, 118 (Ct. App. 1979); Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d at 499-501.

The "discovery" rule has been adopted in several products liability cases when a period of time has elapsed between ingestion of the product and manifestation of the injury. See, e.g., Goodman v. Mead Johnson & Co., 534 F.2d 566, 570, 574-75 (3d Cir. 1976) (oral contraceptive), cert. denied, 429 U.S. 1038 (1977); Roman v. A.H. Robins Co., 518 F.2d 970, 971 (5th Cir. 1975) (prescription drug); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 924 (8th Cir. 1970) (prescription drug); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 780 (5th Cir. 1963) (tobacco). New York has refused to extend the discovery rule beyond the statutory exceptions regarding "foreign objects" in medical malpractice cases, N.Y. CIV. PRAC. LAW § 214-a (McKinney 1982), and Agent Orange, id. § 214-b; see Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 1010, 430 N.E.2d 1297, 1299, 446 N.Y.S.2d 244, 246 (1981) (asbestosis), cert. denied, 102 S. Ct. 2226 (1982); Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 781-82, 391 N.E.2d 1002, 1003, 417 N.Y.S.2d 920, 922 (1979). Thus, the view in New York is that the cause of action accrues at the point of inhalation of asbestos. Steinhardt v. Johns-Manville Corp., 54 N.Y.2d at 1010, 430 N.E.2d at 1299, 446 N.Y.S.2d at 246. It has often been urged that New York should adopt the discovery rule. See, e.g., id. at 1011, 430 N.E.2d at 1299-1300, 446 N.Y.S.2d at 246-47 (Fuchsberg, J., dissenting); Thornton v. Roosevelt Hosp., 47 N.Y.2d at 783-84, 391 N.E.2d at 1004-05, 417 N.Y.S.2d at 924 (Fuchsberg, J., dissenting); N.Y. CIV. PRAC. LAW § 203, commentary at 111 (McKinney 1972). Recently, one New York court has held that, as to strict products liability actions in the occupational-disease setting, the statute of limitations begins to run from the date of discovery. See McKee v. Johns-Manville Corp., 94 Misc. 2d 327, 331-32, 404 N.Y.S.2d 814, 817 (Sup. Ct. Erie County 1978).

¹⁰⁶ See, e.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1043; Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1220.

¹⁰⁷ Comment, *supra* note 3, at 672. At times, worker's compensation cases have adopted what could be labeled a pure manifestation or discovery approach. See Grain Handling Co. v. Sweeney, 102 F.2d 464, 466 (2d Cir.) (occupational disease under the Longshoreman's Compensation Act) (L. Hand, J.), cert. denied, 308 U.S. 570 (1939). More commonly, however, courts in such cases have adopted a modified approach under which the insurer of the last employer prior to manifestation of the employee's injury is liable, see, e.g., General Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 210-11 (2d Cir. 1977); Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955), notwithstanding that the disease or injury may have been the result of exposure in a prior period of insurance coverage, see 9 G. COUCH, *supra* note 38, § 39:118, at 513-14 (2d ed. 1962).

¹⁰⁸ This terminology is taken from the Sixth Circuit's opinion in *Forty-Eight*. See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1221; *supra* note 107.

claims in that arena.¹⁰⁹ The same policy reasons ostensibly adhere in insurance cases.

C. The Manifestation Theory Is Supported by Traditional Interpretation of Insurance Contract Language

When an attempt is made to apply the manifestation theory in cases involving insurer's liability, an additional factor, not present in the type of cases just discussed, must be borne in mind. Overriding any policy considerations arising in litigation between an insurer and his insured is the presence of an insurance contract. It is conceded, therefore, that absent some specifically articulated legislative intent, the type of policy reasons underlying statute of limitations and worker's compensation cases do not provide a sufficient basis for interfering with the provisions of an insurance contract.¹¹⁰

Since the central purpose of an insurance contract is the allocation of risk,¹¹¹ the parties are certainly free to determine at what point the liability of an insurer will attach.¹¹² Where the insurance contract language is clear, it obviously should be given effect, just as the courts would enforce the terms of any other contract.¹¹³ Un-

¹⁰⁹ See *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955). In attempting to interpret the legislative intent of the worker's compensation statute, the *Travelers* court highlighted the difficulty presented by the progressively developing occupational diseases and "the over-riding importance of efficient administration" *Id.* at 145. The court came to the conclusion that the last employer prior to manifestation should pay, although the possible inequities of imposing liability on the one employer were acknowledged. *Id.*; see Comment, *supra* note 3, at 673.

¹¹⁰ See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220; *Commercial Union Assurance Co. v. Zurich Am. Ins. Co.*, 471 F. Supp. 1011, 1015 (S.D. Ala. 1979); *Tijsseling v. General Accident Fire and Life Assurance Corp.*, 55 Cal. App. 3d 623, 628, 127 Cal. Rptr. 681, 684 (Ct. App. 1976); Comment, *supra* note 3, at 674. The courts typically have recognized that the concerns for efficient and expedient administration are present in the cases, but are insufficient to override the contract. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221.

¹¹¹ See Abraham, *Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151, 1185 (1981) ("[i]nsurance is a tool for distributing the risk and the cost of various kinds of losses among groups of risk bearers"); see also *Keene Corp. v. Insurance Co. of N. Am.*, 668 F.2d at 1041 ("[a]n insurance contract represents an exchange of an uncertain loss for certain loss").

