1981

Insurance Law - Duty to Indemnify and to Defend - Each Insurer Which Provides Coverage during Worker's Exposure to Asbestos Is Proportionately and Individually Liable to Defend and Indemnify Its Insured


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INSURANCE LAW — DUTY TO INDEMNIFY AND TO DEFEND — EACH INSURER WHICH PROVIDES COVERAGE DURING WORKER'S EXPOSURE TO ASPEROSIS IS PROPORTIONATELY AND INDIVIDUALLY LIABLE TO DEFEND AND INDEMNIFY ITS INSURED.

Insurance Company of North America v. Forty-Eight Insulations, Inc. (6th Cir. 1980)

Forty-Eight Insulations, Inc. (Forty-Eight), a manufacturer of asbestos products, was named as a party-defendant in over one thousand asbestos-related lawsuits. The plaintiffs alleged that they suffered from asbestos-related injuries caused by exposure to Forty-Eight’s products during the course of their employment. Beginning in 1955, Forty-Eight purchased Comprehensive General Liability (CGL) insurance to protect


2. 633 F.2d at 1215. By May 4, 1978, Forty-Eight had been named as a party-defendant in 251 asbestos lawsuits. Id. One year later, 1,370 asbestos lawsuits had been commenced against the company. Id. The number was representative of the avalanche of lawsuits filed against the asbestos manufacturing industry over the past five years. See id. For a discussion of the asbestos disease litigation, see notes 15-26 and accompanying text infra.

3. 633 F.2d at 1214 & n.1. Asbestos-related diseases include asbestosis, mesothelioma and bronchogenic carcinoma. For a discussion of the asbestos-related diseases which have given rise to personal injury suits throughout the nation, see notes 15-26 and accompanying text infra.

4. See 633 F.2d at 1217-18. The plaintiffs, on behalf of their decedents or on their own behalf, claimed to have suffered injury or death from asbestos-caused lung diseases caused by exposure to asbestos products manufactured by Forty-Eight. 451 F. Supp. at 1235. The underlying suits were commenced against all manufacturers or suppliers, including Forty-Eight, whose asbestos products were used at the sites at which the workers were employed. See Mansfield, Asbestos: The Cases and the Insurance Problem, 15 F. 860, 865-66 (Summer 1980). For a discussion of the asbestos disease litigation and the various legal theories used in multi-party litigation, see notes 22-26 and accompanying text infra. The quantity of asbestos particles from Forty-Eight’s products to which a worker was exposed cannot be certain. 451 F. Supp. at 1235. In these cases, it is possible that Forty-Eight and any or all of the named party-defendant manufacturers may be held liable for damages. See 633 F.2d at 1215 n.3; Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1095-96 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); W. Prosser, Handbook of the Law of Torts § 52, at 315-20 (4th ed. 1971). For a brief review of the development of joint and several tort liability into an “enterprise” theory of liability, see note 26 infra.

5. 633 F.2d at 1215. The policies taken out by Forty-Eight contained provisions which were widely used in CGL insurance policies. Id. at 1215-16. In
itself against product liability judgments. The Insurance Company of North America (INA) — which had insured Forty-Eight for the longest period of all of the insurers — disclaimed any duty to defend or indemnify Forty-Eight for lawsuits alleging asbestos-related injuries manifested after the expiration date of INA's final policy.

INA sought declaratory judgments in the United States District Courts for the Northern District of Ohio and the Eastern District of Michigan against Forty-Eight and four other insurance carriers of Forty-Eight defining its duty to defend and indemnify the manufacturer in effect, an insurer, under a CGL policy, contractually agrees to pay on behalf of an insured such damages which result due to "bodily injury" caused by an "occurrence" during the policy period. See 451 F. Supp. at 1238; Mansfield, supra note 4, at 875. In the INA policy during the period of October 31, 1967 until October 31, 1972, the insurance agreement, policy period and definitions provisions stated:

This policy applies only to bodily injury . . . which occurs during the policy period. . . .

To pay on behalf of insured . . . as damages because of bodily injury . . . caused by an occurrence. . . .

Bodily injury means bodily injury, sickness or disease. . . .

As respects property damage liability occurrence means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of the insured.

633 F.2d at 1228, app. B.

6. 633 F.2d at 1215-16. Prior to 1955, Forty-Eight did not show coverage. Id. & 1215 n.4. From October 31, 1955 until October 31, 1972, the Insurance Company of North America (INA) insured Forty-Eight with six consecutive insurance policies, with varying coverage limits. Id. at 1215. From October 31, 1972 until January 10, 1975, Forty-Eight was insured by Affiliated FM Insurance Company (Affiliated FM). Id. Illinois National Insurance Company (Illinois National) insured Forty-Eight from January 10, 1975 until January 12, 1976 and Travelers Indemnity Company of Rhode Island (Travelers) issued policies to Forty-Eight from January 12, 1976 until November 8, 1976. Id. Since November 8, 1976, Liberty Mutual Insurance Company (Liberty Mutual) has been Forty-Eight's insurance carrier. Id. The coverage range increased over the three decades, and the current policy with Liberty Mutual includes a $100,000.00 per person deductible for asbestosis claims. Id. at 1215-16 n.6 & 1227, app. A. For various provisions of the pertinent policies and their coverage clauses, see id. at 1227-28, app. B; note 5 supra.

7. See note 6 supra. For the relevant provisions of INA's policies, see 633 F.2d at 1227-28, app. A & B.

8. 451 F. Supp. at 1236. INA intended its disclaimer to apply to all lawsuits filed after June 27, 1977 in which a complaint alleged that an asbestos-related disease manifested itself after October 31, 1972. Id. INA's final policy expired on October 31, 1972. Id.

9. Id. The Michigan District Court noted that it had jurisdiction over this case by reason of diversity of citizenship. Id. at 1232. The Ohio action was adjourned pending the determination of the instant declaratory judgment action in the Eastern District of Michigan. Id. at 1238.

10. Id. at 1236. See note 6 supra for a review of Forty-Eight's insurance carriers. This action would determine Forty-Eight's carrier's duties to defend.
the numerous pending asbestos lawsuits. The district court determined that the insurers provided coverage during the time that the plaintiffs were allegedly exposed to Forty-Eight's products were obligated to indemnify and defend Forty-Eight, even though the asbestos-related disease did not manifest itself during the insurer's period of coverage. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that each insurer which provides coverage during a worker's exposure to asbestos is proportionately and individually liable and indemnify. 633 F.2d at 1213-14. For purposes of the declaratory judgment action, Forty-Eight was considered self-insured prior to 1955 since no records of coverage before that date were presented. See 451 F. Supp. at 1233 n.1.

