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Asbestos Litigation: Balancing the Interests of Insurance Companies, Manufacturers and Victims

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Abstract

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KEYWORDS: balancing, companies, victims

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Introduction

Asbestosis victims file approximately 300 to 400 claims each month.¹ An estimated 12,000 to 20,000 pending asbestosis cases represent the largest category of claims in the area of products liability litigation.² Reports of this disease surfaced in the United States as early as the 1930's,³ yet a variety of industries still utilize products containing asbestos fibers.⁴ Florida courts have numerous asbestosis cases on their dockets, and it has been predicted that the profusion of these claims will continue for several years. Dr. Irving Selikoff, director of Mt. Sinai Hospital Environment Sciences Laboratory in New York, claims tens of thousands of cancer victims have not yet realized the association of their malignancies with asbestos exposure.⁵ Consequently, current litigation represents a mere fraction of potential suits.

Compounding the problem are the recent decisions in *White v. Johns-Manville*⁶ and *Keene Corp. v. Insurance Co. of North America*⁷ which could dramatically increase the already overwhelming number of asbestos related lawsuits.⁸ In *White*, the Fourth Circuit held shipyard workers suffering from diseases caused by asbestos inhalation could bring claims under admiralty jurisdiction which the state statute of limitations would have otherwise barred.⁹ The court in *Keene* expanded

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1. The Nat'l L.J., Oct. 19, 1981, at 1, col. 3.
 2. *Id.* at 24, col. 1; Am. Bus., Dec. 1981, at 1, col. 3.
 3. *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).
 4. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1355 (E.D. Tex. 1981).
 5. Am. Bus., Dec. 1981, at 1, col. 4.
 6. 662 F.2d 234 (4th Cir. 1981).
 7. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, — U.S. —, 102 S. Ct. 1644 (1982).
 8. The Nat'l L.J., *supra* note 1.
 9. 662 F.2d 234.

the liability of insurance companies, holding that the statutes of limitations in asbestos cases began to run either at the time of exposure, or the earliest manifestation of symptoms of the disease, whichever is later.¹⁰ Further, at least one court has suggested the application of "market-share liability" to asbestos suits.¹¹

Each of these decisions lays the foundation for an onslaught of new asbestos litigation. This comment explores the basis for each decision, and examines its potential effects on future asbestos related lawsuits. An overview of the difficulties inherent in asbestos litigation is also provided.

Perspective on Asbestos

The term asbestos encompasses a diverse group of natural minerals capable of separating into fibers.¹² There are primarily six species of these minerals, each having distinct characteristics.¹³ Durable and flexible, resistant to fire and wear, asbestos is ideal for use in over 3,000 industrial products and functions.¹⁴ Workers who manufacture insulation, clutch linings in cars, brake shoes, walls, tiles, floors, ironing boards and various resistant cloths frequently suffer exposure to asbestos.¹⁵

Unfortunately, exposure to asbestos fibers leads to a number of serious, often fatal illnesses. The most common of these, asbestosis, is a chronic fibrotic reaction in pulmonary tissue which results in severe breathing problems.¹⁶ The disease usually manifests itself between ten and twenty-five years after initial exposure,¹⁷ and occasionally has a

10. 667 F.2d at 1041.

11. *Hardy*, 509 F. Supp. at 1353.

12. R. SAWYER, ASBESTOS-CONTAINING MATERIALS IN SCHOOL BUILDINGS: A GUIDANCE DOCUMENT Part 2, I-1-1 (1978).

13. *Id.*

14. *Id.* at I-1-2 (citing F. D. KOVER, ASBESTOS: A REVIEW OF SELECTED LITERATURE THROUGH 1973 RELATING TO ENVIRONMENTAL EXPOSURE AND HEALTH EFFECTS (EPA-560/2]-76-001, Office of Toxic Substances 1976)).

15. P. BEESON & W. MCDERMOTT, TEXTBOOK OF MEDICINE 914 (13th ed. 1971).

16. *Id.* at 915.

17. *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

latency period of up to forty years.¹⁸ Once inhaled, asbestos fibers remain in the lungs causing progressive, irreversible damage.¹⁹ As a result of the long latency period, physicians cannot determine with reasonable accuracy which of the victim's exposures to the fibers caused the onset of illness.²⁰ This feature of the disease led to the controversy regarding commencement of insurance liability in *Keene*.²¹

Asbestos inhalation may also result in such malignant diseases as lung cancer, pleural and peritoneal mesothelioma, and cancer of the gastrointestinal organs.²² It has been estimated that at least fifty percent of workers afflicted with asbestosis develop lung cancer.²³ Family members in contact with those directly exposed to asbestos fibers may also develop pleural and peritoneal mesothelioma.²⁴ The problem has become so widespread that a number of United States Senate and House members have proposed "White Lung Bills" which would establish minimum standards for state workers' compensation laws by providing "prompt, adequate, exclusive, and equitable compensation for occupational diseases or death resulting from exposure to asbestos."²⁵

Insurance Company Liability in Asbestosis Cases

In all insurance litigation, the plaintiff must prove that an injury or accident "occurred" within the meaning of a liability policy.²⁶ While most insurance contracts provide coverage for injuries within the policy period,²⁷ carriers often contest coverage in situations involving latent

18. 7 F. NETTER, *THE CIBA COLLECTION OF MEDICAL ILLUSTRATIONS: RESPIRATORY DISEASES* 211 (1979).