¹¹² 13 J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7381, at 1-11 (1976); Abraham, *supra* note 111, at 1185.

¹¹³ *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 17; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043; 13 J. APPLEMAN, *supra* note 112, § 7381, at 8-11; 1 G. COUCH, *supra* note 38, § 15:16, at 671 (2d ed. 1959) ("a contract of insurance cannot be given an interpretation at variance with the clear . . . meaning of the language in which it is expressed").

fortunately, the language of the contracts at issue is often quite ambiguous.¹¹⁴ Nevertheless, it is submitted that the methods of insurance contract interpretation traditionally resorted to by the courts support the adoption of the manifestation theory of liability.¹¹⁵

As described earlier, judicial examination of the CGL policy involves an interpretation of when the occurrence of the injury takes place.¹¹⁶ The historical interpretation of occurrence in the insurance context, focusing not upon the wrongful act, but upon the resultant injury, lends support to the adoption of manifestation theory.¹¹⁷ This interpretation of occurrence has been advocated in the context of prolonged and continued injurious exposure to hazardous conditions.¹¹⁸ Under such an analysis, the manifestation concept of occurrence is not defeated by the fact that the exposure took place during a prior policy period.¹¹⁹

¹¹⁴ The courts and the parties to asbestosis litigation disagree as to whether the policy terms are ambiguous. See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 18 (unambiguous); *Michigan Chem. Corp. v. Travelers Indem. Co.*, 530 F. Supp. at 154 (ambiguous); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1222 (inherently ambiguous); Comment, *supra* note 3, at 677-78.

¹¹⁵ See *infra* notes 116-45 and accompanying text.

¹¹⁶ See *supra* notes 31-36 and accompanying text.

¹¹⁷ *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61, 62 n.14 (3d Cir. 1982) (interpreting "occurrence" in employment discrimination suit, but refusing to speculate regarding application to asbestos cases); *Kirkham, Michael & Assocs., Inc. v. Travelers Indem. Co.*, 361 F. Supp. 189, 193 (D.S.D. 1973) (architectural negligence); *Tijsseling v. General Accident Fire & Life Assurance Corp.*, 55 Cal. App. 3d 623, 626, 127 Cal. Rptr. 681, 683 (Ct. App. 1976) (misrepresentation); 1 R. LONG, *supra* note 25, § 1.25, at 1-73 (1983) ("[w]hile there may be a series of episodes, only one occurrence is intended as far as the application of policy limits is concerned"); 2 R. LONG, *supra* note 25, § 11:02, at 11-12.5 (occurrence is measured not at time of wrongful act, but at time of damage); see 11 G. COUCH, *supra* note 38, § 44:8, at 194; *Rosow & Liederman, supra* note 6, at 1150. *But see* M. KEIN, *INSURANCE LANGUAGE* 64 (1978) (defining occurrence as "a continuous or repeated exposure to conditions that results in injury or damage" (emphasis added)).

¹¹⁸ 1 R. LONG, *supra* note 25, § 1.25, at 1-74 (1983) (inhalation of noxious gases); 2 R. LONG, *supra* note 25, § 11.01, at 11-7, § 11.05A, at 11-23. In order for liability to attach in continuing exposure situations, it is the injury which must occur during the policy period. 2 R. LONG, *supra* note 25, § 11.05A, at 11-21. Of course, once such exposure is discovered, the policy does not cover any injuries caused by further "expected" exposure. *Id.* § 11.01, at 11-7.

¹¹⁹ It is generally recognized that products-liability policies cover losses occurring during the policy period, even though such losses are the result of conditions which arose prior to the period of coverage. 11 G. COUCH, *supra* note 38, § 44:393, at 567. One commentator has observed, however, that such a policy does not cover injuries occurring "after the policy period terminates even if it arises out of work performed during the policy period." *Id.* § 44:8, at 195 (footnote omitted). This observation tends to militate against adoption of the exposure theory of liability.

The historical interpretation of occurrence is strengthened by the fact that the CGL was amended in 1973¹²⁰ to incorporate a revised definition of occurrence¹²¹ which reflects the requirement that the damages, not the exposure, must align with the policy period.¹²² The revision, implemented to effect a clearer statement of the intent of the parties,¹²³ was designed to assure coverage of damages resulting from continuous exposure to hazardous conditions.¹²⁴

Exposure theory proponents have frequently attempted to avoid the precedential hurdle of traditional language interpretation by drawing a distinction between an occurrence policy and a claims-made policy.¹²⁵ The insured is covered under an occurrence policy for damages arising from acts which took place during the policy period.¹²⁶ A claims-made or discovery policy, on the other hand, provides coverage for claims which are made during the policy period "regardless of when the acts giving rise to those claims occurred."¹²⁷ The exposure theorists argue that the CGL policy is occurrence based, and thus, that liability is tied not to the damage but to the underlying act.¹²⁸ This mode of analysis is far from dispositive, however, since the CGL language has also been interpreted judicially as being claims-made.¹²⁹

¹²⁰ See 3 R. LONG, *supra* note 25, at app. 53 (1983). The revised version of the CGL took effect January 1, 1973. *Id.*

¹²¹ The pre-1973 definition of "occurrence" required that the accident or injurious exposure take place "during the policy period." *Id.* at app. 59. Pursuant to the 1973 revision, the phrase "during the policy period" was omitted from the definition of "occurrence" and placed in the definition of "bodily injury." *Id.* at app. 53, 59-60.

