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Insurance Law - Asbestos-Related Diseases Trigger Insurer's Duty to Defend and Indemnify When the Diseases Become Reasonably Capable of Medical Diagnosis

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Recent Development

INSURANCE LAW—ASBESTOS-RELATED DISEASES TRIGGER INSURER’S DUTY TO DEFEND AND INDEMNIFY WHEN THE DISEASES BECOME REASONABLY CAPABLE OF MEDICAL DIAGNOSIS

Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co. (1st Cir. 1982)

Eagle-Picher Industries, Inc. (Eagle-Picher) is a manufacturer of industrial insulation products containing asbestos. Since the late 1960's, Eagle-Picher has been named as a defendant in approximately 5,500 lawsuits by plaintiffs who allege injuries or death from exposure to, and ingestion of, asbestos fibers from Eagle-Picher's products.

From 1968 through 1980 Liberty Mutual Insurance Co. (Liberty Mutual) provided Eagle-Picher with primary comprehensive general liability (CGL) insurance for protection against adverse products liability judgments.


2. Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co., 523 F. Supp. 110, 111 (D. Mass. 1981). For a discussion of the increasing number of asbestos-related lawsuits brought against Eagle-Picher, see note 13 and accompanying text infra. In the suits against Eagle-Picher, plaintiffs seek damages for personal injury or wrongful death. Plaintiffs allege that ingestion or inhalation of asbestos fibers from Eagle-Picher products, accompanied by inadequate warnings from Eagle-Picher regarding the hazards of working with asbestos caused individuals working with Eagle-Picher products to contract one or more asbestos-related diseases—asbestosis, mesothelioma, or branchogenic carcinoma. Brief for Appellees, The Manifestation Companies and Underwriters in the London Market at 9, Eagle-Picher, 682 F.2d 12 (1st Cir. 1982). These personal injury actions underly the insurance issue which is in dispute in Eagle-Picher and will be referred to as the “underlying claims.” For a general description of three of the underlying claims against Eagle-Picher which are at the heart of the insurance controversy, see 682 F.2d at 21-22 n.7.

3. 682 F.2d at 16-17. Under standard CGL policies, the insurer essentially agrees to pay on behalf of an insured such damages which result from “bodily injury” caused by an “occurrence” during the policy period. See 682 F.2d at 17. Liberty Mutual issued primary CGL insurance policies to Eagle-Picher from January 1, 1968 to January 1, 1980. Id. at 16-17. The fourteen separate policies issued by Liberty Mutual during this period contained no more than two variations of each relevant clause. Eagle-Picher, 523 F. Supp. at 112. During the period from 1968 to 1976, the policies provided in pertinent part as follows: “The Company will pay on behalf of the insured all sums which the insured shall become legally obliged to pay as dam-

(1335)
ments. First layer excess insurance coverage, which would go into effect only if the policy limits of the underlying primary coverage became exhausted, was provided by American Motorists Insurance Co. (American

ages because of . . . bodily injury . . . to which this policy applies, caused by an occurrence . . . ." Id. From 1976 to 1978 the phrase “because of bodily injury due to asbestos exposure caused by an occurrence if the bodily injury is included within the products hazard,” was substituted for the “because” clause of the earlier policy. Id.

The Liberty Mutual policies had originally defined “occurrence” as “an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” Id. In subsequent policies the words “during the policy period” were eliminated from the definition of “occurrence” and were added to the definition of “bodily injury.” Id. “Bodily injury” in Liberty Mutual’s policies had been defined as “bodily injury, sickness or disease sustained by any person.” Id. Subsequent policies, however, added to this definition of “bodily injury,” the clause “which occurs during the policy period, including death at any time resulting therefrom.” Id.

4. Id. The advance premium for the Liberty Mutual CGL policies and the limits of liability varied from policy period to policy period as follows:

<table>
<thead>
<tr>
<th>Policy Period</th>
<th>Premium</th>
<th>Limits of Liability</th>
</tr>
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<tbody>
<tr>
<td>1/1/68 - 1/1/69</td>
<td>$8,807 (advance)</td>
<td>$100,000 (each person)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$300,000 (each occurrence)</td>
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<tr>
<td></td>
<td></td>
<td>$300,000 (aggregate)</td>
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<tr>
<td>1/1/73 - 1/1/74</td>
<td>69,229 (annual)</td>
<td>$500,000 (each occurrence)</td>
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<td></td>
<td></td>
<td>$500,000 (aggregate)</td>
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<tr>
<td>1/1/74 - 1/1/75</td>
<td>74,903 (undiscounted annual)</td>
<td>$500,000 (each occurrence)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$500,000 (aggregate)</td>
</tr>
<tr>
<td>1/75 - 1/76</td>
<td>130,151 (undiscounted annual)</td>
<td>$500,000 (each occurrence)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$500,000 (aggregate)</td>
</tr>
<tr>
<td>1/1/77 - 1/1/78</td>
<td>210,000 (estimated annual)</td>
<td>$1,000,000 (each occurrence)</td>
</tr>
<tr>
<td></td>
<td>500,000 (maximum annual)</td>
<td>$1,000,000 (aggregate)</td>
</tr>
</tbody>
</table>

See Brief for Appellant, American Motorists Ins. Co. at 6-8, Eagle-Picher , 682 F.2d at 12.

5. 682 F.2d at 17. It has been industry practice to spread coverage among numerous carriers so that in most cases insurance companies all reinsure one another. Brief for Amicus Curiae, Commercial Union Ins. Cos. at 20, Eagle-Picher , 682 F.2d at 12. See Mansfield, Asbestos: The Cases and the Insurance Problem, 15 Forum 860, 877 (Summer 1980) (it is common practice for insurers to participate in large pools of excess insurance for major manufacturers). For example, in 1973-74, Eagle-Picher paid a premium of $34,100 to American Motorists for first layer excess insurance coverage. Brief for Defendant-Appellant, American Motorists, Eagle-Picher , 682 F.2d 12 (1st Cir. 1982). This policy extended Eagle-Picher's coverage from $500,000 under Liberty Mutual's policy to $5,500,000 under both policies. Id. However, the terms of the American Motorists policies provided that the five million dollar limit would not go into effect until the $500,000 limit of the underlying Liberty Mutual policy was completely exhausted. See 682 F.2d at 17. For a discussion of the various policy limits, see note 4 supra.

In 1977, Liberty Mutual, Eagle-Picher's primary insurer, claimed that its policy limits for 1974 and 1975 were about to be reached. In response, American Motorists contended that Liberty Mutual had misconstrued the terms of its policies, and had caused a premature claim of exhaustion of its primary insurance coverage. The London Market responded by sending a reservation of rights letter to Eagle-Picher, pending resolution of the correct

6. 682 F.2d at 17. The American Motorists policy provided that “[t]he Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, by reason of liability . . . because of personal injury . . . caused by or arising out of an occurrence which takes place during the policy period anywhere in the world.” 523 F. Supp. at 113.