19. *Borel*, 493 F.2d at 1083.

20. *Id.*

21. 667 F.2d 1034 (D.C. Cir. 1981).

22. Motley & Middleton, *Asbestos Disease Among Railroad Workers*, 17 TRIAL 38, 39-40 (1981). Mesothelioma is defined as "a malignant tumor derived from mesothelial tissue" (peritoneum, pleura and pericardium). DORLANDS ILLUSTRATED MEDICAL DICTIONARY 803 (26th ed. 1981).

23. *Id.* at 40 (citing Lewinsohn, *Health Hazards of Asbestos: A Review of Recent Trends*, 24 J. SOC. OCCUP. MED. 2 (1974)).

24. F. NETTER, *supra* note 18, at 211.

25. S. 1643, 97th Cong., 1st Sess. (1981).

26. Annot., 57 A.L.R.2d 1386 (1956).

27. *Id.* at 1387. The policy issued to Keene by Hartford Accident and Indemnity Company states:

disease, claiming the injury occurred beyond the time limits of the policy.²⁸

Advocates of the manifestation theory contend injury occurs when symptoms of asbestosis are revealed.²⁹ Under this approach bodily injury is deemed to occur when the disease becomes apparent or when the victim knew, or should have known, of his illness.³⁰ Therefore, only those insurance companies who covered the manufacturer during the period of manifestation of the symptoms are liable for damages to the victim.

In *Porter v. American Optical Corp.*,³¹ the district court utilized the manifestation theory. A victim of asbestosis sued the company which manufactured a respirator he had used as protection against inhalation of asbestos fibers and dust.³² The trial court held that determination of the onset of injury was based upon manifestation of the symptoms of asbestosis.³³ The insurer providing coverage when the plaintiff's injury became apparent was held responsible, whereas the insurers offering coverage during the victim's exposure, and during the period when the formal medical diagnosis was made, were exonerated.³⁴ The

[t]he company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have th the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent

Keene, 667 F.2d at 1039 (emphasis original).

28. See *supra* text accompanying notes 18-20.

29. *Insurance Co. of North Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216 (6th Cir. 1980).

30. *Id.*

31. 641 F.2d 1128 (5th Cir. 1981). This case is distinguishable from others cited, since the filter manufacturer, rather than the asbestos manufacturer, is the party insured. However the court stated that since the respirators were specifically used to protect against the hazards of exposure to asbestos, the controlling principles in cases against asbestos manufacturers should be utilized. *Id.* at 1144.

32. *Id.* at 1130-31.

33. *Id.* at 1131.

34. *Id.* The district court decision resulted in the two appeals presented. American Optical Corp., the manufacturer of the respirators appealed its liability, and Hartford Accident and Indemnity Company appealed the decision holding it the sole insurer liable for coverage. *Id.*

Fifth Circuit Court of Appeals in *Porter* expressly rejected the manifestation theory.³⁵ The majority held an insurance company's liability for bodily injury due to a cumulative disease should be apportioned among *all* insurers covering the manufacturer during the "injurious exposure" period.³⁶ This reversal closely followed a decision by the Sixth Circuit Court of Appeals in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*³⁷ The *Forty-Eight Insulations* Court described asbestosis as, "a series of continuing injuries to the body, [or a] continuing tort,"³⁸ so that companies providing insurance coverage throughout the period of exposure had to contribute to the victim's compensation. Five insurance companies had issued policies over the twenty year period involved, and for some years, Forty-Eight Insulations had been self insured.³⁹ The court held liability for damages and defense costs were to be pro-rated among all the companies involved, and treated Forty-Eight Insulations as a self-insurer for the period during which it had no commercial coverage.⁴⁰ When the same court was required to apply Ohio law in another asbestos suit,⁴¹ it determined that a cause of action for asbestos-related disease accrued when symptoms were manifested.⁴² This decision was in direct opposition to *Forty-Eight Insulations*.