¹²² *Id.* at app. 53.

¹²³ The drafters of the CGL have attempted since 1966 to write policy language in a manner which more precisely expresses the insurer's intent regarding coverage. *Id.*

¹²⁴ The revised definition was intended to clarify the inclusion of injuries arising from both the sudden accident and continuous exposure situations. *Id.* at app. 60.

¹²⁵ See *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 n.3 (1978); *Brander v. Nabors*, 443 F. Supp. 764, 767 (N.D. Miss.), *aff'd per curiam*, 579 F.2d 888 (5th Cir. 1978); Comment, *supra* note 12, at 245 n.48.

¹²⁶ *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 59 (3d Cir. 1982).

¹²⁷ *Id.*

¹²⁸ See *Bill Binko Chrysler-Plymouth, Inc. v. Compass Ins. Co.*, 385 So. 2d 692, 693 (Fla. Dist. Ct. App. 1980); 8A J. APPLEMAN, *supra* note 112, § 4891.25, at 16 (1981); Comment, *supra* note 12, at 245 n.48.

¹²⁹ See *Bill Binko Chrysler-Plymouth, Inc. v. Compass Ins. Co.*, 385 So. 2d 692, 693 (Fla. Dist. Ct. App. 1980). Even assuming a valid distinction between occurrence and claims-made policies, it is submitted that this distinction would not defeat the manifestation theory of liability. Since occurrence traditionally has focused upon the point of damage, *supra* note 117 and accompanying text, an occurrence policy could be construed to cover diseases

D. *The Policy of Honoring the Reasonable Expectations of Contracting Parties Supports the Manifestation Theory*

In construing insurance contracts, courts quite frequently resort to the maxim of resolving ambiguities in favor of the insured.¹³⁰ This has indeed been the case in asbestosis litigation¹³¹ as courts have sought to spread risks and to promote coverage.¹³² It is submitted, however, that application of this principle is misplaced in the asbestosis-insurance context, where the controversy lies not between the insurance company and the insured but among the various insurers.¹³³ A second maxim to which the courts have resorted is honoring the reasonable expectations of the parties to a contract.¹³⁴ Indeed, it has been asserted that the divergent decisions regarding asbestos insurer liability are reconcilable in that each represents an attempt to "honor the parties' reasonable expectations."¹³⁵ It appears that application of the reasonable expectation doctrine is also somewhat dubious in the present context, but in the final analysis is supportive of the manifestation theory.

The policy of honoring the expectations of contracting parties is generally lauded in the arena of insurer liability.¹³⁶ Moreover,

which manifest during the time of the policy period, whereas claims-made policies would cover claims brought within the policy period regarding diseases which were manifest in a prior period.

¹³⁰ See, e.g., 13 J. APPLEMAN, *supra* note 112, § 7401, at 197.

¹³¹ E.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 17; *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041; *Michigan Chem. Corp. v. Travelers Indem. Co.*, 530 F. Supp. at 154; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. at 1237; see Comment, *supra* note 3, at 679.

¹³² See *infra* notes 146-47 and accompanying text.

¹³³ *Union Carbide Corp. v. Travelers Indem. Co.*, 399 F. Supp. 12, 15-16 (W.D. Pa. 1975); see *Michigan Chem. Corp. v. Travelers Indem. Co.*, 530 F. Supp. at 154. The appropriateness of applying the policy of construing ambiguities in favor of the insured in the asbestos-litigation context is questionable. First, such preferential treatment should only be invoked where an ambiguity actually exists. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 17 (where policy terms are unclear, construction of contract should favor the insured); 13 J. APPLEMAN, *supra* note 112, § 7384, at 211-27. While the parties may disagree regarding when the injury occurs in the context of the policy language, such difference of opinion is not sufficient to render the policy language ambiguous. Comment, *supra* note 3, at 678. Additionally, the use of the doctrine of favoring the insured has been criticized in cases where the parties are of basically equal bargaining power, such as an insurance company and a large asbestos manufacturer. Rosow & Liederman, *supra* note 6, at 1159.

¹³⁴ See *infra* notes 137-45 and accompanying text.

¹³⁵ Comment, *supra* note 12, at 241, 246; see Shea, *supra* note 25, at 578.

¹³⁶ See Abraham, *supra* note 111, at 1153; Comment, *supra* note 12, at 254; see also 1 G. Couch, *supra* note 38, § 15:16, at 666-71 (2d ed. 1959). Perhaps the most notable propo-

one advantage of the doctrine is that, theoretically, it encourages insurers to draft clearly any policy provisions that might be interpreted as contrary to the traditional notion of the parties' reasonable expectations.¹³⁷ The advantages of the theory, nevertheless, are questionable in the context of asbestos insurer liability, for it is unclear whether the parties reasonably expected, with any degree of specificity, that coverage would attach at either the point of exposure or of manifestation.¹³⁸ It is submitted that to assign one or the other "expectation" not only involves excessive judicial speculation, but also would likely serve to hinder an insurer's ratemaking, since it would be guided by no predictable rule upon which an insurer could anticipate liability.¹³⁹ Insofar as courts continue to

ment of the reasonable expectations doctrine was Professor Keeton, who described it as follows: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Keeton, *Insurance Law Rights At Variance With Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

The doctrine arose in response to the notion that an insurance policy is basically an adhesion contract. Comment, *supra* note 12, at 253; see Keeton, *supra*, at 966. The doctrine has been employed in numerous insurance contract cases. See Abraham, *supra* note 111, at 1153 n.7; Comment, *supra* note 12, at 255 n.123. It should be noted, however, that the doctrine is generally used in cases involving consumers who, unlike the asbestos manufacturers, lack sophisticated knowledge of insurance law. Abraham, *supra* note 111, at 1154.