The definitions contained in the policies provided in pertinent part as follows:

"Personal injury means (a) bodily injury, shock, sickness or disease . . . Occurrence means an accident, or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury . . .”

Id.

7. 682 F.2d at 17. The language of the London Market policies in effect from October 10, 1975 to January 1, 1979 parallels that of the American Motorists policy except that in defining the term “occurrence,” the London Market policies added that “all such exposure to substantially the same general conditions existing at or emanating from one premises shall be deemed one occurrence.” Brief for Defendant-Appellant, American Motorists at 9-10, Eagle-Picher, 682 F.2d at 12 (1st Cir. 1982). Other insurance companies also provided Eagle-Picher with first-layer excess coverage between 1968 and 1973, and additional umbrella coverage between 1973 and 1979. However, they were not parties to the declaratory judgment action. 682 F.2d at 16 n.1.

8. 682 F.2d at 17. The coverage provided by the second layer of excess insurance goes into effect only if the policy limits of the first excess layer have become exhausted. Id.; 523 F. Supp. at 112. In Eagle-Picher, the second layer of excess coverage consisted of many short-term policies, typically covering one year at a time, which were issued by various underwriters in the London Market. See Eagle-Picher, 523 F. Supp. at 113. For a graphic representation of the coverage scheme in Eagle-Picher, see id. at 119. There were three second-layer excess umbrella policies issued by the London Market covering the period from September 1973 to January 1, 1979. Brief for Appellant, American Motorists at 10, Eagle-Picher, 682 F.2d 12 (1st Cir. 1982). The second layer policies contained no independent coverage clauses or definitions. Eagle-Picher, 523 F. Supp. at 113. Instead, these policies incorporated by reference the terms of the underlying policy, stating that indemnification would be provided for damages “caused by or arising out of each occurrence happening anywhere in the world, and arising out of the hazards covered by and as defined in the underlying Umbrella policies . . . .” Brief for Appellant, American Motorists at 10, Eagle-Picher, 682 F.2d at 12 (emphasis in original); Eagle-Picher, 523 F. Supp. at 113.

9. 682 F.2d at 15. Liberty Mutual had sent notice to Eagle-Picher that its 1974 and 1975 insurance policy limits were about to be reached. Id. Eagle-Picher then forwarded this notice to its excess insurers, American Motorists and the London Market. Id.

10. Id. American Motorists disagreed with Liberty Mutual's practice of handling claims as though Liberty Mutual's liability had been triggered by the manifestation of asbestos-related injuries. See Eagle-Picher, 523 F. Supp. at 112.
theory of insurability.\textsuperscript{11}

In 1978, Eagle-Picher sought declaratory relief in the United States District Court for the Eastern District of Massachusetts\textsuperscript{12} to determine the obligation of its various insurers to defend and indemnify it in the numerous lawsuits arising out of exposure to its asbestos products.\textsuperscript{13} The central issue which faced the district court in the declaratory judgment action was whether insurance coverage was to be triggered when a claimant was exposed to material containing asbestos or when the asbestos-related disease first manifested itself.\textsuperscript{14} The district court concluded that coverage under the applicable policies would be triggered by the date of medical diagnosis of an asbestos-related disease, or at death, if no prior diagnosis has been made.\textsuperscript{15} On appeal,\textsuperscript{16} the United States Court of Appeals for the First Cir-

\textsuperscript{11} 682 F.2d at 15-16. This letter held in abeyance all rights under the insurance policies issued by the London Market while there was a genuine controversy between the insurers regarding defendant's duties and obligations under their respective policies in connection with the underlying asbestos-related claims. \textit{Eagle-Picher}, 523 F. Supp. at 112. The reservation of rights letter appears to have been a catalyst in Eagle-Picher's subsequent commencement of the declaratory judgment action. See 682 F.2d at 16.

\textsuperscript{12} \textit{Eagle-Picher}, 523 F. Supp. at 111. Jurisdiction was based on diversity of citizenship. See id. at 112. For the purposes of this declaratory judgment action, Eagle-Picher was considered to be uninsured prior to 1968. 682 F.2d at 16. This conclusion was apparently reached because there was no evidence adduced of any insurance in effect for asbestos-related claims filed against Eagle-Picher prior to 1968. Brief for the Appellee, Eagle-Picher at 4, 4 n.3, \textit{Eagle-Picher}, 682 F.2d at 12.

\textsuperscript{13} \textit{Eagle-Picher}, 523 F. Supp. at 111. When Eagle-Picher commenced its declaratory judgment action in September, 1978, there were approximately 900 claims against them. Brief for the Appellant, Eagle-Picher at 6, \textit{Eagle-Picher}, 682 F.2d at 12. There were 5,500 outstanding claims at the time of trial and more than 11,000 by the end of 1981; the claims against Eagle-Picher continue to be filed at the rate of almost 500 per month. \textit{Id.} at 6-7. For a discussion of the explosion of claims against the asbestos industry as a whole, see note 27 and accompanying text infra.

\textsuperscript{14} \textit{Eagle-Picher}, 523 F. Supp. at 111. Eagle-Picher, Liberty Mutual and some London underwriters known as the "Bird" defendants argued to the court that liability should be triggered by the manifestation of medically diagnosable symptoms of asbestos-related disease, while American Motorists and other London Market underwriters referred to as the "Froude" defendants claimed that an insurer's liability is triggered when the claimant is initially exposed to asbestos fibers. \textit{Id.}

\textsuperscript{15} \textit{Id.} at 118. To aid it in the interpretation of the relevant policy language, the district court received medical testimony from two doctors specializing in the area of asbestos-related disease. \textit{Id.} at 115. The court ruled that the manifestation theory of interpretation was meritorious, basing its decision on three grounds: 1) the medical evidence adduced at trial; 2) the legal principle that contract terms are to be accorded their common, popular and ordinary meaning; and 3) the public policy dictating construction of contracts to promote coverage of the insured. See \textit{id.} at 115-18. The district court further supported its conclusion by stating that a manifestation approach most closely approximated the expectations of the contracting parties. \textit{Id.} at 118. The court reasoned that the date of medical diagnosis is to be deemed the date of manifestation since that point in time is more easily ascertained by demonstrable evidence. See \textit{id.}

\textsuperscript{16} 682 F.2d at 12. The defendant-proponents of the exposure theory appealed, alleging that the district court erred by excluding extrinsic evidence of Eagle-Picher's intent in entering into the insurance contracts. \textit{Id.} at 16. Appellant had also argued
RECENT DEVELOPMENT

cuit affirmed and modified the lower court's opinion, holding that the operative date for determining insurance liability is the date on which the asbestos-related disease becomes reasonably capable of medical diagnosis. Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co., 682 F.2d 12 (1st Cir. 1982).