11. 451 F. Supp. at 1238. The central question was whether coverage attached at the time the disease manifested itself or at the time of exposure. Id. The dates that coverage attaches were considered relevant because of the possibility that several carriers may be held liable for indemnification under the exposure theory. Since Forty-Eight may have had several carriers during the dates that a plaintiff was exposed to Forty-Eight's products. Id. at 1239-43. On the other hand, only one insurer would be held liable to defend and indemnify Forty-Eight under a manifestation theory since these duties attach on the date that an asbestos disease manifests. Id. For a discussion of the peculiarities of asbestos-related diseases which give rise to these theories of liability, see notes 15-21 and accompanying text infra.

INA, along with Affiliated FM, Illinois National and Liberty Mutual advocated the application of the manifestation theory of liability. 451 F. Supp. at 1233. For a discussion of the manifestation theory of liability, see notes 34-46 and accompanying text infra. Liberty and Forty-Eight, who also counterclaimed for declaratory judgment, urged the exposure theory of liability. 451 F. Supp. at 1233. For a discussion of the exposure theory of liability, see notes 47-52 and accompanying text infra.

12. 451 F. Supp. at 1239. District Judge Feikens initially noted that plaintiff INA, as well as Illinois National and Affiliated FM, had previously relied on the exposure theory in deciding whether they were obligated to defend or indemnify their insureds. Id. The court suggested that this implicit approval of the exposure theory afforded the correct interpretation of the scope of coverage provided by the policy. Id. Judge Feikens also noted that the medical evidence supported an application of the exposure theory in that each inhalation of asbestos fiber results in tissue change and, therefore, "[e]ach minute injury may then be a part of a 'continuing tort'. . . ." Id., quoting Karjala v. Johns-Manville, 523 F.2d 155, 160 (8th Cir. 1975). The court, after rejecting INA's position that cases dealing with statutes of limitations, workmen's compensation and construction of the word "occurrences" apply, concluded that the obligation to defend and to indemnify would be apportioned on the basis of the relative length of the insurers' coverage, and that Forty-Eight would be responsible for part of any judgment rendered against it in proportion to the period in which it was self-insured. 451 F. Supp. at 1244-45.

13. All parties appealed the district court's decision. 633 F.2d at 1217. Appellants INA, Affiliated FM, Illinois National and Liberty Mutual, supported by several amici curiae, challenged the district court's use of the exposure theory of liability. Id. at 1217. For a discussion of the manifestation and exposure theories of liability, see notes 33-52 and accompanying text infra. Appellee Forty-Eight urged modification of the district court's opinion in three respects. See 633 F.2d at 1220-21. For a discussion of Forty-Eight's three suggestions, see notes 79-83 and accompanying text infra.

14. The case was heard by Senior Circuit Judge Peck and Judges Keith and Merritt. Judge Keith wrote the majority opinion, and Judge Merritt wrote a dissenting opinion.

Asbestos-caused lung diseases — asbestosis, mesothelioma and pulmonary carcinoma (lung cancer) — are unlike many other occupational injuries since a long latency period exists between the time of contact with asbestos and the apparent effect of the diseases. Asbestosis, for example, may take as long as twenty years to manifest itself.

15. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). Asbestosis, the most common of the three asbestos-related injuries, is characterized by lung scarring and is commonly found among workers whose work continually exposes them to asbestos fibers. 493 F.2d at 1083. This disease was discussed by the Borel court:

The disease is difficult to diagnose in its early stages because there is a long latent period between initial exposure and apparent effect. This latent period may vary according to individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used. In some cases, the disease may manifest itself in less than ten years after initial exposure. In general, however, it does not manifest itself until ten to twenty-five or more years after initial exposure. This latent period is explained by the fact that asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible.

Id. For a full discussion of asbestos and its effects on industrial insulation workers, see Selikoff, Chung, & Hammond, The Occurrence of Asbestosis Among Insulation Workers, 132 Ann. N.Y. Acad. Sci. 139, passim (1965) [hereinafter referred to as "Occurrence of Asbestosis"]. See also Mansfield, supra note 4, at 861-63, for an analysis of the pleural and parenchymal variations of asbestosis.


18. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1082-84 (5th Cir. 1973), cert. denied, 419 U.S. 896 (1974). The Borel court discussed the latency periods in asbestos-diseases and noted that the latent period is affected by several variables, including the extent and duration of exposure, the intensity of exposure, and individual idiosyncrasies such as smoking. Id. at 1083. The court also noted that the effect of the disease is cumulative since each exposure may result in additional tissue changes. Id. Thus, it was concluded that the latency period will be determined by the various factors which contribute to the overall effect. Id.

The continuous exposure of workers to asbestos fibers over the course of many years has recently given rise to numerous lawsuits seeking damages for asbestos-related injuries. Tort actions have been brought by injured shipyard or insulation workers after their injuries are diagnosed or their symptoms are manifested. The workers' claim that the defendant manufacturer or supplier of asbestos fibers or products failed to warn them that asbestos was a dangerous product and, there-


Major studies have concluded that asbestos insulation workers with more than 40 years experience exhibit a 90% higher incidence of abnormality than those with less than 10 years experience. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1084-85 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), citing The Occurrence of Asbestosis, supra note 15. In addition, Joseph Califano, former Secretary of the Department of Health, Education and Welfare, has estimated that 8 to 11 million American workers have been exposed to asbestos since the beginning of the Second World War. See Mansfield, supra note 4, at 866-67.


24. 493 F.2d at 1088. In Borel, a former industrial insulation worker alleged that insulation materials manufactured by the defendants were unreasonably dangerous because the defendants failed to give adequate warnings of a known or knowable danger. Id. Judge Wisdom, writing for the court, agreed, and held that a seller is under a duty to warn of those dangers that are reasonably foreseeable. Id. at 1088-91. The court ruled, as a matter of law, that the dangers in inhaling asbestos dust were not sufficiently obvious to the employee to relieve the defendants of their duty to issue warnings. Id.
fore, should be held liable under various theories of tort liability. In several jurisdictions, manufacturers and suppliers are held jointly and severally liable for the plaintiffs' asbestos-related injuries.