¹³⁷ The "certainty-producing effect," coupled with a desire to promote coverage, has been a major thrust behind advocacy of the reasonable expectations doctrine. Comment, *supra* note 12, at 254; see Abraham, *supra* note 111, at 1168; Keeton, *supra* note 136, at 968. Significantly, the new CGL policy proposed by the Insurance Services Office adopts a "claims-made" or "first discovery" approach to insurance coverage. Shea, *supra* note 55, at 526. If adopted, the new CGL policy would reflect an industry-wide acceptance of the manifestation theory of liability.

¹³⁸ See Comment, *supra* note 12, at 255. One disadvantage of the reasonable expectations doctrine is the possibility of judicially constructed bargains that the parties never intended. See *id.* Significantly, under the doctrine, "the construction adopted is that which a reasonable person in the position of the insured would have understood the language used to mean." 1 G. COUCH, *supra* note 38, § 15:16, at 669 (2d ed.). Given that traditional insurance law interpretations of the CGL policy have adopted a manifestation approach, it is not unreasonable to think that the insured expected such an approach would be applied in cases involving latent diseases.

¹³⁹ See Comment, *supra* note 12, at 257. The reasonable expectations rule is particularly inequitable with respect to those insurers on the risk during the periods prior to manifestation. The *Keene* court, for instance, insisted on allocating a portion of the liability to those on the risk during exposure, and noted that a pure manifestation approach would lead to problems of coverage. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045-46. The result of such an approach, however, is that the insurers on the risk during manifestation have the benefit of adjusting their rates and coverage in proportion to the risk, whereas those insurers on the risk during prior periods are not so benefited. Notably, one court confronting the issue subsequent to the *Keene* decision has not been persuaded by that holding. See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d at 23.

construe the reasonable expectations of the parties, however, it is suggested that the results of this undertaking would in fact support the manifestation theory of liability. This point is illustrated by examining the adoption of the reasonable expectations approach in the area of health and accident insurance.¹⁴⁰

Courts in health and accident cases tend to favor a layman's interpretation of policy language,¹⁴¹ maintaining that the manifestation theory is consistent with the layman's reasonable expectations of coverage.¹⁴² As one commentator noted:

The insured purchased health and accident insurance protection against illness which he claims were [sic] unknown and undiscovered at the time he bought the insurance. Finding that the disease or illness did not occur until after the policy was sold merely upholds the coverage for which the insured paid a premium.¹⁴³

Courts and commentators have reasoned that this rationale is inappropriate in the context of insidious disease insurance because the parties to such an insurance contract are aware of the latency of the disease.¹⁴⁴ It is submitted that this reasoning is misguided.

¹⁴⁰ See, e.g., *Royal Family Ins. Co. v. Grimes*, 42 Ala. App. 481, 168 So. 2d 262, 264 (Civ. App. 1964); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 211-12, 60 P.2d 1070, 1072 (1936); *Cohen v. North Am. Life & Casualty Co.*, 150 Minn. 507, 508, 185 N.W. 939, 939 (1921); *Kissil v. Beneficial Nat'l Life Ins. Co.*, 64 N.J. 555, 561, 319 A.2d 67, 70 (1974); *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 84, 171 N.E. 914, 915 (1930) (Cardozo, C.J.); *Reiser v. Metropolitan Life Ins. Co.*, 262 App. Div. 171, 173, 28 N.Y.S.2d 283, 286 (1st Dep't 1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942); *Wenger v. Mutual Benefit Health & Accident Ass'n*, 203 N.Y.S.2d 946, 947 (Sup. Ct. N.Y. County 1960); *Wilkins v. Grays Harbor Community Hosp.*, 71 Wash. 2d 178, 185, 427 P.2d 716, 719 (1967); see also *Rosow & Liederman*, *supra* note 6, at 1156-57; Comment, *supra* note 3, at 670 (manifestation theory often applies in the area of health and accident insurance).

¹⁴¹ See, e.g., *Cohen v. North Am. Life & Casualty Co.*, 150 Minn. 507, 508, 185 N.W. 939, 939 (1921); *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 84, 171 N.E. 914, 915 (1930) (Cardozo, C.J.) (disease or infirmity so characterized "in the common speech of men"); *Reiser v. Metropolitan Life Ins. Co.*, 262 App. Div. 171, 173, 28 N.Y.S.2d 283, 286 (1st Dep't 1941) (interpretation of contract "must not be that of the scientist but that of the average person"); *Wenger v. Mutual Benefit Health & Accident Ass'n*, 203 N.Y.S.2d 946, 947 (Sup. Ct. N.Y. County 1960).

¹⁴² E.g., *Cohen v. North Am. Life & Casualty Co.*, 150 Minn. 507, 508, 185 N.W. 939, 939 (1921); *Silverstein v. Metropolitan Life Ins. Co.*, 254 N.Y. 81, 84, 171 N.E. 914, 915 (1930) (Cardozo, C.J.); see *Rosow & Liederman*, *supra* note 6, at 1157; Comment, *supra* note 3, at 670-71. The *Keene* court stated that, in health insurance cases, "the security that the policies provided would be undermined if a disease were not covered by the insurer on the risk at the time the disease manifests itself." *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17 (emphasis in original).