Asbestos is a fibrous mineral in great demand in industry for its heat-
resistant and insulating properties. The inhalation of asbestos fibers, which may be released into the air when the mineral is mined, processed, and applied, or destroyed in the course of a construction project, may result in respiratory or pulmonary injury, diseases of the cardiovascular system or various cancers. Further, since the effects of the inhalation of asbestos are thought to be both time and dose-related, it is persons who are continu-

19. Mansfield, supra note 5, at 861. There are possibly as many as 3,000 different products containing some asbestos in daily use throughout the world, ranging from toothbrushes to asphalt roofing shingles. Id. It has been suggested that as a fire and heat-resistant ingredient, there is no other material available at a reasonable price which is as effective as asbestos in excessive heat-related applications. Mehaffy, supra note 18, at 342. See also Mansfield, supra 5, at 861.

20. Ingram, Insurance Coverage Problems in Latent Disease and Injury Cases, 12 ENVTL. L. 317, 319 (1982). The primary use of asbestos in the construction industry is for insulation. Id. at 319. The material was used most extensively in the insulation of large ocean-going vessels during World War II. Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation, 16 FORUM 636, 637 (Spring 1981). However, asbestos is or has also been used in cements, asphalts, wallboard, plastics, shingles, paints and even in automobile brake linings and clutch facings. Ingram, supra, at 319. Thus, the implication that workers in the construction industry may be at primary risk of asbestos-related disease encompasses not only those engaged in the construction of buildings, but also those engaged in the construction of roads and automobiles. See id.

21. Ingram, supra note 20, at 320. First, scarring of the lungs, resulting from the inhalation of sufficient quantities of asbestos particles, may lead to a condition typified by an inelasticity of the lungs. Id. at 320-21. This irreversible and progressive disease is known as asbestosis. Id. Studies have shown that the longer a person has been exposed to asbestos, the more likely it is that he will contract asbestosis. See Mansfield, supra note 5, at 861. For a more detailed discussion of the correlation between exposure to asbestos and asbestos-related disease, see notes 22 and 26 and accompanying text infra. Fibrosis of the lung tissue may lead to a hypertension of the pulmonary system resulting in an overwhelming strain to the right ventricle of the heart and subsequent coronary failure. Ingram, supra note 20, at 320-21.

Second, exposure to asbestos may also lead to cancer of the lung or gastrointestinal tract. Comment, Relief for Asbestos Victims: A Legislative Analysis, 20 HARV. J. ON LEGIS. 179, 180-81 (1983).

Third, exposure to asbestos has also been implicated in the development of mesothelioma, which is a cancer characterized by tumors of the lung membrane. Ingram, supra note 20, at 321. Unlike the development of asbestosis, however, there has been no proven correlation between length of exposure to asbestos and increased risk of contracting mesothelioma. Id. With mesothelioma, the length of time between the first exposure to asbestos and the development of a tumor can range from three and one-half years to a maximum of seventy-three years. Id. at 321-22.

22. Mansfield, supra note 5, at 861; Mehaffy, supra note 18, at 346. This generally means “that asbestos-related diseases may develop only after the inhalation of substantial amounts of asbestos dust over a substantial period of time.” Mansfield, supra note 5, at 861. For example, 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) (citation omitted).

For examples of cases where worker-plaintiffs have been exposed to asbestos for a considerable period of time prior to developing asbestos-related disease, see Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151 (6th Cir. 1981) (asbestos insulation mechanic exposed from 1939-1973); Karjala v. Johns-Manville Prods. Corp., 523
RECENT DEVELOPMENT

ously exposed to asbestos in an occupational setting who are at the greatest risk of being affected with an asbestos-related disease. 23

Despite the fact that asbestos has been widely-used for centuries, 24 the possible injurious effects from exposure to asbestos particles were not identified until the middle of the twentieth century. 25 An increased awareness of a


23. Mansfield, supra note 5, at 861. For a discussion of the occupational hazards of working with asbestos in the construction industry, see note 20 supra. It has been stated that over the next 30 to 35 years, an estimated 1 million to 2 million American workers will die from diseases caused by exposure to asbestos in the workplace. See Comment, supra note 21, at 179. One author has noted that asbestos-related disease may be contracted not only by members of the construction, insulation, and shipbuilding industries, but also by others working with asbestos, such as garage mechanics and maintenance employees. See Comment, supra note 18, at 58 & n.25. While those working with asbestos are more likely to contract an asbestos-caused disease, environmental exposure to asbestos has also been shown to cause disease. Id. at 62. But see Mansfield, supra, at 862 (there is presently no evidence of risk to the general public from exposure to minute amounts of asbestos particles). For example, "neighborhood exposure"—exposure through residence near an asbestos factory—may cause the development of an asbestos-related disease. Comment, supra note 18, at 62. Asbestos-related diseases have also occurred among those living in the household of an asbestos worker. Id. For a study of the effects of household exposure, see Anderson, Household Contact Asbestos Neoplastic Risk, 271 ANN. N.Y. ACAD. SCI. 311 (1976).

24. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083 n.3 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); Comment, supra note 18, at 57. Asbestos is known to have been used in lamp wicks as early as the fifth century B.C. Methaffy, supra note 18, at 342. By 1874, commercial production of asbestos insulation material had begun. Borel, 493 F.2d at 1083 n.3. Production of asbestos cement commenced sometime between the latter half of the nineteenth century and 1903. Methaffy, supra note 18, at 342 (asbestos cement first produced in 1903). See also Borel, 493 F.2d at 1083 n.3 (asbestos cement introduced around 1870).

From 1877 to 1967, world asbestos production and use increased from 50 tons to 4 million tons per year. Comment, supra note 18, at 58. As of 1978, nearly 1 million tons of asbestos were being consumed annually in the United States. Id. By the end of 1978, a total of almost 32 million tons of asbestos had been used in the United States, most of it since 1940. Methaffy, supra note 18, at 342.

25. See Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1045 n.22 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982); Vagley & Blanton, supra note 20, at 637. An English study completed in the 1930's had documented a correlation between pulmonary diseases and contact with asbestos. However, it was not until 1964 that such a link was conclusively made. Vagley & Blanton, supra note 20, at 637 (citing Selikoff, Asbestos Exposure and Neoplasia, 188 J. A.M.A. 22 (1964)). The following year, Dr. Irving Selikoff and others published a report in the Annals of the New York Academy of Science which identified a positive correlation between potential health hazards and the exposure of insulation workers to asbestos. See Methaffy, supra note 18, at 344 (citing Selikoff, Churg, & Hammond, The Occurrence of Asbestosis Among Insulation Workers in the United States, ANN. N.Y. READ. SCI., 132, 139 (1965)). Consequently, one commentator has suggested that 1965 was the milestone year in terms of when an
causal link between latent disease and exposure to toxic substances, coupled with the expansion of the law of products liability, have led to a tremendous growth in the number of lawsuits brought against manufacturers of asbestos products. Tort actions have been brought by, or on behalf of, an asbestos manufacturer should have been put on notice of hazards involved in the use of its products. Id.