The insurance coverage disputes between suppliers or manufacturers of asbestos and their casualty insurers are separate from the underlying products liability lawsuits. These declaratory judgment actions sound in rejecting the "state of the art" defense, which may relieve manufacturers of liability where scientific and technological knowledge is such that a product could not be made safer without impairing its usefulness, the court reasoned:

As a practical matter, the decision to market such a product requires a balancing of the product's utility against its known or foreseeable danger. But, as comment k [RESTATEMENT (SECOND) OF TORTS] makes clear, even when such balancing leads to the conclusion that marketing is justified, the seller still has a responsibility to inform the user or consumer of the risk of harm. The failure to give adequate warnings in these circumstances renders the product unreasonably dangerous.

Id. at 1088-89 (citations omitted).


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in contract and focus on interpretation of the language used in the standard CGL insurance policies. Under CGL policies, the insurer agrees to indemnify its insured for all sums which the insured becomes legally obligated to pay as damages because of "bodily injury" caused by an "occurrence" arising during the policy period. The interpretation of this language as it relates to asbestos caused diseases remains unclear since courts must decide when "bodily injury occurs" in ailments characterized by long latency periods.

Because of the time lag between when one comes in contact with asbestos fibers and when an asbestos cause disease manifests itself, disagreement as to which of two or more consecutive insurers are responsible to defend a claim has arisen. Two theories of construction of the language used in the CGL policies of insurance have emerged and insurance coverage regarding the underlying asbestos-related lawsuit attaches at one of two distinct times depending on which of the theories is accepted.


For an analysis of the manifestation and exposure theories of liability, see notes 33-52 and accompanying text supra.


34. See Mansfield, supra note 4, at 876; Note, supra note 27, at 1128. For cases which apply a manifestation theory of liability in various contexts, see generally General Dynamics Corp. v. Benefits Rev. Bd., 565 F.2d 208 (2d Cir. 1977) (workmen's compensation case); Tijsseling v. General Fire & Life Assur. Corp., 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976) (insurance liability does not begin until a latent defect manifests itself in property case); Remmer v.
Accordingly, those carriers on risk on the date of manifestation must provide a defense and indemnity payments for any judgment of liability in the underlying asbestos suit. Variations of this theory have been adopted in statute of limitations cases, workmen's compensation cases, and health insurance cases.

The only reported case advocating the manifestation theory of liability in an asbestos injury insurance case was Porter v. American Optical Corp. decided by the Eastern District of Louisiana. However, this case was reversed and remanded for further proceedings by the Fifth Circuit. In Porter, an insulation worker successfully sued a manu-


35. See notes 16-26 and accompanying text supra.


37. See, e.g., General Dynamics Corp. v. Benefits Rev. Bd., 565 F.2d 208 (2d Cir. 1977); Travelers Ins. Co. v. Cardillo, 225 F.2d 137, cert. denied, 350 U.S. 913 (1957); Grain Handling Co. v. Sweeney, 102 F.2d 464 (2d Cir.), cert. denied, 308 U.S. 570 (1939); Bucuk v. Zusi Brass Foundry, 49 N.J. Super. 187, 139 A.2d 433 (Sup. Ct. App. Div. 1958). These cases suggest that either the employer under whom the worker was last exposed to asbestos, or the worker's present employer, pays. See Traveler Ins. Co. v. Cardillo, 225 F.2d at 145. The rule is not a pure manifestation approach but represents a compromise in assessing coverage for progressive diseases based on the premise of the efficient administration of claims. Id. See also note 72 infra.

38. See, e.g., Kissil v. Beneficial Nat. Life Ins. Co., 64 N.J. 555, 319 A.2d 67 (1974); Royal Family Ins. Co. v. Grimes, 42 Ala. App. 481, 168 So. 2d 262 (Civ. App. 1964); Metropolitan Life Ins. Co. v. Reynolds, 48 Ariz. 205, 60 P.2d 1070 (1936); Cohen v. North Am. Life & Cas. Co., 150 Minn. 507, 185 N.W. 999 (1921). These cases are predicated on the theory that latent conditions do not trigger indemnification liability where the plaintiff does not know or can not discover with reasonable certainty the condition. Annot., 53 A.L.R.2d 686, 688-89 (1957) (no disease unless it can be diagnosed with reasonable medical certainty). For a discussion of various health insurance cases and application of the manifestation theory of liability, see Note supra note 27, at 1127-32. See also note 74 infra.


40. 641 F.2d 1128, 1145 (5th Cir. 1981). The Fifth Circuit stated that it was content with the Sixth Circuit's approach to this issue and incorporated by reference the reasoning and result of the Insurance Co. of N. America v. Forty-Eight Insulations, Inc. opinion. Porter v. American Optical Corp., 641 F.2d
manufacturer of a respirator for injuries sustained during the course of his employment, contending that the respirator was defectively designed. The district court discussed American Optical's insurance coverage and concluded that the insurer on risk at the time of the manifestation of the plaintiff's illness was liable. The court reasoned that while the worker was exposed to the injurious material during the earlier carrier's period of coverage, "his continued exposure during this period did not result in any manifestation of injury, i.e., sickness or disease . . . .", within the terms of the insurance contract. The Fifth Circuit, in reversing the district court, stated that the "injurious exposure" theory was the "proper" theory of insurance coverage in asbestos cases.

41. Porter v. American Optical Corp., No. 75-2202, slip op. at 5a (E.D. La. Nov. 23, 1977). The plaintiff brought suit for injuries sustained while he was an employee of National Gypsum Company in New Orleans. 641 F.2d at 1131. Porter worked approximately thirty years in National Gypsum's main plan where high concentrations of dust and airborne fiber required use of respirators. Id. at 1133. Porter used American Optical Corporation's (American Optical) respirator and filter apparatus on the job but was debilitated by asbestosis in 1974. Id. at 1131-33.

42. No. 75-2202, slip op. at 5 (E.D. La. Nov. 23, 1977). The plaintiff had sued under a strict liability theory, alleging that his injuries were proximately caused by the respirator manufacturers' failure to warn him of the dangers involved in the use of the respirator, as well as by the defects in the respirator's design.