¹⁴³ *Rosow & Liederman*, *supra* note 6, at 1157.

¹⁴⁴ See *id.*; Comment, *supra* note 3, at 671. While the courts generally have described the health insurance cases as the most relevant of the analogies presented, see, e.g., *Keene*

The manufacturer, like the individual, purchases insurance anticipating that it will provide coverage if the underlying risk—liability for injuries resulting from this product—arises. The fact that a manufacturer generally is aware that asbestosis is an insidious disease does not defeat application of the manifestation theory of coverage, for a manufacturer is not aware that a particular individual will contract asbestosis, and thus cannot be certain that a need for the expected coverage will attach at a specific point.¹⁴⁵

E. *The Manifestation Theory and the Policy of Promoting Insurance Coverage*

1. Availability of Insurance Coverage

A final theme which is central to the judicial reasoning in insurance cases is the policy of attempting to promote coverage.¹⁴⁶ Courts and commentators favoring the exposure theory generally have emphasized that their approach best promotes coverage, citing its ability to spread the risk among the several insurers.¹⁴⁷ While noble in theory, their reasoning is subject to several major caveats.

Initially, it should be noted that while the consideration of promoting coverage in a particular case is a legitimate concern of the court, it must always be viewed in light of the insurance contract—the core of any insurance case.¹⁴⁸ Additionally, it is sug-

Corp. v. Insurance Co. of N. Am., 667 F.2d at 1043 n.17; Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1221, these cases nonetheless have been considered distinguishable from the liability insurance cases, see Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1043; Rosow & Liederman, *supra* note 6, at 1157; Comment, *supra* note 3, at 671. One commentator observed: "It cannot be said that the manufacturer of a product that poses an insidious hazard to the health of others is truly unaware that the damages for which he may be found liable arose out of bodily injury that remained latent for some time." Comment, *supra* note 3, at 671.

¹⁴⁵ Cf. 2 R. LONG, *supra* note 25, § 11.05A, at 11-20 (expecting "signifies more than a bare hope and embraces a high degree of certainty that a thing is about to happen").

¹⁴⁶ See 682 F.2d at 2; Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1041; Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1219; Shea, *supra* note 25, at 578 (cases consistent in favoring greatest amount of available coverage).

¹⁴⁷ See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. at 1242-43. The exposure theory "tends to allocate liability widely among insurers and reduce the difficulty experienced by manufacturers, distributors, and retailers of asbestos and other products in obtaining current coverage." Shea, *supra* note 25, at 578; see Mansfield, *supra* note 1, at 877 (exposure theory spreads losses over a number of years); *Insurer's Duty*, *supra* note 19, at 1099.

¹⁴⁸ See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1225.

gested that the exposure theory may place liability on insurers who are insolvent or nonexistent at the time of manifestation. The manifestation theory is attractive in this regard since it ties current risks with current rates, thus increasing the likelihood of available coverage.¹⁴⁹ While the manifestation theory has been criticized as allowing insurers to whom premiums were paid during the time of exposure to escape responsibility,¹⁵⁰ it is submitted that such insurers fulfilled their obligation in regard to these premiums by standing ready, willing and able to pay any good faith claims that might arise at a point of manifestation occurring while they were on the risk.

Judicial acceptance of the manifestation theory of liability would, however, be attended by the risk that following manifestation of a sufficient number of cases of asbestosis, insurance companies will increase their rates dramatically,¹⁵¹ will underwrite policies only with large deductibles,¹⁵² or will discontinue coverage in the area altogether, leaving manufacturers virtually uninsured for future claims.¹⁵³ While the potential ultimate effects of the mani-

¹⁴⁹ See Mansfield, *supra* note 1, at 876. Since the manifestation theory places "losses attributable to the underlying cases in more recent policy years," it serves to keep current the loss structure for rate-making, with premiums increasing to compensate for the losses. *Id.*

¹⁵⁰ Keene Corp. v. Insurance Co. of N. Am., 513 F. Supp. at 50.

¹⁵¹ See, e.g., *id.* at 51; Mansfield, *supra* note 1, at 876; *Insurer's Duty*, *supra* note 19, at 1097. *But cf.* Vagley & Blanton, *supra* note 1, at 656 (effect of assigning liability to large number of insurers in products liability cases would be an increase in costs, or the unavailability of insurance).

¹⁵² See Mansfield, *supra* note 1, at 876; *Insurer's Duty*, *supra* note 19, at 1097. In 1976, Liberty Mutual Insurance Company instituted a \$100,000 per person deductible amount for their asbestosis policies. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1215 n.6.

¹⁵³ See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1219; Mansfield, *supra* note 1, at 876; Casenote, *supra* note 23, at 1142; *Insurer's Duty*, *supra* note 19, at 1097. A current scarcity exists in the availability of products liability insurance for manufacturers in certain high-risk industries. Casenote, *supra* note 23, at 1142.