Recognition of a link between the diseases of lung cancer and mesothelioma and exposure to asbestos occurred in the 1970's. Id. One commentator, however, claims that the link between asbestos and lung cancer was established as early as 1955. Comment, supra note 18, at 60 (citing N.Y. ACAD. OF SCI., Cancer and the Worker, 36 (1977)).

26. Ingram, supra note 20, at 317. Asbestos-related diseases comprise one variety of products liability actions which some commentators have termed "toxic torts." See Podgers, Toxic Time Bombs, 67 A.B.A.J. 139 (Feb. 1981). Toxic torts involve the medical problems of persons exposed to chemical by-products of industrialized society. Id. Since medical science has only recently discovered a link between toxic substances and disease, the search for answers to the growing number of problems arising out of these suits is in its legal infancy. Id. See Ingram, supra note 20, at 317. Generally, toxic torts encompass latent diseases which appear several years after initial exposure to the toxic substance. Podgers, supra, at 139. Latent disease cases differ from those involving traditional torts because in the latter, a victim generally knows the identity of the party that injured him and when the injury occurred. Id. at 140.

27. One article suggests that the advent of strict liability and the abolition of privity of contract between the supplier or manufacturer and the injured party has increased the number of lawsuits brought against manufacturers, including those who produce asbestos products. See Vagley & Blanton, supra note 20, at 640-42. Additionally, the expansion of statute of limitations periods for cumulative trauma and long latency diseases has arguably led to a geometrical progression in the number of claims which may be brought against manufacturers of products years after initial exposure. Id. at 642. Commentators have suggested that the most important event within recent expansion of products liability law has been the demise of the requirement that a plaintiff demonstrate the responsibility of a particular manufacturer or producer for the product which caused his injury. Id. Four policy theories have been espoused by courts to lessen the burden of plaintiffs who are unable to determine which one of several defendant-manufacturers produced the product that caused the injury. See Ingram, supra note 20, at 328-33. These four theories—referred to as "alternative liability," "concert of action," "enterprise liability" and "market share liability"—are particularly applicable to the asbestos context where an insulation worker may be unable to identify which manufacturer's insulation fiber caused his injury. See id.


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RECENT DEVELOPMENT

jured asbestos workers following manifestation of symptoms of asbestos-related disease or after their injuries have been medically diagnosed. These workers claim that the defendant manufacturer or producer failed to adequately warn them of the danger of working in close proximity to asbestos and, therefore, should be held liable under various tort theories.

Manufacturers have been largely unprepared for the deluge of tort claims against them. Their consequent fear of exhausting their products


29. Note, Duty to Indemnify and to Defend—Each Insurer Which Provides Coverage During Workers’ Exposure to Asbestos is Proportionately and Individually Liable to Defend and Indemnify its Insured, 26 VILL. L. REV. 1080, 1084 & nn.21-23 (1981). Since most asbestos diseases are occupationally related, workers’ compensation claims have also increased. Mansfield, supra note 5, at 869. One commentator notes that while workers’ compensation may be available in most states as the exclusive remedy against an employer for injury contracted in the workplace, there is wide “variation among states both as to the amount of compensation available and the burden of proof placed upon the worker before he can recover.” Vagley & Blanton, supra note 20, at 649. The inconsistency in the state-by-state handling of the problem is exacerbated by slow processing of claims due to overburdened state courts. Id. at 648. As a consequence, not only is the outcome of litigation uncertain, but the process is lengthy and costly for the injured or dying worker. Id.

Workers’ compensation remedies do not bar injured workers—even those who have been given awards under the workers’ compensation laws—from instituting third-party suits against producers and suppliers of the products to which these workers have been exposed in the workplace. Id. at 650. For a discussion of the failure of state workers’ compensation laws to compensate adequately victims of asbestos-related disease, see Treiger, supra note 21, at 182-83. See also Fitzhugh, Dishartening Prospects: The Stress of Occupational Disease Cases on the Longshoremen’s and Harbor Workers’ Compensation Act, 22 S. TEX. L.J. 471 (1982); Smith & Birck, Sailing the Unchartered Seas of Asbestos Litigation under the Longshoremen’s and Harbor Worker’s Compensation Act, 22 WM & MARY L. REV. 177 (1980).

30. Mansfield, supra note 5, at 866. See Note, supra note 29, at 1084-85 & nn.24-25. The plaintiffs in these asbestos cases, as in other products liability cases, usually plead strict liability, negligence, and breach of warranty. Mansfield, supra note 5, at 866. For a discussion of alternative theories of liability which have led to an expansion of manufacturers’ liability for alleged asbestos-caused injuries, see Ingram, supra note 20, at 328-33.

If the manufacturers are found liable in these underlying tort actions, the manufacturers look to their insurers for defense and indemnification based on the terms of the manufacturers’ insurance policies. See Note, The Calculus of Insurer Liability in Asbestos-Related Disease Litigation: Manifestation + Injurious Exposure = Continuous Trigger, 23 B.C.L. REV. 1141, 1142 (1982).