43. Id. American Optical joined, as third-party defendants, three insurance companies which had insured American Optical during Porter's employment with National Gypsum and during the time Porter was ill. 641 F.2d at 1131. From 1954 until January 1, 1971, Aetna Casualty & Surety Company (Aetna) provided coverage. Id. at 1142. From January 1, 1971 until January 1, 1975, Hartford Accident & Indemnity Company (Hartford) provided coverage in two separate policies covering American Optical, as a corporate affiliate of Warner-Lambert Company. Id. at 1142-43. From January 1, 1975 until January 1, 1978, Continental Insurance Company (Continental) extended coverage to American Optical. Id. at 1143.

44. See Porter v. American Optical Corp., No. 75-2202 slip op. at 5 (E.D. La. Nov. 23, 1977). The court thus exempted both the carrier on risk during the longest period of the plaintiff's exposure, and the carrier on risk when positive diagnosis of the illness was made.

45. Id. Thus, the insurer on the risk at the time of the exposure was excused from liability primarily as a matter of contract construction since the policy precisely defined bodily injury as "sickness or illness" only. See id. Cf. notes 6 & 27 supra ("bodily injury" not limited to "sickness or illness" only, but includes "bodily injury" itself). The district court reasoned that the Aetna policy (1954-1971) did not provide coverage because exposure to the asbestos during its coverage did not result in a manifestation of "sickness or disease". No. 75-2202, slip op. at 5 (E.D. La. Nov. 23, 1977). Thus, no occurrence of bodily injury existed during this time period. Id. Further, Continental was absolved of liability since Porter's exposure to asbestos and manifestation of his illness occurred prior to the dates it was on risk (1975-1978). See 641 F.2d at 1143-44.

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Under the second theory of liability, the "exposure theory", bodily injury is held to occur upon the first inhalation of asbestos fiber. This theory relies heavily upon medical evidence which shows that asbestos-caused diseases involve minute cumulative, and progressive injuries to the body. The essence of the exposure theory of liability, which has been supported by the various manufacturers and suppliers, is to spread losses over the years of primary coverage so that one carrier does not bear the total burden of indemnification and defense of the manufacturer or supplier.

Several advocates of the exposure theory contend that only those carriers on risk during the years when the worker is exposed to asbestos should be under a joint and several duty to defend and indemnify the insured. Other exposure theorists, on the other hand, suggest that all


48. See Keene Corp. v. Insurance Co. of N. America, No. 78-1011, slip op. at 3-5 (D.D.C. Jan. 30, 1981). See also Mansfield, supra note 4, at 876-77. The uncontroverted medical testimony reveals that bodily injury occurs with the first inhalation of asbestos fibers which reach the anterior cells of the lungs. Id. The fibers remain there and cause continuous, progressive and insidious harm to the lungs. Id. See also Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083-86 (5th Cir. 1974), cert. denied, 419 U.S. 869 (1974).

49. See Mansfield, supra note 4, at 876. The exposure theory of liability is advocated by all the party-defendants in the underlying lawsuits, except Eagle-Picher Industries, Inc. Id. Also, several insurance companies, including Travelers, Hartford and a minority of the Lloyd's of London syndicates of underwriters support the exposure theory. Id. The other insurance carriers, including Liberty Mutual, Aetna, INA and the majority of the Lloyd's of London excess market support the manifestation theory of liability. Id.

50. Id. at 877. It has been noted that under the exposure theory manufacturers will not be forced to pay increased liability insurance costs in order to cover present manifestations of disease in workers since no one insurer will have to bear the entire loss. Id. Cf. note 34 supra (contrary result under manifestation theory). Additionally, recent excess carriers will not have to provide indemnification under an exposure theory of liability since the primary limits of the basic carriers will not be reached as rapidly as under the manifestation theory. Mansfield, supra note 4, at 877.

51. See Mansfield, supra note 4, at 876. This view can be illustrated as follows: "[I]f an underlying claimant were exposed to asbestos products in a shipyard during World War II (i.e., 1942-1946), then the insurer which provided coverage for those years would bear the entire burden for the lawsuit even if diagnosis were in 1975 and the suit filed in 1976." Id.
carriers on risk subsequent to the initial exposure are jointly and severally responsible for defense and indemnification because the various asbestos diseases are continuous and progressive.\textsuperscript{52}

Advocates of both the manifestation and exposure theories of liability are conscious of the need to arrive at an administratively manageable construction of the CGL insurance policies.\textsuperscript{53} In interpreting these policies, courts prefer to spread losses throughout the industry in a manner that results in fairness to the parties concerned.\textsuperscript{54} Accordingly, the manifestation theory of liability has been rejected in favor of the exposure theory.\textsuperscript{55} However, rules of construction that would place the burden of liability on insurers to minimize possible tort liability for hazardous activities have been urged by various commentators, and

\textsuperscript{52} Id. at 876-77. This variation of the exposure theory can be illustrated as follows:

If an underlying plaintiff were exposed to asbestos products in the 1942-1946 period, were diagnosed in 1975, and filed a lawsuit in 1976, certain exposure advocates would argue that all insurance carriers who had issued policies from 1942 to 1976 would be obligated to provide a defense and indemnity to the manufacturer.

\textit{Id.} at 877. This branch of the exposure theory is premised on the fact that asbestos fibers remain in the anterior portions of the lung, and cause continuous harm to the lungs. \textit{Id.} at 876-87. Thus, all carriers are liable for indemnification if they provided insurance during any period a plaintiff was employed, irrespective of the date that the coverage terminated or that the disease was diagnosed. \textit{Id.}

\textsuperscript{53} See Keene Corp. v. Insurance Co. of N. America, No. 78-1011, at 6-7 (D.D.C. Jan. 30, 1981). Such administratively manageable interpretations of insurance policies are aimed at avoiding litigation. See Mansfield, supra note 4, at 877. However, commentators have noted that any attempt to forecast the ultimate resolutions of these insurance coverage questions may prove to be speculative and indeterminate. \textit{Id.} The variables that will affect judicial solution of these issues include uncertainties relating to third-party recoveries from exposure due to ripout or repair work, unpredictable legislative response, and the number of future lawsuits. See \textit{id.} Cf. Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), \textit{cert. denied}, 350 U.S. 913 (1955) (efficient administration in workmen's compensation cases is of overriding importance).


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favored by some courts. This allegedly could cause carriers of insureds who engage in relatively dangerous activities to encourage the insured to make such activities safer in order to avoid the high resultant costs of indemnification.