One dramatic response to this problem of asbestos manufacturers being left uninsured is the recent filing for protection under Chapter 11 of the federal bankruptcy law by UNR Industries, see Lewin, *UNR Industries Files for Chapter 11*, N.Y. Times, July 30, 1982, at D1, col. 3, and by Johns-Manville, see Feder, *Manville Submits Bankruptcy Filing to Halt Lawsuits*, N.Y. Times, Aug. 27, 1982, at A1, col. 6. The bankruptcy filings have the potential effect of staying asbestos litigation not only against the two companies, but against other codefendants as well. Winter, *Bankruptcies Create Asbestos Case Turmoil*, 68 A.B.A. J. 1361 (1982); see Lewin, *supra*, at D12, col. 5. It has been suggested that this resort by asbestos manufacturers to the protection of the bankruptcy courts illustrates the need for a legislative response to the asbestosis-victim compensation problem. Miller, *Asbestos Legislation: Who Compensates the Victims? Don't Let Industry Shirk Its Duty*, N.Y. Times, Sept. 5,

festation theory are of significant concern both to the parties and to society at large, it is submitted that these possible effects do not justify a substantial break with precedent by the courts, whose function is to interpret a particular contract in a particular case so as to settle a grievance between the parties. Indeed, any attempts at a far-reaching restructuring of the insurance industry's response to asbestosis claims would seem to lie within the function of the legislature, not the judiciary.

2. The Legislative Response

A number of legislative bills already have been introduced to deal with the problem of asbestosis claims.¹⁵⁴ Most of these bills, patterned after the Black-Lung legislation,¹⁵⁵ deal primarily with

1982, § III, at 2, col. 3; Feder, *supra*, at D4, col. 1; Lewin, *The Legal Issues in Manville's Move*, N.Y. Times, Aug. 27, 1982, at D4, col. 2; Noble, *Asbestos Claimants Angered by Filing*, N.Y. Times, Aug. 27, 1982, at D4, col. 5. Indeed, several commentators, noting that a judicial resolution of the asbestos problem is infeasible both from the standpoint of crowded court dockets and from that of litigation costs to the parties, have urged the legislature to provide relief. See, e.g., Mehaffy, *supra* note 1, at 351-52; Shea, *supra* note 25, at 578; Vagley & Blanton, *supra* note 1, at 648, 656-57; Winter, *supra* note 1, at 398-99; Comment, *supra* note 12, at 255; see also *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981) (new approaches to asbestosis, whether judicial or legislative, urgently needed); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1229 (Merritt, J., dissenting) (issue deserves legislative resolution).

Other proposed solutions to the caseload problem include the use of arbitration, class actions and the doctrine of collateral estoppel. See 662 F.2d at 1189; Winter, *supra* note 1, at 397-98. The doctrine of collateral estoppel has been employed in an increasing number of products liability suits. Wheeler & Allee, *Collateral Estoppel in Products Liability Cases*, Nat'l L.J., Dec. 13, 1982, at 15, col. 3 (describing use of doctrine in asbestos and DES cases). The use of the doctrine in the asbestos context increased drastically following the *Borel* decision. See *id.* at 17, col. 2; *supra* notes 21-22 and accompanying text. Application of collateral estoppel in products liability cases frequently has been criticized, however. Mansfield, *supra* note 1, at 869; Wheeler & Allee, *supra*, at 19, cols. 3-4. The urgent need for legislative action is made even more acute by the Supreme Court's consistent denial of certiorari in the asbestosis cases. See *supra* note 88.

¹⁵⁴ See H.R. 5735, 97th Cong., 2d Sess. (1982) (Occupational Health Hazards Compensation Act of 1982, proposed by Rep. Miller); S. 1643, 97th Cong., 1st Sess. (1981) (Asbestos Health Hazards Compensation Act of 1981, proposed by Sen. Hart); H.R. 5224, 97th Cong., 1st Sess. (1981) (Asbestos Health Hazards Compensation Act, proposed by Rep. Fenwick). See generally Mansfield, *supra* note 1, at 870; Winter, *supra* note 1, at 398.

¹⁵⁵ See Mansfield, *supra* note 1, at 870; Mehaffy, *supra* note 1, at 351. In 1969, Congress passed legislation providing for benefits for coal miners suffering from pneumoconiosis, or "black lung disease." See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). See generally De Carlo & Vieweg, *Federal Black Lung Law and Insurance In a Nutshell*, 11 FORUM 661, 662-65 (1976); Kelly, *Black Lung Benefit Trusts As A Federal Self-Insurance Alternative*, 82 W. VA. L. REV. 847, 847-50 (1980).

worker's compensation-type claims and employer's liability.¹⁵⁶ Since the legislation does not serve to bar any causes of action in products liability,¹⁵⁷ the courts are left with a proliferation of suits on the products liability side and the unresolved problem of insurers' liability.¹⁵⁸

Faced with this situation, it is submitted that Congress must respond by enacting a legislative scheme that will enable products-liability insurers to satisfy claims and still provide adequate coverage for the respective manufacturers.¹⁵⁹ Although legislative limitations on tort liability may be the ultimate solution in this area,¹⁶⁰

¹⁵⁶ See Mansfield, *supra* note 1, at 870; Winter, *supra* note 1, at 398. The bill proposed by Representative Miller proffers a system of compulsory coverage of all employers and employees in cases involving exposure to asbestos or uranium ore. The bill provides for a schedule of benefit payments and establishes compensation under the Act as the exclusive remedy against the employer. See Occupational Health Hazard Compensation Act of 1982, H.R. 5735, 97th Cong., 2d Sess. 7-11, 22 (1982). The Fenwick and Hart bills, similarly, are structured along worker's compensation lines, although the bills extend coverage to nonemployees such as household members. See H.R. 5224, 97th Cong., 1st Sess. 11 (1981); S. 1643, 97th Cong., 1st Sess. 127 CONG. REC. S10034 (daily ed. Sept. 18, 1981).