liability insurance policy limits has been heightened by a disclaimer of liability from the United States Government.\(^\text{32}\) Additionally, the interpretation of the language contained in the agreements between manufacturers and their insurers has remained unclear since no consensus could be reached as to when "bodily injury" occurs in ailments characterized by long latency periods.\(^\text{33}\) These factors have resulted in a proliferation of actions by asbestos-affected plaintiffs.\(^\text{N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1215 (6th Cir. 1980),}^\text{cert. denied,} 454 U.S. 1109 (1981) (the court deemed Forty-Eight self-insured prior to 1955). Eagle-Picher, 523 F. Supp. at 110, 111 (Eagle-Picher was uninsured prior to 1968). Since most manufacturers continued to produce asbestos products until the early 1970's, these manufacturers face enormous potential liability for asbestos-related diseases. \(^\text{See, e.g., Eagle-Picher, 682 F.2d at 23; Keene, 667 F.2d at 1038; A.CandS, Inc. v. Aetna Casualty and Sur. Co., 666 F.2d 819, 820 (3d Cir. 1981). This potential liability is exacerbated by the fact that manufacturers have been, and probably will be, unable to obtain insurance coverage for these claims. See Vagley & Blanton, supra note 20, at 656. See also Oshinsky, Insurance Coverage for Asbestos Tort Liability Litigation, 5 J. PRODS. LIAB. 69, 73 (1982).}\(^\text{32}\) Comment, supra note 21, at 192-96. With the onslaught of tort litigation against them, asbestos manufacturers have begun to seek indemnity from third parties including the United States Government. \(^\text{Id.}\) Manufacturers of asbestos products argue that the government bears some legal, moral, and financial responsibility for asbestos claims. \(^\text{See id. at 194-96. They point out that military specifications mandated the use of asbestos in products manufactured for the government during World War II. Id. at 194-95. Furthermore, they claim careless work practices in naval shipyards during World War II contributed to the high incidence of asbestos-related disease among persons in the shipbuilding industries. See id.}\) The government, however, has steadfastly denied any liability for asbestos-related disease, hiring a team of over 60 attorneys to defend asbestos claims filed against it. \(^\text{Id. At least one court has agreed with the government’s position. In 1979, the District Court for the Eastern District of Virginia dismissed all third-party claims by an asbestos manufacturer against the United States. Glover v. Johns-Manville Corp. v. United States, 525 F. Supp. 894 (E.D. Va. 1979), aff’d, 662 F.2d 225 (4th Cir. 1981) (holding that active negligence of asbestos manufacturers precluded indemnification from the federal government even though the government was also negligent in causing plaintiffs’ asbestos-related disease). But see Barlich v. Turner & Newell, Ltd., No. 78-1027 (E.D. Pa. 1980) (denying motion to dismiss U.S. government as party defendant).}\) The role of the federal government in compensating victims of asbestos-related disease has also been limited by federal legislation. The Federal Longshoremen’s and Harbor Workers’ Compensation Act has exempted defense contractors from liability for underlying asbestos claims. \(^\text{See Federal Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950 (1983).}\) Keene Corporation, a producer of asbestos, sought recovery from the federal government through a different approach. Keene filed “omnibus” cases in which it sought recovery from the government for all past and future monies paid to plaintiffs in underlying asbestos claims filed against it. \(^\text{Keene Corp. v. United States, 700 F.2d 836 (2d Cir.), cert. denied,} 104 S. Ct. 195 (1983) (holding that notice filed by plaintiff of a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 1846(b), 2671-2680 (1983), was insufficient, that there was no admiralty jurisdiction over the claims, and therefore denying any relief).}\) Rosow & Liederman, \textit{An Overview to the Interpretative Problems of “Occurrence” in Comprehensive General Liability Insurance}, 16 Forum 1148, 1152 (Summer 1980); Note, supra note 30, at 1142. See also Mansfield, supra note 5, at 874-75. The problems encountered in determining when “bodily injury occurs” within the meaning of an insurance agreement in the latent disease context is not peculiar to the asbestos problem. \(^\text{See, e.g., Schering Corp. v. Home Ins. Co., 712 F.2d 4 (2d Cir. 1983) (synthetic\text{http://digitalcommons.law.villanova.edu/vlr/vol28/iss6/10}}}
tos manufacturers against their insurers seeking declaratory relief in the context of coverage for asbestos-related injuries. The focus of these disputes is a short clause contained in virtually every insuring agreement which, in theory, is used to define the "trigger" of an insurer's liability to its insured.

Under the standard CGL policy in force between an asbestos manufacturer and its insurer, 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" during the policy period. Because there may be a long latency period between the time when one inhales an asbestos fiber and the subsequent time when an asbestos-caused disease develops, insurers are forced to defend asbestos-related disease actions and are held liable for damages and costs.

One significance of this standard policy language is that it sets forth the trigger of coverage. Oshinsky, supra note 31, at 81. The trigger is the event which requires an insurance policy to provide coverage for a claim. Id. Furthermore, this standard language also determines the scope of an insurer's obligations once a policy is triggered. Id. “The trigger of coverage is injury during the policy period. Once its policy is triggered, an insurance company is required to pay all sums which the policyholder is legally obligated to pay in the underlying tort case.” Id.


In each of these controversies over insurance coverage, the asbestos manufacturer has been forced to defend in the actions brought by plaintiffs with asbestos-related disease. In addition, the manufacturer has had to pay costs and face liabilities that would otherwise be assumed by its insurer. A.CandS, Inc. v. Aetna Casualty and Sur. Co., 666 F.2d 819, 821 (3d Cir. 1981).

35. See Rosow & Liederman, supra note 33, at 1152. See also Mansfield, supra note 5, at 875.

One significance of this standard policy language is that it sets forth the trigger of coverage. Oshinsky, supra note 31, at 81. The trigger is the event which requires an insurance policy to provide coverage for a claim. Id. Furthermore, this standard language also determines the scope of an insurer's obligations once a policy is triggered. Id. “The trigger of coverage is injury during the policy period. Once its policy is triggered, an insurance company is required to pay all sums which the policyholder is legally obligated to pay in the underlying tort case.” Id.
first manifests itself, insurance carriers that have insured a manufacturer of asbestos at various times have taken conflicting positions as to whether bodily injury occurs at the time an individual is exposed to asbestos or at the time an asbestos-related disease manifests itself.

Inconsistent theories of policy interpretation referred to as "the manifestation theory" and "the exposure theory" have been used to justify when

LIABILITY INSURANCE § 11.01, at 11-4). In 1966, the standard policy was revised so that "occurrence" was substituted for "accident." Id.

Although some policy language differs from the current standard form, the insurer essentially agrees to

- pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
- bodily injury caused by an occurrence.

bodily injury is defined as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."

Occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury."

Mansfield, supra note 5, at 875. For an excellent discussion of the development and content of the standard CGL policy, see Note, supra note 30, at 1147-48. For a discussion of the variant policy language used in the American Motorists policies, see note 6 supra.

37. See Vagley & Blanton, supra note 20, at 639. See also Mansfield, supra note 5, at 862. It is not uncommon for an asbestos-related disease to manifest itself twenty to thirty years after the initial exposure to asbestos. Comment, supra note 18, at 77.

38. See Rosow & Liederman, supra note 33, at 1154; Note, supra note 29, at 1085-86. The plaintiffs in the underlying tort actions were typically exposed to asbestos products supplied by different manufacturers, each of whom periodically switched insurance companies during the years in which the workers were exposed. Note, Asbestos Litigation: The Insurance Coverage Question, 15 IND. L. REV. 831, 834 (1982). In the case of asbestos-related disease, the inhalation of asbestos fibers may begin during one policy period, the insidious disease may develop during subsequent policy periods, and manifestation may occur in still another policy period. Note, supra note 30, at 1142. Different products liability insurers are likely to provide coverage at different points in the development of the plaintiff's disease. Id. at 1143. Furthermore, since the manufacturer may be uninsured during all or some of this period, identifying the party liable for indemnification is not only difficult, it is also crucial. See id.

Because the express language of the CGL policy may be susceptible to varying plausible interpretations, and there is no consensus among the parties as to when the asbestos-related disease "occurs" under the policy, the parties have attempted to give the policies' terms their own interpretation as to both what is the required accident or occurrence and when it occurs. See Vagley & Blanton, supra note 20, at 652. See also Rosow & Liederman, supra, at 1149.

39. See Mansfield, supra note 5, at 876; Vagley & Blanton, supra note 20, at 652. Under the manifestation theory, the time at which the asbestos-related disease became known or should have been known to the plaintiff, or the date on which the plaintiff is diagnosed as having such a disease—whichever occurs first—is the controlling date for the trigger of coverage. Mansfield, supra note 5, at 876. In applying this theory, a court construes the standard CGL policy language "bodily injury" to include only injury which manifests itself during the policy period. Note, supra note 30, at 1155. Thus, this theory would allow an insurer to disclaim any duty to defend or indemnify if its policy had been in force when the injurious act occurred, but had expired by the time the injury became evident. See Note, Products Liability Insurance—Time of Exposure Triggers Coverage for Asbestos-Related Diseases, 26 WAYNE L. REV. 1127, 1128 n.7.