In the instant decision, the Sixth Circuit prefaced its opinion with a background of the asbestos disease litigation, and stated that "there is a need for us to arrive at an administratively manageable interpretation of the insurance policies, one that can be applied with minimal need for litigation". Judge Keith, writing for the majority, noted that cumulative diseases are different from ordinary tort situations by referring to the medical testimony presented at trial. The court then noted that a consistent interpretation of "bodily injury", "occurrence", and "disease" as a matter of contract law was needed. The court ac-

56. See G. CALABRESI: THE COSTS OF ACCIDENTS 68-93 (1970). Calabresi discusses a "cheapest cost avoider" theory which is a pure market approach to accident cost avoidance. See id. Calabresi suggests that accidents could be avoided entirely, or their frequency substantially reduced, if costs of accidents were assessed to those actors who, and those activities which, could avoid the accident and its accompanying costs most cheaply. Id. at 135. Although several criteria which can be used to choose the cheapest cost avoider are noted by Calabresi, the most significant guideline is that accident costs should be allocated in such a way as to maximize the likelihood that errors will be corrected by the market. Id. at 150. Also, a forum and method are to be chosen by the various actors which are best suited to follow this guideline and thus determine which party can most cheaply modify its behavior so as to avoid accidents. Id. at 160-64.

57. See G. CALABRESI, supra note 55, at 135-73.

58. 633 F.2d at 1214-15. The court noted that asbestosis is the most common disease, and stated that its opinion would discuss the liability situation only as it relates to asbestosis. See id. at 1214 n.1.

59. Id. at 1218. For the court's decision regarding the medical determination of the point which asbestosis occurs, see note 69 infra.

60. 633 F.2d at 1218-19. The court relied on medical testimony to buttress this determination. Id. at 1218. See also notes 65-75 and accompanying text infra for the court's three bases for rejecting the manifestation theory of liability and accepting the notion that cumulative diseases are different from ordinary tort situations.

61. 633 F.2d at 1218-19. The court noted that due to the nature of asbestos related injuries, numerous opinions as to the point in time when an afflicted party has been "injured" or "diseased" have been offered. Id. The Sixth Circuit's reference to medical evidence resulted in the determination that the definition of "disease" is a judgment call. Id. at 1218. The court considered Dr. George Wright's testimony which contrasted a physician's interpretation of "disease" with that of an histologist. Id. Dr. Wright testified that a physician or biologist would not regard asbestosis as a disease unless it was manifested by symptoms or diagnosis. Id. Conversely, a histologist would consider asbestosis as a disease from the very beginning since tissue damage occurs once the asbestos fibers enter the tissue systems. Id.

62. Id. at 1219. See notes 66-71 and accompanying text infra for the court's analysis of when the disease, as a matter of contract law, is deemed to occur. For a review of these words insofar as they relate to CGL policies of insurance, see notes 6 & 27-29 and accompanying text supra.
knowledged the two theories of construction which could be applied to determine coverage and rejected the manifestation theory of liability on three grounds.

The court initially posited that "the legal theory used in the underlying tort suits is certainly relevant in helping a court define what was meant by the policy language." The court thus reasoned that since the underlying theory of tort liability is that the asbestos manufacturer or supplier of asbestos products continually failed to warn asbestos workers of the dangers of breathing asbestos particles, the contracting parties would presume that their coverage would parallel this theory of liability. The court noted that without this assumption, the insurer's purported coverage would be "illusory" and a manufacturer would not be able to secure insurance coverage in later years once the disease had begun to manifest itself. Moreover, the court inferred that subsequent insurers can impose high deductibles on their insureds which can effectively leave the insured with no coverage.

The second ground set forth by the court for rejecting the manifestation theory was the universal acceptance that the time when asbestosis manifests itself is not the time when disease occurs. The court

63. 633 F.2d at 1217-18. The court suggested that the manifestation theory, which was urged by INA, Affiliated FM, Illinois National, Liberty Mutual and several amici curiae, and the exposure theory, proposed by Forty-Eight, Travelers, several amici curiae, and supported by the district court, represented the two principal coverage theories. See id. For an analysis of these theories, see notes 33-50 and accompanying text supra.

64. 633 F.2d at 1219-20. See also, notes 66-71 and accompanying text infra.

65. 633 F.2d at 1219. The court rejected INA's attempt to refute the district court's reliance on Borel as controlling precedent. Id. For a discussion of the Borel opinion, see notes 15, 18 & 23 supra. INA argued that rules of contract construction, not rules of tort law, should control interpretation of insurance policies. 633 F.2d at 1219. However, the court reasoned that INA was oversimplifying the issue, and stated that insurance policies must be construed to protect a manufacturer-insured from product liability judgments. Id. See also note 67 infra.

66. 633 F.2d at 1219.

67. Id. In its discussion of illusory coverage, the court reviewed INA's claim that the district court's reliance upon Borel as "controlling precedent for interpretation of insurance contracts is almost embarrassing." Id. at 1219 n.12. The court rejected INA's contention and stated that CGL insurance contracts necessarily follow tort theories so that it can be readily determined what the policy meant to cover. See id. See also note 65 supra.

68. 633 F.2d at 1215 n.6. The court noted that Forty-Eight's present carrier was Liberty Mutual. Id. at 1215-16 n.6 & 1218-19. The parties' contract of insurance provided a $100,000.00 per person deductible for asbestosis cases, which, the court noted, as a practical matter, left Forty-Eight uninsured because most asbestosis cases settle for less than $100,000.00. Id.

69. Id. at 1219. The majority agreed that it is possible to hold a hearing to determine the point at which asbestos in the lungs results in the body's
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considered medical evidence produced at trial to support this position. Finally, the court noted that the law favors a construction of insurance contracts in favor of the insured and against the insurer.

The Sixth Circuit also determined that analogous insurance cases urged by the appellants, such as the statute of limitations cases, work-
defenses being overwhelmed, and asbestosis could thus be said to have occurred and the manufacturer would be treated as on the risk from that time. Id.

Judge Keith rejected the dissent's suggestion of looking to x-ray diagnosis and establishing a 10 year point on the ground that medical testimony indicates that "bodily injury" occurs at or after inhalation. Id. at 1217 n.10. The majority, however, was pragmatic:

The only problem with this Solomonian interpretation is that no one wants it. The principle reason is cost. If medical testimony as to asbestosis' origin would have to be taken in each of the thousands of asbestosis cases, the cost of litigation would be prohibitive. This appears to be especially true since many of the asbestosis cases are settled before trial. In addition, it is almost impossible for a doctor to look back and testify with any precision as to when the development of asbestosis "crossed the line" and became a disease.

Id. at 1218.