¹⁵⁷ See, e.g., H.R. 5735, 97th Cong., 2d Sess. 22-25 (1982); Winter, *supra* note 1, at 398.

¹⁵⁸ See *supra* note 8 and accompanying text. The flood of asbestos-related litigation is expected to increase over the next few decades. See Mehaffy, *supra* note 1, at 350; Vagley & Blanton, *supra* note 1, at 647. It is predicted that approximately 20,000 workers will die annually from asbestos exposure. See Mehaffy, *supra* note 1, at 350; Vagley & Blanton, *supra* note 1, at 647. Cases involving new classes of victims continue to arise, Mehaffy, *supra* note 1, at 350-51 (members of households or the general public), and hazards still exist from new products, as well as from a re-release into the atmosphere of asbestos fibers when asbestos-containing products are removed or destroyed, *id.* at 351. Moreover, it is estimated that payments of damages for asbestos exposure during the period from 1977 to 1995 will range from \$9.3 to \$25.6 billion. Vagley & Blanton, *supra* note 1, at 647.

¹⁵⁹ The seemingly limitless liability that has been imposed upon manufacturers as a result of products liability litigation in general has provoked much discussion regarding a system of national products liability legislation. See, e.g., INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT, reprinted in 5 L. FRUMER & M. FRIEDMAN, *supra* note 28, at app. 585, [hereinafter cited as FINAL REPORT]; O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501, 529 (1976); Sandler, *Strict Liability and the Need for Legislation*, 53 VA. L. REV. 1509, 1513 (1967); Shea, *supra* note 25, at 578-79; Vagley & Blanton, *supra* note 1, at 656-57. It has been suggested that legislation in this area would offer the advantages of availability of adequate and affordable insurance coverage, and of uniform standards by which manufacturers could measure the desirability of new methods and products. See Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,714-715 (1979); Shea, *supra* note 25, at 579; Vagley & Blanton, *supra* note 1, at 656-57.

¹⁶⁰ See, e.g., 8D J. APPLEMAN, *supra* note 112, § 5152, at 378-79 (1981). While legislative limitations on tort liability are rarely favored, they have been deemed necessary at times in order to redress the claims of all victims. One particularly appropriate example of a justifiable limitation on tort liability is the scheme of no-fault insurance adopted by most states in the area of automobile insurance. See *id.* This legislative abolition of a common-law right of action has withstood constitutional and other challenges in the courts. See Pinnick v.

Congress currently needs to address the feasibility of programs designed to enable insurers to continue underwriting asbestosis insurance, such as federal reinsurance systems,¹⁶¹ or pooling arrangements¹⁶² funded by contributions from manufacturers, insurers, consumers,¹⁶³ and the government itself.¹⁶⁴ Absent legislation di-

Cleary, 360 Mass. 1, 13, 271 N.E.2d 592, 599-600 (1971); 8D J. APPLEMAN, *supra* note 112, § 5153, at 378-79 (1981).

One commentator has urged the adoption of a no-fault compensation-type scheme of insurance in the products liability arena, whereby a manufacturer who elected to proceed under the system would pay, regardless of fault, the out-of-pocket losses and medical expenses of the victims. See J. O'CONNELL, *ENDING INSULT TO INJURY* 97-98 (1975). Pain and suffering and psychic loss would not be compensable. *Id.*; see Note, *Industry Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1020 (1979). Although such a system would limit the amount received by each victim, it would have the effect of increasing the total payout to all victims, since litigation expenses incurred under the current system would be avoided. See J. O'CONNELL, *supra* at 98; O'Connell, *supra* note 159, at 540. For this reason, the proposal generally is favored by consumer groups. O'Connell, *supra* note 159, at 531.

¹⁶¹ See FINAL REPORT, *supra* note 159, at app. 1171. Reinsurance is defined as "insurance purchased by an insurance company to transfer a portion of its liability to other insurers." *Id.* at app. 1171-72. Since the federal government would not be in the business to make a profit, it could offer such insurance at lower rates, hopefully lowering the primary insurance rates and increasing coverage. *Id.* at app. 1173-74. The interagency task force favored the reinsurance approach over such mechanisms as direct federal insurance, mandatory pooling, and assigned risk plans. *Id.* at app. 1172, 1179.

¹⁶² Insurance pooling arrangements have long been recognized as a means of efficiently spreading the risk of insurance and reducing administrative costs. FINAL REPORT, *supra* note 159, at app. 1155-56 (there is "security in numbers"). Thus, such pools serve to reduce insurance costs in that they allow an insurer to "be less conservative in the ratemaking process." *Id.* at app. 1142. Voluntary pooling arrangements, long used in the aircraft industry, are favored. *Id.* at app. 1157-58. Where insurers do not voluntarily enter such agreements, however, it has been recommended that Congress consider enacting mandatory pooling systems as a short-term solution for industries suffering from lack of availability of coverage. *Id.* at app. 1163-68.