By denying that bodily injury occurs prior to the manifestation of symptoms, the
an insurer should become liable. Under the manifestation theory, bodily injury occurs when the injury manifests itself. Consequently, those insurers providing coverage at the time of manifestation of the asbestos-related disease must defend and indemnify the insured in any lawsuit alleging an asbestos-related injury or death. Exposure theorists postulate instead that manifestation theory is contrary to the medical evidence establishing that asbestos-related diseases reach an advanced stage of development prior to the appearance of any initial symptom. Comment, Liability Insurance for Insidious Disease: Who Picks Up the Tab?, 48 FORDHAM L. REV. 657, 668-69 (1980).

The manifestation theory has, at one time or another been advocated by Eagle-Picher, Liberty Mutual, Aetna Insurance Co., Insurance Co. of N. Am., the majority of the London Market known as the "Bird" defendants, and others. Mansfield, supra note 5, at 876.

40. The exposure theory assumes that injury is simultaneous with the first inhalation of an asbestos fiber, even though medical support for this proposition is inconclusive. Comment, supra note 39, at 668-69. But cf. Vagley & Blanton, supra note 20, at 652 (medical evidence indicates that exposure to asbestos results in tissue injury upon first inhalation of the asbestos fiber). The medical evidence upon which this theory is based demonstrates that when an inhaled asbestos fiber reaches an alveolus in the lung, minute cellular or histological changes occur; therefore, within the meaning of the policy, these histological changes or "insults" to the lungs are equated with bodily injury. Mansfield, supra note 5, at 876. Since these histological changes to the lungs are equated with bodily injury; an "occurrence" of bodily injury within the meaning of the policy would have taken place. See id.

Major advocates of the exposure theory include Traveler's Ins. Co., Hartford Accident and Indemnity Co., a minority of the London Market referred to as the "Froude" defendants and all asbestos manufacturers except Eagle-Picher. Mansfield, supra note 5, at 876. However, both insureds and insurers have vacillated between exposure and manifestation positions in instances where 1) the insured's coverage would be increased by virtue of application of another theory and 2) where the insurer's liability would be decreased through the application of another theory. Note, supra note 39, at 1128 n.7; Note, supra note 38, at 845.

41. Vagley & Blanton, supra note 20, at 652. For a more detailed description of the manifestation theory, see note 36 supra. It has been suggested that the manifestation approach results in placing losses in more recent policy years because it is in those years that the preponderance of the asbestos-related diseases, currently being litigated, manifested themselves. Note, supra note 38, at 844. The net effect is a dramatic increase in premiums for current general liability insurance. Mansfield, supra note 5, at 876. Some commentators have also noted that the manifestation theory has the "apparent advantage of expeditious, although perhaps more arbitrary resolution of the question when insurance liability accrues." Vagley & Blanton, supra note 20, at 652 (citing Comment, supra note 39, at 668).

42. For a discussion of the impact of the manifestation theory upon an insurer's duty to defend and indemnify, see note 39 supra. The standard CGL insurance policy contains a duty to defend clause. Note, supra note 38, at 843. An insurer's duty to defend an insured is not only distinguishable from, but is in some ways broader than, its duty to indemnify. See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1244 (E.D. Mich. 1978), 633 F.2d 1212 (6th Cir. 1980), modified on rev'g, 657 F.2d 814, cert. denied, 454 U.S. 1109 (1981). The provision means that, as part of the consideration for the premium, the insurer is obligated to pay the expenses incurred in the defense of any action alleging liability which is covered by the policy to indemnify. Comment, supra, at 843. The duty to defend extends to actions which may be groundless or even fraudulent. Id. Further, the costs of legal defense are in addition to the limit of the insurer's liability stated in the policy. Id. The duty to indemnify arises under the policies only when damages are determined. Vagley &
bodily injury occurs upon initial exposure to the asbestos fiber. Consequently, under the exposure theory, those who insured the asbestos manufacturer from the time of the first exposure until the exposure ceased must share any liability proportionately.

The inability of insureds and insurers to reach a consensus as to the appropriate theory of coverage has forced them to look to the courts to determine their rights, liabilities, and obligations under their insurance contracts. In Insurance Co. of North America v. Forty-Eight Insulations, Inc., the Court of Appeals for the Sixth Circuit held that each insurer providing coverage during an injured party's exposure to asbestos is both proportionately

Blanton, supra note 20, at 651-52. For a discussion of the relevant language in CGL policies, see note 36 and accompanying text, supra.

The exposure theory tends to cloud the issue of the duty to defend. Some exposure theorists argue that manufacturers must pay defense costs on a pro rata basis. Others, particularly manufacturers, argue that joint and several obligations on insurers preclude any requirement that they contribute a portion of these costs.

Mansfield, supra note 5, at 877. Confronted with this issue, the district court in Forty-Eight held that the duty to defend in the asbestos setting should be co-extensive with the duty to indemnify. Forty-Eight, 451 F. Supp. at 1244. Therefore, the court declared that defense costs be apportioned in identical fashion to the underlying damage claims. Id.

43. Vagley & Blanton, supra note 20, at 652. For a more detailed description of the exposure theory, see notes 40 & 44 and accompanying text supra. The exposure or "pro rata theory" also embodies a second major subdivision. Mansfield, supra note 5, at 876. The second major branch of exposure theorists contend "that each carrier on the risk from the onset of exposure until diagnosis or the filing of the underlying lawsuit" is jointly and severally liable to the manufacturer for defense and indemnification. Id. This hybrid theory is based on the belief that once asbestos fibers become embedded in the lung, they remain resident there causing not only initial, but also, progressive injury to the lungs. Id. at 876-77.

This subsequent development of disease after initial inhalation of the asbestos fiber is known as "exposure-in-residence." Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1042 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982).

44. Vagley & Blanton, supra note 20, at 652. Since coverage will be triggered by each injured plaintiff's exposure to the insured's asbestos products, the general economic effect of the exposure theory is to spread losses back over numerous years of primary insurance coverage. Mansfield, supra note 5, at 877. The net result is that manufacturers, particularly those which are no longer in the asbestos business, will not be faced with increased liability insurance costs. Id. Whereas losses under an exposure theory are spread back over numerous years of primary coverage, under a manifestation theory losses are pushed forward in time through increased premium costs. See id. at 876-77. Consequently, an exposure theory benefits more recent excess insurers who will not have to indemnify since applicable current primary policy limits will not be readily exhausted. Id. at 877. The exposure theory, however, presents drawbacks for manufacturers such as Eagle-Picher who were not covered during the greatest period of exposure to its products. Eagle-Picher, 523 F. Supp. at 118.