70. Id. at 1219. The court referred to Dr. George Wright, a medical expert, who testified that an individual could delay seeing a doctor until a disease is advanced to its furthest stages, and the date of diagnosis would not then be the date the disease began. See id.

71. Id. at 1219-20. The court of appeals adopted the district court's analysis of this issue. Id. The district court, which determined that application of either New Jersey or Illinois law would produce a similar result, stated that "where the terms of insurance contracts are clear and unambiguous, they must be given their common and ordinary meaning." 451 F. Supp. at 1237. (citations omitted). The corollary to this proposition is that a policy is to be construed against the insurer and in favor of the insured where there is uncertainty or ambiguity over the interpretation of the policy. Id. (citations omitted).

72. 633 F.2d at 1220. The court initially discussed cases determining when the statute of limitations should start to run. Id. It was pointed out that in latent injury cases, "the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves". Id., quoting Urie v. Thompson, 337 U.S. 163, 170 (1949) (citations omitted). The reason underlying this "manifestation rule" is to protect plaintiffs, unaware that they were being injured until years later when the disease manifests itself, from having their claims barred by the statute of limitations. 633 F.2d at 1220. The court noted that these policy considerations are strong and would prevent the harsh consequences of invoking the statute of limitations in typical tort cases. Id. at 1220 & n.13. It was determined that application of these decisions to the instant case would be anomalous since the policy considerations are inapposite; that is, a manifestation rule could deny insurance coverage to the insured since its excess or primary carrier would no longer be on risk. Id. at 1220. Further, the court posited that "it is the injury and not its discovery that makes the manufacturer liable in the underlying tort suit". Id. Finally, the court said that despite the use of identical language in statutes of limitations and insurance policies, the policy is to protect either the injured plaintiff or insured, and not to bar recovery. Id. For cases discussing the statutes of limitations issue, see id. at 1220 n.13 & 14 and cases cited therein. See also note 36 supra.
mens' compensation cases,73 and health insurance cases,74 present policy considerations which are inapposite to the instant coverage issue.75 Judge Keith rejected INA's argument that "bodily injury" meant "compensable bodily injury", reasoning that the exposure theory adopted by the district court was the superior interpretation for the contracts of insurance76 because it represented the intention of the parties77 as well as being a literal construction which would maximize the insured's coverage.78

73. 633 F.2d at 1221. The Sixth Circuit discussed Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955) in its analysis. 633 F.2d at 1221. Judge Keith noted that a "last employer pays" rule has been adopted in cases such as Travelers Ins. Co. v. Cardillo where an employee is debilitating by a progressive and cumulative disease. See id. & n.15. However, this rule was rejected because the policy considerations on which it is based were held insufficient to override the rule of contract interpretation. Id. Further, the importance of efficient administration of claims was held to be of greater significance in the workmen's compensation suits than in liability insurance cases, and thus this policy consideration was held inapplicable. Id. See also note 37 supra.

74. 633 F.2d at 1221. The Sixth Circuit discussed two cases, Metropolitan Life Ins. Co. v. Reynolds, 48 Ariz. 205, 60 P.2d 1070 (1976) and Cohen v. North Am. Life & Cas. Co., 150 Minn. 507, 185 N.W. 939 (1921) both of which adopted the manifestation rule. 633 F.2d at 1212, 1221. See also id. n.17 and cases cited therein. These cases were cited approvingly for the principle that insurance policies must be strictly construed in favor of the insured. Id. at 1221. It was noted that each case allowed protection for the insured, who was disabled by sickness, because it would be "unfair to the insured and contrary to his expectations when he bought the insurance to allow a hidden condition to defeat the coverage which he bought". Id. (footnote omitted). Accordingly, the Forty-Eight court adopted the exposure rule to afford coverage to the insured under the policies of insurance construed in the insured's favor. Id. See also note 38 supra.

75. 633 F.2d at 1222-23. The court rejected the appellants' argument, stating:

The manufacturer here paid for protection from bodily injury resulting in liability. It should make no difference when the bodily injury happens to become compensable. Put another way, we see nothing in the policy which requires that the underlying plaintiffs' cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable. Id. at 1223 (emphasis supplied by the court). However, the court intimated that the insurance industry could foresee the use of an exposure rule. Id. n.19. The policies themselves, as well as commentator interpretations of standard CGL clauses, reflect industry-wide recognition that courts could apply a proration scheme or similar exposure theory. Id.

76. See id.

77. Id. at 1223. The court suggested that "bodily injury" should be construed to include tissue damage which occurs upon the initial inhalation of asbestos fibers. Id. This construction would afford both a literal application of policy language as well as construction which affords maximum coverage to the insured. Id.

78. Id. This literal construction, it was noted, best represented what the contracting parties intended. Id.
In conclusion, the court modified the determinations of the district court which had been challenged by the manufacturer. First, the court stated that Forty-Eight must pay for its share of the defense for the years it was either self-insured or uninsured when the defense costs could be readily apportioned. The court next accepted the fundamental tort principle that liability for asbestos-caused injuries will not be adjudged until it is shown that Forty-Eight's products were involved, while the burden of disclaiming coverage is on the insurer. Finally, the Sixth Circuit stated that the district court's proration formula did not produce an unjust result, and therefore rejected Forty-Eight's formula.

79. See notes 80-83 and accompanying text infra.

80. 633 F.2d at 1224-25. Forty-Eight did not dispute that it had to bear its share of the liability for the years it was uninsured, but it argued that as long as any carrier had a duty to defend, Forty-Eight should not be liable for the costs of defense. See id. Forty-Eight based this argument on the notion that an insurer's duty to defend is much broader than its obligation to indemnify. See id. at 1224, citing Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

Although the court agreed with these principles, it noted that an insurer must bear the entire costs of defending its insured only when "there is no reasonable means of prorating the costs of defense between the covered and non-covered items." 633 F.2d at 1224, quoting National Steel Constr. Co. v. National Union Fire Ins. Co., 14 Wash. App. 573, 576, 543 P.2d 642, 644 (1975).

The court then utilized Forty-Eight's "exposure theory" for prorating defense costs. 633 F.2d at 1225. For a discussion of an insurer's duty to defend, see Note, An Insurer's Duty to Defend its Insured and an Insurer's Liability for Wrongfully Declining to Defend its Insured, 6 WM. MITCHELL L. REV. 473, 473-490 (1980).