A bold departure from these approaches occurred in *Keene Corp. v. Insurance Co. of North America*.⁴³ From 1948 to 1972, plaintiff

35. *Id.*

36. *Id.* at 1145. The case was remanded for apportionment of coverage between Aetna Casualty and Surety Company and Hartford Accident and Indemnity Company, and the judgment against American Optical was affirmed. The district court judgment absolving Continental Insurance Company of liability was also affirmed since Continental provided no coverage during Porter's exposure to asbestos fibers and his use of the respirator. *Id.* at 1145-46.

37. 633 F.2d 1212 (6th Cir. 1980).

38. *Id.* at 1217.

39. *Id.* at 1213, 1215.

40. *Id.* at 1225. The five companies included: Insurance Company of North America, Affiliated FM Insurance Company, Illinois National Insurance Company, Travelers Indemnity Company of Rhode Island, and Liberty Mutual Insurance Company. *Id.* at 1215.

41. *Clutter v. Johns-Mansville Sales Corp.*, 646 F.2d 1151 (6th Cir. 1981).

42. *Id.* at 1158.

43. 667 F.2d 1034 (D.C. Cir. 1981).

Keene Corporation manufactured thermal insulation products containing asbestos.⁴⁴ As a result of its employees' exposure to this compound, Keene had been involved as a co-defender in over six thousand cases by alleged victims of asbestosis, mesothelioma, and lung cancer.⁴⁵

Throughout the period of the employees' exposure, *Keene* was successively issued comprehensive general liability policies by a number of insurance companies. During litigation however, each insurer denied coverage in whole or in part.⁴⁶ Keene filed suit for a declaratory judgment and damages in order to determine the liability of each insurer with which it had contracted.⁴⁷

The court rejected both the manifestation theory and the exposure theory proposed by the insurers, and held "inhalation exposure, exposure in residence, and manifestation all trigger coverage under the policies."⁴⁸ The court's theory regarding time of injury was essentially a combination of theories previously accepted, and provided that each insurer be held liable for the entire loss.⁴⁹ "When more than one policy applies to a loss, the 'other insurance' provisions of each policy provide a scheme by which the insurers' liability is to be apportioned."⁵⁰ The manufacturer was released from liability for any damage which may have occurred during its uninsured periods.⁵¹ The court attempted to

44. *Id.* at 1038.

45. *Id.*

46. *Id.* at 1039. *Keene* was covered by the following companies: From Dec. 1961-Aug. 1968, Insurance Company of North America (INA); from Aug. 1967-Aug. 1968, Liberty Mutual Insurance Co.; from Aug. 1968-Aug. 1971, Aetna Casualty and Surety Co.; from Aug. 1971-Oct. 1974, Hartford Accident and Indemnity Co.; and Oct. 1974-Oct. 1980, Liberty Mutual Insurance Co. *Id.* at 1038.

47. *Id.* at 1039.

48. *Id.* at 1047. Additionally, the court defined bodily injury as any segment of injury encompassed by asbestosis. *Id.*

49. *Id.* at 1041, 1050. This liability includes defense costs as well as indemnification. *Id.* 1041.

50. *Id.* at 1050.

51. *Id.* at 1048-49. The insurance companies asserted that this decision would allow the defendant to purchase coverage for only one year, and still be covered for a long period of time. The court presented two reasons why this would not be the case: 1) the longer a company has purchased insurance, the fewer number of injuries it would be responsible for; and 2) since only one policy would apply to each injury, the insured would only be able to collect damages from one of the several policies it purchased, thereby benefitting the insurance companies. *Id.*

satisfy the expectations of the manufacturer when it purchased the insurance policies, and to “give effect to the policies’ dominant purpose of indemnity.”⁵²

The contracting parties for an insurance policy exchange assumption of the risk of the insured’s liability, for a fixed amount of money.⁵³

An insurance contract represents an exchange of an uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability, and the certain loss is the premium payment. . . . At the heart of the transaction is the insured’s purchase of certainty—a valuable commodity.⁵⁴

The manifestation theory defeats this purpose, since manufacturers have been virtually uninsured after the onslaught of asbestos suits filed in recent years.⁵⁵ Insurance companies providing coverage during the exposure period, but prior to manifestation of symptoms, escape liability under this approach. Consequently manufacturers face the strong possibility of being forced out of business from damage awards against which they are not indemnified, depriving them of the freedom from liability for which they bargained.

The exposure theory is equally threatening, also defeating the purpose of the bargained-for contract.⁵⁶ Under this approach no guarantee of protection against future development of the disease exists. The court held that in purchasing insurance coverage, Keene Corporation bargained for coverage of all future liability excluding only those injuries it knew or should have known existed prior to the insurance agreement.⁵⁷ The court also determined the extent of protection provided during the policy period. The majority once again focused on the prom-

52. *Id.* at 1041.