Pooling arrangements have been proposed to fund several of the asbestosis compensation schemes currently under study. See, e.g., H.R. 5735, 97th Cong., 2d Sess. 29-39 (1982); H.R. 5224, 97th Cong., 1st Sess. 18-21 (1981). Such arrangements have been urged by several commentators in this and other products liability compensation contexts. See Adam, *Proper Compensation For the Damaged Worker*, 330 ANNALS N.Y. ACAD. SCI. 597, 599 (1979); Lanzone, *Asbestos Litigation: Common Sense or Common Disaster*, 54 N.Y.S.B.J. 24, 26 (1982); Sandler, *supra* note 159, at 1516; Vagley & Blanton, *supra* note 1, at 657; Note, *supra* note 160, at 120-21; Lewin, *Asbestos Now Company Peril*, N.Y. Times, Aug. 10, 1982, at D2, col. 2.

¹⁶³ See Sandler, *supra* note 159, at 1516. Contributions to the asbestosis compensation fund should also be sought from those entities that purchased large quantities of asbestos products for industrial use, such as major builders or manufacturers who incorporate the products into their own products. Such consumer contributions have heretofore been urged in the context of other products liability compensation schemes. See *id.* (urging that a "sales tax" method of loss spreading be adopted); Note, *supra* note 160, at 1020 n.211. It has been suggested that such consumer contributions to the compensation system will encourage consumers to gravitate to the safer products which have a correspondingly lower "tax rate." See

rected at products liability insurance in general,¹⁶⁵ it appears that narrowly drawn legislative action would be the penultimate solution to the problem of asbestos-insurer liability, or at least an effective supplement to judicial application of the manifestation theory.¹⁶⁶

Sandler, *supra* note 159, at 1516.

¹⁶⁴ It has been urged that the government share in the responsibility of compensating claims due to asbestos-related injuries. *See, e.g.,* Shabecoff, *Asbestos Makers Press U.S. to Do More in Liability Cases*, N.Y. Times, Jan. 19, 1983, at A1, cols. 1-2; Winter, *supra* note 1, at 399. Such a proposal is based upon the recognition that the government was a major consumer of asbestos products used in shipbuilding during the World War II era. *See, e.g.,* Vagley & Blanton, *supra* note 1, at 637; Shabecoff, *supra*, at A1, col. 1, B8, col. 1.

¹⁶⁵ *See supra* note 159 and accompanying text. As to insidious disease cases of first impression which may arise in the future, *see supra* note 6 and accompanying text, legislative resolution, although prospectively necessary, may be premature at the present time, *see* Mehaffy, *supra* note 1, at 351. Hence, although it has been recognized that similar difficulties of victim compensation are likely to occur in future insidious disease contexts, Nader, *Conclusion: We Are Not Helpless*, in *WHO'S POISONING AMERICA*, *supra* note 61, at 341, and that legislative compensation systems for the prospective victims of such injuries are already being proffered, *see id.* at 343; ENVIRONMENT AND HEALTH, *supra* note 6, at 122-24, commentators have advocated the postponement of legislative actions until such situations arise, *see, e.g.,* Mehaffy, *supra* note 1, at 351. Indeed, a legislative scheme which is appropriate in the asbestosis context may not be appropriate to litigation involving other diseases. For example, the worker's compensation considerations, and the proposed legislation based on such claims, which must be considered regarding the insidious diseases arising in the occupational setting, are inapplicable to cases involving drugs such as DES, which constitute pure products liability claims. *See* Vagley & Blanton, *supra* note 1, at 639. Moreover, it has been noted that the insurance industry itself can avoid confusion as to the point of injury in other contexts by clearly drafting the policy language "to provide coverage at a point in time suitable to the insurer." 3A L. FRUMER & M. FRIEDMAN, *supra* note 28, § 50.01C[4], at 19-60.12; *see supra* note 137 and accompanying text.

The prematurity of such legislation is bolstered by the notion that future insidious diseases may not produce the volume of litigation that asbestosis has. *See* Vagley & Blanton, *supra* note 1, at 647; *supra* note 8 and accompanying text. While limiting legislation to one particular product may seem inequitable, it has been noted in defense that the unique nature of the asbestosis experience justifies a solitary abandonment of traditional tort concepts. *See* Mehaffy, *supra* note 1, at 351. *But see* Vagley & Blanton, *supra* note 1, at 657 (urging legislative and administrative solutions for all "occupational diseases and cumulative trauma injuries").

¹⁶⁶ While a legislative approach must remain effective for as long as required to alleviate the problem, it is generally preferred that such interference be, if possible, a short-term remedy. *See* FINAL REPORT, *supra* note 159, at app. 1179. It is recognized that any legislative action implemented would have no effect on causes of actions which have previously accrued. *See* Pinnick v. Cleary, 360 Mass. 1, 13, 271 N.E.2d 592, 600 (1971); 8D J. APPLEMAN, *supra* note 112, § 5152, at 378 (1981). By adopting the manifestation theory of liability, however, this problem is avoided in the asbestos context, since all causes of action will not accrue until the diseases manifest.

IV. CONCLUSION

It is recognized that there are no simplistic solutions to the problem of insurers' liability for asbestosis claims. The manifestation theory of liability, however, apparently provides the most workable solution in handling these suits. Combined with the necessary congressional action, designed to address the problems peculiar to the asbestosis crisis, such a solution should serve to accomplish the ultimate concern of the courts and the legislature—the timely and expeditious resolution of the claims of asbestosis victims.

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