81. 633 F.2d at 1225. The court noted that while Forty-Eight would be held jointly and severally liable along with other asbestos manufacturers in an underlying product liability suit, the insurer's liability determined in a declaratory judgment proceeding is individual and proportionate. Id. Thus, if an insurer can show no exposure took place during the years it was on risk, no liability exists on the part of the insurance company for indemnity or defense because no bodily injury occurred within the policy's provisions. Id.

82. Id. n.27. This shifting of the burden of proof from the insured to insurer was premised on the uniqueness of the asbestos disease litigation. Id. Thus, each insurer is presumptively viewed as being on risk for the years the worker was exposed, and the insurance company must show that certain of the manufacturer's products were not used. Id.

83. Id. at 1226. Forty-Eight's recommended formula and that of the district court can be contrasted as follows:

[I]f three insurance companies were on the risk for a 9 year period of exposure . . . the first insurer would be on the risk for the first 3 years plus the remaining 6 while the disease progressed. The second insurer would be on the risk for 3 years plus the following 3 years. The final insurer would be on the risk only for the final 3 years. Thus, liability would be apportioned 9/18 for the first insurer, 6/18 for the second, and 3/18 for the third. Under the district court's formula, . . . each insurer would be liable for 1/3 of the costs.

Id. (emphasis supplied by the court). The court rejected Forty-Eight's approach because of the policy's language which defined "occurrence" as "an accident, including continuous or repeated exposure to conditions". Id.
In his dissent, Judge Merritt argued that asbestosis is a disease which progresses through an exposure stage, a discoverability stage, and a manifestation stage. The dissent contended that the exposure theory is at odds with insurance law, since liability is ordinarily not imposed until an identifiable harm arises, and contrary to insurance cases which conclude that "latent conditions that are not discoverable with a reasonable certainty do not amount to an event or condition that triggers indemnification liability." The manifestation theory of liability, however, was also rejected based on grounds of fairness and considerations of insurance and tort law.

The dissent concluded that in light of medical evidence and case law developments a carrier's coverage should begin with the discoverability supplied by the court. Also, the court determined that the extent of an insurer's liability should not turn on the fortuity of which insurer provided coverage when an injury manifests itself. See id. at 1229 (Merritt, J., dissenting). See notes 85-88 and accompanying text infra for a discussion of Judge Merritt's three stages.

84. See id. at 1229 (Merritt, J., dissenting). See notes 85-88 and accompanying text infra for a discussion of Judge Merritt's three stages.

85. 633 F.2d at 1229-30 (Merritt, J., dissenting). The basis of the dissent's criticism of the exposure rule was that some asbestos may be inhaled without the disease ever developing, and therefore liability should not attach. Id. at 1229 (Merritt, J., dissenting).

86. Id. The dissent cited the following property insurance and health insurance cases in support of its position: Broccolo v. Horace Mann Mut. Cas. Co., 37 Ill. App. 2d 493, 186 N.E.2d 89 (1962) (hysterectomy performed upon insured within two years of date that insured came within group policy fell within exclusionary clause as sickness was contracted prior to coverage in view of treatment for bleeding prior to coverage date, although disability occurred after that date); Craig v. Central Nat'l Life Insurance Co., 16 Ill. App. 344, 148 N.E.2d 31 (1958) (under health insurance policy excepting pregnancy or sickness from coverage unless same occurred at least nine months after issuance of policy, insured entitled to recover where sickness occurred less than nine months after policy date); Kissel v. Beneficial Nat'l Life Ins. Co., 64 N.J. 555, 319 A.2d 67 (1974) (words "contracted and commencing" meant that coverage would exist where first positive symptoms of disease did not manifest themselves until after first 15 days of child's life). 633 F.2d at 1229 (Merritt, J., dissenting). The dissent posited that those cases stand for the proposition that indemnification liability is not triggered where latent conditions are not discoverable with a reasonable certainty. Id. at 1229-30 (Merritt, J., dissenting).

87. 633 F.2d at 1230 (Merritt, J., dissenting). The manifestation rule was discarded on grounds similar to those advanced by the majority; specifically, that the rule would most likely result in no coverage at all to the insured. Id. Judge Merritt suggested that a domino effect would result with carriers refusing to insure such manufacturers, or imposing an extraordinarily high deductible for asbestos disease lawsuits. Id. See note 68 supra.

88. Id. at 1230 (Merritt, J., dissenting). The dissent noted that the manifestation rule would construe the words "disease" and "occurrence" more favorably to the insurer than to the insured; and intimated that such rules of construction are contrary to insurance law principles. Id. For further support of this proposition, see note 67 supra. In addition, the dissent posited that various tort law cases hold that a disease may exist if it can be diagnosed with reasonable medical certainty, but that this diagnosis is not required to determine the beginning date for coverage. 633 F.2d at 1230 (Merritt, J., dissenting).
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Judge Merritt suggested that an arbitrary “ten years from the date of first exposure” rule should be adopted as the time that the disease of asbestosis occurs so as to comport with the medical testimony. 89 It is submitted that the Sixth Circuit’s goal of establishing a single rule to apply to the insurance coverage suits between the party defendants in asbestos disease lawsuit and their casualty insurers is laudable. 90 The court properly presented the two major theories of construction of CGLs 92 and correctly applied the exposure theory to the facts of the case before it. 93 Further, it is suggested that the majority correctly noted that if a manifestation theory was applied in this type of case, few insurers would contract to protect a company which had exposed thousands of workers to a hazard for an earlier period of years. 94 Having exposed workers to asbestos, the probability that thousands of asbestos caused injuries will manifest themselves at a future date is great. 95 Thus, the application of a manifestation theory would result in carriers limiting their coverage, increasing the policy deductible and offering coverage at exorbitant premiums. 96 However, it is suggested that the court’s shifting of the burden of disclaiming coverage to the insured was not properly supported. 97 The court determined that it was “appropriate to presumptively view each