53. *Id.*

54. *Id.*

55. *Id.* at 1045. Once it was confirmed that exposure to asbestos causes serious disease, (late 1960’s-1970’s), insurance companies stopped issuing policies providing adequate coverage for those injuries. *Id.*

56. *Id.* at 1044. Under Hartford’s theory, the original exposure to asbestos fibers constitutes the injury, and future development of the disease is merely “a consequence of the injury.” *Id.*

57. *Id.* at 1048.

ise of certainty upon which plaintiff had relied.⁵⁸

The court's interpretation of the contracts resulted in Keene being fully covered by each insurance policy, even if only part of the injury occurred during the policy period.⁵⁹ The court specified however, that only one policy could be applied to a specific injury. Keene had to select the policy from its succession of coverage to provide indemnification for the injury in question.⁶⁰ Since only one policy would be selected to cover each injury, the insurance companies would benefit.⁶¹ If, for example, three policies were in force throughout the victim's exposure to asbestos fibers, two companies would be free from primary liability. (Subject to the 'other insurance' provisions.)

Finally, the court determined the method of allocating liability for each injury. The court simply concluded Keene could collect damages from any company providing coverage during the time of injury, subject to the 'other insurance' provisions stated in the policy selected.⁶²

The *Keene* theory exposes insurers to extraordinarily broad liability for coverage, which could cause the downfall of numerous insurance businesses.⁶³ Paul W. MacAvoy, a Yale economist, predicts payments to asbestos victims may total up to 90 billion dollars over the next thirty years, and some insurers may have insufficient reserves to cover these costs.⁶⁴ This view was criticized by Floyd H. Knowlton, a Vice-President of Travelers Insurance, who asserted that no carriers are

58. *Id.* at 1047-48.

59. *Id.* at 1048. The court holds that the policies do not provide for a reduction of liability if only part of the injury occurs within the policy period. Additionally, it states there is no authority for the suggestion that Keene is "self-insured" for periods during which no other policy was in force. "There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies." *Id.* at 1049.

60. *Id.* at 1049-50.

61. *Id.*

62. *Id.* at 1050. The court cites as an example INA's policy which provides:

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below. *Id.*

63. Wall St. J., June 14, 1982, at 1, col. 6.

64. *Id.* at 18, col. 1.

threatened by insolvency.⁶⁵ Other commentators compare the predictions of doom to those which occurred when medical malpractice insurance payments soared, yet no major crisis ever materialized.⁶⁶ Others fear that based on the *Keene* decision, insurers must now "reopen their books on policies that expired 10 or 20 years ago,"⁶⁷ and will be unable to project future losses as applied to latent diseases. As a result, it may be impossible to reliably price new policies.⁶⁸

Asbestosis in Shipyard Workers

Statutes of Limitation:

The tolling of the statute of limitations in cases involving insidious disease depends upon determination of the onset of bodily injury. Under the laws of several states, the statute begins to run when the plaintiff knows, or should have known, of the cause of injury.⁶⁹ This approach was followed in *In re Johns-Manville*, wherein asbestos victims were required to file their claims within two years of the time plaintiffs knew or should have known of the onset of their disease.⁷⁰ Other states hold this identification of injury insufficient to begin running of the statute. Under the laws of Pennsylvania, the statute will not begin to run simply because plaintiff knows of his injury—he must also be able to determine a nexus between cause and injury.⁷¹ Virginia law dictates that the statute may begin to run prior to manifestation of symptoms if expert medical testimony can pinpoint the plaintiff's time of injury.⁷²

Federal Courts of Admiralty may utilize equity as an alternative to formal statutes of limitations. Under the doctrine of laches, proof that a plaintiff was negligent by failing to bring a timely action is an

65. *Id.*

66. *Id.*

67. *Id.* at 18, col. 3.

68. *Id.*

69. *In re Johns-Manville*, 511 F. Supp. 1235 (N.D. Ill. 1981).

70. *Id.*

71. *Grabowski v. Turner & Newall*, 516 F. Supp. 114, 118 (E.D. Pa. 1980). Under Pennsylvania law a duty is imposed upon the plaintiff to use reasonable diligence in informing himself of facts concerning his injury. *Id.*

72. *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981).

affirmative defense to the complaint.⁷³ Laches is premised on the assumption that one has abandoned his right to recover if the claim was unreasonably delayed, thereby causing prejudice to defendant.⁷⁴

Federal Court Admiralty Jurisdiction:

Pursuant to Article III, Section 2, of the United States Constitution,⁷⁵ original jurisdiction of admiralty or maritime cases is vested in United States district courts. The definition of "maritime cases" however, has been subject to considerable controversy.