45. Rosow & Liederman, supra note 33, at 1148-49. These declaratory judgment actions focus on the interpretation of the language used in the standard CGL insurance policies. See Mansfield, supra note 5, at 874-79.

Insurance policies generally are interpreted in the same way as other contracts. 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:1 (2d ed. 1959). In construing the terms of insurance policies, the policy language should be given its clear, literal, and unambiguous meaning. 13 J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 7384 at 67-70 (1976). The plain meaning of the policy terms is to be
and individually liable to defend and indemnify its insured. The court interpreted according to their common dictionary definition. See, e.g. Fuerstenberg v. Mowell, 63 Ohio App. 2d 120, 409 N.E.2d 1035, 1036-37 (1978).

Where a policy is ambiguous, the Court will attempt to ascertain the intention of the parties and effectuate it. 13 J. APPLEMAN & J. APPLEMAN § 7385, at 112 (1976). The meaning which parties attach to the terms of the contract may also be inferred from their conduct. Id. at 134.

If the meaning of the terms remains unclear, the court will construe the policy in favor of the insured in order to effectuate insurance's purpose of indemnifying loss. See Note, supra note 38, at 835. In construing terms in favor of the insured, the court will use the insured's reasonable expectation as a guide. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1041 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). The First Circuit has, however, noted that a presumption in favor of the insured might be weakened where the insured was a businessman with equal bargaining power. See Commercial Ins. Co. of Newark, N.J. v. Gonzalez, 512 F.2d 1307, 1313 (1st Cir. 1975).


46. 633 F.2d 1212 (6th Cir. 1980), modified on reheg 657 F.2d 814, cert. denied, 454 U.S. 1109 (1981). Forty-Eight manufactured asbestos-containing products from 1923 to 1970. Id. at 1214. Since Forty-Eight could not produce insurance policies for the period prior to 1955, the court deemed Forty-Eight to be self-insured during that time period. Id. at 1215. From 1955 to 1981, Forty-Eight was consecutively insured against products liability judgments through policies with varying coverage amounts, but which nonetheless contained uniform liability language. Id. at 1215-16. A dispute as to liability among Forty-Eight's various insurance carriers resulted in the Insurance Company of North America (INA) initiating a declaratory judgment action. Id. at 1216.

On appeal, INA, Affiliated FM, Illinois National, Liberty Mutual, and various amici curiae, including Eagle-Picher, advocated a manifestation approach. Id. Forty-Eight, Travelers and other amici curiae advocated the exposure theory. Id. at 1217.

The district court in Forty-Eight concluded that since a deposit of asbestos fibers causes medical injury to the lung, each such injury constitutes an "occurrence" within the policy language therein triggering the insurer's liability. Forty-Eight, 451 F. Supp. at 1239. Finding that asbestos injuries are both progressive and incapable of apportionment by time, the district court held that each insurer on the risk when a diseased plaintiff was allegedly exposed is obligated to provide a defense and, in many instances, indemnification. Id. at 1239-40. District Judge Feikens reasoned that since a manufacturer can be held jointly and severally liable for the injuries, the insurer on the risk during the same indivisible injurious process should also be held jointly and severally liable. Id. (citing Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974)).

In adopting the exposure theory, the district court rejected Forty-Eight and Travelers' Insurance Company's theory that asbestos-related disease should be considered a "continuing tort," requiring all insurers on risk from the time of the alleged initial exposure through manifestation to be jointly and severally liable. Id. at 1238. Under the district court's decision, Forty-Eight must bear the judgment and defense costs for injuries apportioned to the period when it had no coverage. Id. at 1243-45.

47. Id. at 1239. The court prefaced its analysis by stating that it was desirable to arrive at an administratively manageable interpretation of the policies which would reduce litigation. Id. at 1218. However, the court dismissed the possibility of holding hearings to determine the point at which the disease occurs in a given case.
based its adoption of the "pro rata exposure theory" on three grounds: the expectation of the contracting parties that coverage would parallel the underlying theory of tort liability which injured plaintiffs had asserted against the manufacturer; the agreement of the medical community that the time asbestosis first manifests itself is not the time when bodily injury occurs; and the judicial policy of construing ambiguous policy language in such a fashion as to promote coverage.

In his dissenting opinion in Forty-Eight, Judge Merritt argued for adoption of a discoverability rule under which a carrier's liability would attach when "identifiable harm" occurs. According to Judge Merritt, identical harm would occur when the disease is detectable by x-ray. However, since most victims will not bring suit until actual manifestation of the disease, Judge Merritt also argued for a limitation period for bringing these claims. Under this arbitrary limitation period, the disease of asbestosis is deemed discoverable ten years from the date of exposure, with each further exposure considered to be an additional compensable injury. If there is no manifestation of asbestosis within ten years after exposure, those insurers on the risk at the time the disease becomes manifest are liable.

Under the "pro rata" theory of liability, the extent of an insurer's liability would be determined by the duration of the claimant's exposure to the manufacturer's products during that insurer's policy period in relation to the total duration of the claimant's exposure to the manufacturer's products. The "pro rata share" theory may be illustrated as follows: If a plaintiff is exposed to asbestos products from 1942-1946, his asbestosis is diagnosed in 1975, and he filed a lawsuit in 1976, all insurers who issued policies from 1942-1946 would be obligated to defend and indemnify the insured. See Mansfield, supra note 5, at 877. Accordingly, if "insurer A provided 3 years of coverage, insurer B an additional 3 years, and the manufacturer was uninsured for the remaining 3 years, liability would be allocated at 1/3 for each of the concerns." Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1244 (6th Cir. 1980), modified on reh'g, 657 F.2d 814, cert. denied, 454 U.S. 1109 (1981). This pro rata method of apportionment is based upon joint and several liability. Mansfield, supra note 5, at 876.

The Forty-Eight court argued that because of the manufacturer's failure to warn of the hazards of asbestos, workers contracted disease or injury from continuous exposure to the mineral. Since the insurance policies in Forty-Eight were designed to protect against suits based on a failure to warn theory, the insured could reasonably expect its coverage to parallel the exposure theory of liability. Further, Judge Keith noted that the policies in question contemplated coverage for cumulative trauma cases against the insured because the insurers had inserted a provision referring to "continuous or repeated exposure to conditions which result in injury." Id. at 1223 (emphasis added).

The court's determination that asbestos-related disease does not occur when it first manifests itself was based on the testimony of Dr. Wright, an histologist, or expert in the study of human tissue. Wright had distinguished the tissue injury which marks the origins of the disease from the actual diagnosis of the disease. Consequently, by adopting the exposure theory, the Forty-Eight court implicitly decided that injury occurs upon first inhalation of the asbestos fiber.

The Sixth Circuit reasoned that, as applied to the progressive disease context, the terms of the policies were "inherently ambiguous."
In 1981, in Porter v. American Optical Corp., the Fifth Circuit Court of Appeals rejected the lower court’s application of the manifestation theory as the trigger of the insurer’s liability. Without independent analysis, the Porter court followed the decision reached in Forty-Eight and applied the exposure theory to the facts of the case before it.