89. 633 F.2d at 1230-31 (Merritt, J., dissenting). The dissent noted that asbestosis is a “latent” disease and is susceptible of discoverability through medical detection devices. Id. at 1230 (Merritt, J., dissenting).
90. Id. at 1231 (Merritt, J., dissenting). Judge Merritt conceded that problems of judicial and administrative manageability would flow from the adoption of this rule. Id. He noted that this rule is predicated on the injured party’s having had “heavy exposure” to asbestos dust. Id. However, he referred to Dr. Wright’s medical testimony which indicated that 10 years is an approximation of the time frame in which asbestosis would occur. Id.
91. Id. at 1218. See also notes 40-54 and accompanying text supra. It is suggested that the need for administratively manageable interpretations of policies is paramount, as was noted by both the majority and the dissent. See id. at 1218-19, 1230-31 (Merritt, J., dissenting).
92. 633 F.2d at 1217. For a review of the court’s analysis of these theories and the reasoning supporting its holding to adopt the exposure rule, see notes 59-76 and accompanying text supra.
93. 633 F.2d at 1218-23. See also notes 45-48 and accompanying text infra.
94. See 633 F.2d at 1222-23. See notes 68 & 69 and accompanying text supra.
96. See Keene Corp. v. Insurance Co. of N. America, No. 78-1011, slip op. at 6 (D.D.C. Jan. 30, 1981). See also notes 94 & 95 and accompanying text supra.
97. See 633 F.2d at 1225 n.27. The Sixth Circuit departed from the accepted rule that “the burden to show coverage is on the insured”. Id. (citations omitted).
manufacturer as being on the risk for each of the years in which a worker was exposed to asbestosis." 98 The Sixth Circuit, in reversing the ordinary burden of proof on the insured to show coverage, 99 relied on this confusing language. 100 It is suggested that the court obfuscated the burden of proof issue by use of such inappropriate terms as "the manufacturer", rather than "the insurance company", as being on the risk, 101 and that a worker was exposed to "asbestosis", where the court meant "asbestos fiber" or "asbestos products". 102

Moreover the court's shifting of the burden of proof from the insured to its casualty insurer is not necessary. 103 Judge Keith concluded that where "an insurance company can show that a certain manufacturer's products were not or could not have been involved for certain years, it will be absolved from paying its pro rata share for those years". 104 It is submitted that this determination would be made in the underlying tort action, and where there was no exposure to the manufacturer's products, nonsuit or summary judgment in favor of the manufacturer is appropriate. 105 Further, the Sixth Circuit apparently confused the carrier's obligation to defend with its duty to indemnify. The former exists on the part of each insurer which carries products liability coverage during the period of time the worker was exposed to its in-

98. Id. (emphasis supplied by the court).
99. See notes 103 & 104 and accompanying text infra.
100. 633 F.2d at 1225 n.27.
101. Id.
102. Id. See also Mehaltty, Asbestos-Related Lung Disease, 16 F. 341, 342-45 (Winter 1980). Asbestosis, by definition, is pulmonary fibrosis produced by the inhalation of asbestos fibers. Id. at 343. "Thus, it is submitted that the Sixth Circuit's loose use of language confuses their argument in support of a reversal of the burden of proof. See id.

The Sixth Circuit also referred to the Borel case in support of its reversal of the burden of proof. See 633 F.2d at 1225-26 n.27. However, Borel imposed joint and several liability upon manufacturers in the underlying lawsuits in order to determine which manufacturers would be liable for the plaintiff's injuries. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083-86 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974). This issue is separate from the issue of whether the manufacturer was insured during the years that the plaintiff-worker alleges he was exposed. The date of exposure is to be determined during discovery or at the trial of the underlying product liability lawsuit and not in the declaratory judgment proceedings.

103. See notes 104-106 and accompanying text infra. For the court's reasons supporting the shift of the burden of proof to the insurer, see 633 F.2d at 1225-26 n.27.
104. 633 F.2d at 1225-26 n.27. The court stated that in most cases, it is impossible to ascertain which company provided asbestos products in different years, and accordingly, shifting the burden of proof to the insurer is the fairest way to apportion liability. Id.
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sured's products,106 and the latter is triggered only upon a finding of tort liability of the manufacturer in the underlying personal injury lawsuit.107

In addition, the policy repercussions of placing the burden of compensating the injured on insurance companies must be mentioned. The dissent accurately notes that accident costs can be minimized where the burden is placed upon those best able to evaluate the risks of hazardous activities.108 The dissent further suggested that an insurer will see that the products of the insured pose some risks, and thus correspondingly raise the premiums.109 An increase in premiums would create a direct and immediate incentive for the insureds to maintain safer workplaces.110 However, experience has shown that carriers increase the deductible rather than raise the premium.111 These increases correspond to the present uncertainty as to which coverage theory a court will use. A higher deductible, while of some value, is not as effective an incentive to create a safer workplace as is a higher premium,112 since an insured generally thinks about deductibles only after a claim has been made against him.113 The exposure theory of liability, however, takes away the need for either extremely high deductibles or premiums, by spreading the risk114 and thus increasing the incentive for insurers to encourage manufacturers to maintain a safe workplace while it is on the risk.115

The greatest impact of the instant decision will be found in the court's resolution of the extent of an insurer's duty to indemnify its


108. 633 F.2d at 1231-32 (Merritt, J., dissenting). Judge Merritt reasoned that "[t]he more 'early' insurers that are liable upon a victim's exposure, the more likely it is that the potential harm will be discovered and the public warned". Id. at 1231 (Merritt, J., dissenting).

109. Id. The dissent further stated that this action on the part of the carrier may result in the manufacturer terminating such hazardous activities and removing the product from the market. Id.

110. See G. Calabresi, supra note 57, at 69-94.

111. 633 F.2d at 1215-16 n.6. Thus, rather than raising the premium to encourage reduction of hazardous activities, the manufacturer will as a practical matter, remain uninsured for asbestos disease cases.

112. See id.

113. See G. Calabresi, supra note 57, at 69-94.

114. See notes 47-52 and accompanying text supra.

115. See Melhatty, supra note 102, at 352.
insured in a latent disease case. The effect of employing an exposure theory of liability will ensure that a manufacturer presently has insurance coverage to protect its interests in the personal injury tort actions brought against it. In terms of long-range effects, the exposure theory will cause insurers to fully evaluate the nature of their insured's activities in order to gauge future tort responsibility for injuries caused while it is on the risk, but which are manifested at a later date. It is submitted that when a similar long-term carcinogen case or factual situation arises in the future, the courts can impose the financial burden on those carriers that did not investigate its insured's activities.

Vincent Richard McGuinness, Jr.


117. See notes 106-07 and accompanying text supra.

118. See notes 94-96 & 108-115 and accompanying text supra.

119. Id. See Keene Corp. v. Insurance Corp. of N. America, No. 78-1011, slip op. at 6 (D.D.C. Jan. 20, 1981). See also notes 57 & 58 and accompanying text supra.