Traditionally, locality of the event determined whether a cause of action was maritime in nature.⁷⁶ In *The Plymouth*,⁷⁷ a shipowner's claim was given maritime status when his vessel collided with a wharf (considered land). Paradoxically the prayer for admiralty jurisdiction by owners of storehouses on the wharf was denied. The United States Supreme Court held, "the jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters where it occurred."⁷⁸ Over one hundred years ago Justice Story held "the jurisdiction of the admiralty is exclusively dependent upon the locality of the act,"⁷⁹ and in recent years the Court in *Victory Carriers, Inc. v. Law*⁸⁰ upheld the locality test. The majority in *Victory Carriers, Inc.* held maritime law applicable exclusively to incidents taking place in navigable waters, thereby denying admiralty jurisdiction in an action by a longshoreman

73. *The Key City*, 81 U.S. 653 (1871). The circumstances of each case must be considered to determine whether the claim may be barred. *Id.* at 660.

74. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, —, 30 P.2d 781, 784 (1934).

75. U.S. CONST. art. III, § 2 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ; to all Cases of admiralty and maritime jurisdiction.

76. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 253 (1972).

77. 70 U.S. (3 Wall.) 20 (1866).

78. *Id.* at 36.

79. *Executive Jet Aviation*, 409 U.S. at 253.

80. 404 U.S. 202 (1971). The Court reasoned that although the plaintiff was loading a ship, his injury was caused by a vehicle on land, therefore admiralty jurisdiction did not apply. *Id.*

who was injured on a pier by one of his own trucks.⁸¹

The Supreme Court in *Executive Jet Aviation v. City of Cleveland* clearly explains that using the strict locality test can lead to unsound conclusions.⁸² For example, admiralty jurisdiction may at times be denied to maritime employees, whereas utilizing the strict locality test would allow swimmers colliding in water to bring their case under admiralty jurisdiction.⁸³

Courts recognize this inequity and often consider other factors when invoking admiralty jurisdiction.⁸⁴ The court in *Executive Jet Aviation* defined the parameters of admiralty jurisdiction by enacting a two part test. The criteria established that the action must not only encompass a maritime locality but must also "bear a significant relationship to traditional maritime activity."⁸⁵ The combination locality and maritime nexus test insures admiralty jurisdiction will be inapplicable in a situation where the cause of action fortuitously occurs in navigable waters.

White v. Johns-Manville:

Plaintiffs in the principal case, John W. White and four companion shipyard workers, were exposed to asbestos dust over a lengthy period of employment, and each developed asbestosis. The district court joined a number of complaints and issued three individual findings. First, the court held the injuries did not bear a reasonable relation to traditional maritime activity and consequently declined to employ admiralty jurisdiction.⁸⁶ Pursuant to the rules of diversity jurisdiction the court applied Virginia's two year statute of limitations for personal injury.⁸⁷ The court commenced the limitations period from the date of

81. *Id.*

82. 249 U.S. at 255.

83. *Id.*

84. The Court in *Executive Jet Aviation* explains that in spite of the broad language in cases like *The Plymouth*, the Court has never held that locality of an action is the exclusive consideration in applying admiralty jurisdiction. *Id.*

85. *Id.* at 268.

86. *White v. Johns-Manville Corp.*, 662 F.2d 234, 238 (4th Cir. 1981). The court rejected the plaintiff's claims brought under the Extension of Admiralty Act, 46 U.S.C. § 740 (1976), and general maritime law, 28 U.S.C. § 1333 (1976). *Id.*

87. *Id.* at 238; VA. CODE § 8.01-243 (1977).

White's last exposure to asbestos, thereby barring his claim.⁸⁸

Second, the court restricted damages to "injuries which occurred during the period commencing at a date two years before the institution of each plaintiff's action and ending at the date of last exposure."⁸⁹ Consistent with its ruling the court excluded evidence of asbestos exposure prior to the commencement of this time period.⁹⁰ Although summary judgment was granted against White and several other plaintiffs, a jury verdict of \$435,000 was awarded to four employees.⁹¹

The trial court's third order granted a judgment notwithstanding the verdict for the manufacturer, based upon a failure to prove injuries during the restricted two year time period. Each order was appealed before the Fourth Circuit Court of Appeals. The circuit court questioned the district court's refusal to apply admiralty jurisdiction. Determining that the criteria established in *Executive Jet Aviation*⁹² had been met, the circuit court reversed. The locality requirement was fulfilled by the employees' exposure to asbestos containing materials on ships at both shipyard and dry-dock locations, as well as while working at sea. The nexus requirement was also satisfied because insulation materials are an integral part of ships, and "clearly essential to the maritime industry."⁹³

The circuit court overruled the district court's application of the Virginia statute of limitations,⁹⁴ although in applying the equitable doctrine of laches district courts may consider state statutes of limitations.⁹⁵ In asbestos cases the long latency period of the disease must also be considered, with the burden upon defendant to prove prejudice

88. *White*, at 238.

89. *Id.*

90. *Id.*

91. *Id.* The cases were: "1) Oman v. Johns-Manville and Owens-Corning, 2) Walker v. Johns-Manville, Owens-Corning and Pittsburgh Corning, 3) Reynolds v. H. K. Porter Co. Inc. and 4) Gibbins v. Johns-Manville." *Id.* (emphasis deleted).

92. *See supra* text accompanying note 85.

93. *White*, at 239.

94. *Id.* at 239-40. The manufacturers argued that applying admiralty jurisdiction in products liability cases would expand such jurisdiction to cases involving products remotely associated with maritime activities. The court, however, found that the manufacturers were able to foresee that these insulation materials would be used primarily on ships. *Id.*

95. *Id.* at 240.

by showing plaintiff inexcusably delayed his claim.

The circuit court approved the district court instruction that manufacturers were not liable for asbestosis incurred prior to the specified periods of exposure. It stated, however, the defendant may be accountable for negligent "aggravation of a pre-existing condition."⁹⁶ It was therefore permissible for the jury to award damages based upon exacerbation of the plaintiff's pre-existing asbestosis. The decision of the district court was vacated and remanded for a new trial conducted under federal court admiralty jurisdiction.

Market—Share Liability

The third decision in the trilogy presented focuses upon the relatively new doctrine of Market Share Apportionment. A basic tenet of traditional tort liability demands plaintiff demonstrate a connection between his loss or injury, and defendant tortfeasors' act or omission.⁹⁷ Historically it has been difficult, if not impossible, to obtain damages when one is unable to clearly identify the party at fault.⁹⁸ Three limited exceptions to the rule necessitating precise identification of the tortfeasor have evolved: concert of action, alternative liability and *res ipsa loquitur*.⁹⁹ Under each of these doctrines, the presumption that the defendant is in a better position to determine who actually caused the injury shifts the burden of proof away from the plaintiff. Each defendant's relationship to, and involvement in the injury producing activity must be demonstrated.

96. *Id.* at 241.

97. W. PROSSER, *LAW OF TORTS* 236 (4th ed. 1971).

98. *Id.* at 671-72.

99. Newcomb, *Market Share Liability for Defective Products: Ill Advised Remedy for the Problem of Identification*, 76 NW. U.L. REV. 300 (1981). Under each of these doctrines there must be some evidence that the defendant could have been at fault, whereas under "enterprise liability" or "market-share liability" no connection between the defendant and a particular incident need be identified. It is sufficient that the named defendant was producing the injury-causing product at the time of the occurrence. *Id.* at 310.

Early Application:

In *Hall v. E.I. DuPont de Nemours & Co.*,¹⁰⁰ and the companion case *Chance v. E.I. DuPont de Nemours & Co.*,¹⁰¹ damages were sought from a number of explosives manufacturers and their trade association for injuries incurred in eighteen accidents.¹⁰² Because identification of the manufacturers of the blasting caps involved in each accident could not consistently be determined, defendants were randomly selected from the six companies comprising the entire explosives industry. The existing doctrines allowing recovery under these circumstances were inapplicable since defendant's relationship to the injury-producing activity could not be proved.¹⁰³ In an effort to provide recovery to the victims, the court in *Hall* suggested that virtually the entire industry be held liable for injuries resulting from use of its product.¹⁰⁴ This theory, referred to as enterprise liability or industry-wide liability, resulted from the responsibility of industries to compensate victims for harm typically resulting from use of its goods.¹⁰⁵ The court proposed the entire industry share the burden for any member's failure to take appropriate safety measures.

The doctrine received much publicity when in 1980, two suits were brought by women who had developed cancer and/or adenosis as a result of in-utero exposure to diethylstilbestrol, ("DES"), a drug administered to their mothers during pregnancy.¹⁰⁶ Unable to identify which drug company produced the particular DES ingested, plaintiff's in *Sindell* employed the enterprise liability doctrine in order to hold all manufacturers of DES jointly liable.¹⁰⁷ The court modified the *Hall*

100. 345 F. Supp. 353 (E.D.N.Y. 1972).

101. *Id.* The cases were later severed; none of the eventual decisions were based upon the theory of enterprise liability suggested in this decision.

102. *Hall*, 345 F. Supp. at 358.

103. *See supra* text accompanying notes 97-99.

104. 345 F. Supp. at 358.

105. *Id.* at 369.

106. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 449 U.S. 912 (1980); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980).

107. *Sindell*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132. Plaintiffs in *Sindell* alleged that all D.E.S. manufacturers adhered to identical industry-wide testing and safety standards and should therefore be jointly liable for injuries caused by D.E.S.

approach, deeming it unfair to impose liability on the approximately 200 distributors of DES, when only 6 or 7 manufacturers produced 90% of the drug then marketed.¹⁰⁸ The court formulated a narrower application of industry wide liability:

we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose.¹⁰⁹

Under this theory, those companies manufacturing a substantial share of DES available at the time of distribution could be joined in the action with the liability of each equitably apportioned.¹¹⁰

Market Share Apportionment Applied to Asbestos Suits:

The problem of proof encountered in *Hall* and *Sindell* repeatedly arises in asbestos suits. Victims of asbestosis and mesothelioma are frequently exposed to asbestos-containing products over an extended period of time. It becomes impossible to determine the precise moment of onset of the disease, therefore impossible to identify the manufacturers of the product from which they became ill.

In *Hardy v. Johns-Manville Sales Corp.*,¹¹¹ a United States district court took a step in overcoming this hurdle, by determining that Texas courts would probably adopt some form of enterprise liability,¹¹² thus permitting discovery based upon the theory of market share apportionment.¹¹³ Because this ruling limited itself to discovery and cross claim motions, a final adjudication of whether the doctrine applied to asbestos cases has yet to be reached.

The *Hardy* decision, although narrow, has opened the door for market-share liability in asbestos cases. Some commentators will cele-

Id. at ___, 607 P.2d at 925-26, 163 Cal. Rptr. at ___.

108. *Id.* at ___, 607 P.2d at 937, 163 Cal. Rptr. at ___.

109. *Id.*

110. *Id.*

111. 509 F. Supp. 1353 (E.D. Tex. 1981).

112. *Id.*

113. *Id.*

brate this extension of the *Sindell* doctrine. At first blush its applicability in asbestos cases seems directly on point. Asbestos usage abounds despite knowledge of asbestos carcinogenicity.¹¹⁴ As stated in the landmark case introducing the concept of alternative liability, *Summers v. Tice*,¹¹⁵ when a choice exists between an innocent plaintiff and negligent defendant, the latter should bear the cost for injuries incurred.¹¹⁶ If, through no fault of his own, a plaintiff cannot identify the guilty defendant, the manufacturers primarily responsible for distributing the dangerous product to the public should apportion damages among themselves.

Some find market-share apportionment a deplorable basis upon which to hold asbestos manufacturers liable for damages. Contrasted with victims of DES for whom it has been virtually impossible to identify the producers of the drug ingested by their mothers,¹¹⁷ plaintiffs in asbestos cases can provide substantial information regarding the time and place of their exposure. Although it may be impossible to consistently determine which exposure caused the disease, thorough discovery procedures may lead to identification of the appropriate defendant. Furthermore, under the *Sindell* doctrine those companies not manufacturing DES during a particular plaintiff's exposure to the drug could exculpate themselves from liability.¹¹⁸ Because it is often impossible to determine the onset of disease in an asbestos case, manufacturers not even producing the product at the time of injury should not be prevented from avoiding liability. To hold a 'substantial share' of asbestos producers liable for an injury with no evidence linking them to a particular occurrence defies the foundation upon which tort theory is based.

114. *Id.* at 1355.

115. 33 Cal. 2d 80, 199 P.2d 1 (1948).

116. *Id.*

117. Plaintiffs in the D.E.S. cases were not yet born when their injury occurred. They had no means by which to determine the brand of D.E.S. administered to their mothers. Even if medical and hospital records were available, it would be impossible to determine with certainty the manufacturer of the D.E.S. distributed by individual pharmacists at any given time.

118. *Sindell*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132.

Ramifications

The trilogy of decisions presented strongly favors plaintiff's rights. *Keene* expands the liability of insurance carriers who issued policies to companies utilizing products containing asbestos. As a result, employers who are uninsured for certain time periods under either the exposure theory or manifestation theory are now fully protected. The companies are at last free from the possibility of facing bankruptcy because of asbestos injuries incurred during their uninsured periods and plaintiffs are guaranteed a source from which to recover damages.

The *White* decision provides access to federal court admiralty jurisdiction, allowing shipyard workers to by-pass state statutes of limitations which previously barred their claims. The potential surge of new claims by shipyard employees who constitute the majority of victims suffering from mesothelioma and asbestosis could flood our courts for years to come.¹¹⁹ Finally, the *Hardy* application of market-share apportionment in asbestos suits shifts the burden of proof away from victims. Defendant manufacturers must demonstrate their freedom from liability in producing the injury causing product.

The theory expanding the scope of 'when bodily injury occurs' can be applied to a host of latent occupational diseases (e.g., those caused by cotton dust and uranium).¹²⁰ The application of admiralty jurisdiction to a products liability case where the substance was manufactured on land, could arguably be extended to a myriad of products which eventually find their way into a maritime environment. Although the majority in *White* denies this possibility, a comparable decision was handed down in the recent case of *Sperry Rand Corp. v. Radio Corp. of America*,¹²¹ perhaps indicating a trend in maritime products-liability cases. Applying the theory of market-share liability to asbestos claims indicates a growing acceptance of this relatively new doctrine, which

119. The Nat'l L.J., *supra* note 1.

120. Legal Times of Wash., Feb. 8, 1982, at 5, col. 3.

121. 618 F.2d 319 (5th Cir. 1980). The court applied admiralty jurisdiction in a products liability case against the manufacturer of a gyro-pilot steering system used aboard a vessel. The defendants in this case also argued that this might expand admiralty jurisdiction to any case involving a product used in a maritime situation, which the court denied. *Id.* For further discussion of maritime products liability, see Comment, 52 TEMPLE L.Q. 283 (1979).

conceivably could be expanded to any products liability case in which precise identification of the party at fault is impossible.

Steps have been taken which would minimize the effects of these decisions. Numerous attorneys have been involved in lobbying efforts for legislative action to compensate victims of asbestosis.¹²² Reactions to this effort are mixed: some legislators see it "as too much of an effort to bail out Johns-Manville,"¹²³ who bears the brunt of most asbestos-related lawsuits. Insurance companies are split while organized labor seems to be "taking a wait and see" stance, and trial attorneys face losing huge fees if litigation is halted.¹²⁴

Under a bill proposed by Senator Hart, (D-Colo.),¹²⁵ an industry and government funded pool would be created to compensate victims of asbestosis. Under this act, asbestos victims would be prevented from filing lawsuits to obtain additional remuneration. However, Rep. George Miller (D-Calif.), who will soon introduce his own bill, states, "let the companies explain . . . how the federal government should pay out billions of dollars when there is established liability (on their part) If they want a government bailout, they're whistling in a hurricane."¹²⁶ Rep. Millicent H. Fenwick (R-N.J.) has proposed a bill, H.R. 5224,¹²⁷ establishing a federal trust fund which would operate through the Labor Department, although there has been some indication that she may abandon it and support Miller's bill.¹²⁸ There has also been some indication that Senator Edward Kennedy (D.-Mass.) may introduce a bill paralleling Miller's house bill, perhaps including provisions for uranium-linked disease.¹²⁹ Attorneys representing private industries are also working on proposals which are intended for introduction through sponsors in the Senate.¹³⁰

122. LEGAL TIMES OF WASH., *supra* note 120, at 1, col. 1.

123. Podgers, *Toxic Time Bombs*, 67 A.B.A.J. 139, 142 (1981).

124. LEGAL TIMES OF WASH., *supra* note 120, at 1, col. 1.

125. Podgers, *supra* note 123, at 142.

126. LEGAL TIMES OF WASH., *supra* note 120, at 5, col. 3. Sources have indicated that Miller's bill would create a "federal workers' compensation mechanism," operating through the Labor Department, and not requiring government payments. *Id.*

127. H.R. 5224, 97th Cong., 1st Sess., 127 CONG. REC. 28, 415 (1981).

128. Legal Times of Wash., *supra* note 20, at 5, col. 3.

129. *Id.*

130. *Id.* These include Kenneth Feinberg, representing Raysbestos-Manhattan Inc., William Tucker retained by Johns-Manville, and Harrison Wellford, also repre-

Defendants are also beginning to assert that they were simply following government specifications in their manufacturing process.¹³¹ This "government-contract defense" has not yet been ruled on in asbestos suits, but has been allowed in "Agent-Orange" cases.¹³² If successful in the asbestos arena it could dispose of thousands of pending asbestos suits.¹³³ In order to utilize this defense, defendants would have to first prove a contractual relationship with the government.¹³⁴ Since much of the asbestos manufactured was for use in naval shipyards, it might be possible for defendants to show this relationship. In order to successfully assert this defense, manufacturers would have to prove that the government established specifications for the product, the specifications were met, and the government was aware of the product's hazards.¹³⁵

Conclusion

Defendant manufacturers and insurance companies face a growing threat as the arsenal of support for plaintiffs in asbestos-related cases continually increases. A variety of compromises have been proposed, but a multitude of problems must be overcome before a satisfactory solution can be achieved. The necessity of reaching an equitable balance is clear. Insurance companies need protection from the threat of over-expansive liability, employers and manufacturers must be saved from the threat of bankruptcy,¹³⁶ and above all, the victims of asbestosis must be assured adequate compensation for the debilitating injuries they have incurred.

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131. Winter, *U.S. Contracts Asserted in Asbestos Defense*, 68 A.B.A.J. 790 (1982).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. After this article was committed to print, Johns-Manville Corp. filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. Wall St. J., Sept. 13, 1982, at 5, col. 1.