Under the applicable state law, when there are ambiguities in the policy, the policy is to be construed to promote coverage. Id. at 1219 (citations omitted).

The Forty-Eight court, in adopting the exposure theory, rejected the manifestation theory proponents’ argument that various health insurance, workmen’s compensation, and statute of limitations cases sustaining the manifestation approach should be controlling. Id. at 1220-23. The Sixth Circuit reasoned that statute of limitations cases decided in favor of a manifestation rule are grounded in policy considerations inapposite to those present in insurance cases. Id. at 1220. The court opined that while a manifestation rule in a statute of limitations setting would promote fairness to injured plaintiffs acting in good faith, such a rule in the insurance context would not effect the purpose of insurance contracts, namely, to cover the insured. Id.

The court also rejected an analogy to workmen’s compensation cases because in that context adoption of a “last employer pays” rule is grounded in efficient administration. Id. at 1221. It stated that administrative convenience does not override rules of contract interpretation. Id. The Forty-Eight court reasoned that the health insurance cases, although ruling that the date of diagnosis triggers coverage, rely on the same rules of policy construction applicable to Forty-Eight. Id. Consequently, the Sixth Circuit construed Forty-Eight’s insurance policies to honor the legitimate expectation of the parties and to promote coverage. Applying this rule of policy construction to the facts of the case before it, the court ruled that the exposure theory should be embraced. Id. at 1221-22.

52. 641 F.2d 1128 (5th Cir. 1981), cert. denied, 454 U.S. 1109 (1982). The plaintiff brought suit against American Optical alleging injury from a defect in a respirator and filter apparatus supplied by this manufacturer. Id. at 1131. The primary defendant, American Optical, joined as third-party defendants its various insurance companies on the risk during the plaintiff’s employment and illness. A jury found that the defective respirator had caused the plaintiff, an asbestos worker, to incur asbestosis. Id. The district court was faced with the remaining third-party claims against the defendant’s various insurers. Id. However, since the claim involved a respirator, it was argued that the only years of coverage in dispute were the years in which the device was used. Id.

53. 641 F.2d at 1145. The district court had concluded that the insurer on the risk at the time of the manifestation of the claimant’s illness was liable for defense and indemnification of the insured. Porter v. American Optical Corp., No. 75-2202, slip op. at 5 (E.D. La. Nov. 23, 1977). The district court had equated the policy term “bodily injury” with the terms “sickness or disease”. Porter, 641 F.2d at 1145. Consequently, the district court reasoned that while the worker was exposed to the injurious material during Aetna Casualty & Surety Company’s period of coverage, the continued exposure did not result in any injury within the meaning of that insurer’s policy. Porter, No. 75-2202, slip op. at 5. The result of the district court’s findings was that Aetna, which was the carrier on risk during the longest period of plaintiff exposure, as well as the carrier on the risk when the actual diagnosis was made, was exempted from liability. Note, supra note 29, at 1080, 1088 nn.44-45.

54. 641 F.2d at 1145. The Porter court then remanded the case for a determination of apportionment of liability among the casualty insurers consistent with the pro rata theory adopted in Forty-Eight. Id.

Subsequently, the Court of Appeals for the District of Columbia Circuit, in *Keene Corp. v. Insurance Co. of North America*, was confronted with three different theories of policy construction. Each theory had been postulated to determine the extent to which various insurance policies covered a manufacturer's liability for damages resulting from asbestos-related diseases caused by its products. Reversing the decision of the lower court which had adopted the exposure theory, the District of Columbia Circuit held that inhalation exposure, exposure-in-residence, and the manifestation of the asbestos-related disease all triggered coverage under Keene's policies. The Assurance Corp., 554 F. Supp. 257 (1983) (accepting exposure theory in context of latent disease caused by drug Mellaril).

55. 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982). Between 1948 and 1972, Keene manufactured thermal insulation products that contained asbestos. *Id.* at 1038. Keene was, at the time of suit, named as a co-defendant in over 6,000 lawsuits alleging injury caused by exposure to Keene's asbestos products. *Id.* The underlying cases typically involved insulation workers or their survivors alleging personal injury or death resulting from prolonged inhalation of asbestos fibers. *Id.* For a discussion of the underlying claims in insurance-related declaratory judgment actions, see notes 2 & 28-30 and accompanying text *supra*.

From 1961 to 1981, various insurance companies had issued CGL policies to Keene for protection against products liability suits and judgments. 667 F.2d at 1038-39. When Keene tendered its asbestos-related damage suits to its insurance companies for defense and indemnification, each company denied responsibility either in whole or in part. *Id.* at 1039. Keene subsequently filed suit for declaratory judgment and damages. *Id.*

56. 667 F.2d at 1042-43. INA, Liberty Mutual, and Aetna argued in *Keene* that coverage is triggered only by the manifestation of asbestosis, mesothelioma or lung cancer during a policy period. *Id.* Keene and Hartford Accident and Indemnity Company advanced different versions of the exposure theory. *Id.* at 1042. Based on the medical evidence of asbestosis as a continuous process, Keene argued that successive coverage is triggered by both exposure to asbestos dust, or "inhalation exposure," and the subsequent development of the disease, or "exposure-in-residence." *Id.* For a discussion of these two major branches of the exposure theory, see notes 40 & 43 *supra*.

Hartford advanced a variant of the exposure theory: that successive coverage was triggered by continued exposure, but exposure-in-residence did not trigger further coverage. *Keene*, 667 F.2d at 1242, 1244 n.18. Under Hartford's proposed theory, each company's coverage would be determined by the ratio of exposure years during its policy period to the entire period of inhalation. *Id.* at 1039.

57. 667 F.2d at 1039. The district court had held that defense and indemnification costs should be prorated among the insurance carriers relative to the extent of exposure during their respective policy periods. *Id.* Keene was deemed liable for a pro rata share of the costs of defense and indemnification for the period of exposure to its products while it was uninsured. *Id.*

58. *Id.* at 1047. Judge Bazelon, writing for the majority in *Keene*, reasoned that the allocation of rights and obligations established by the policies would be undermined if either exposure or manifestation were to represent the sole trigger of coverage. *Id.* The court concluded that inhalation exposure, which is the initial exposure to the asbestos fiber, was part of an injurious process which was sufficient to constitute injury under the policies. *Id.* at 1046. The court noted that the initial exposure was sufficient to trigger the insurer's liability, regardless of whether that particular exposure caused a discrete and immediate injury. *Id.*

Furthermore, the D.C. Circuit concluded that exposure-in-residence, or the time between the inhalation of the asbestos fiber and the manifestation of the disease, was a second trigger of insurer liability. *See id.* at 1044. In so concluding, Judge Bazelon
Keene court reasoned that liability must parallel the injurious process of asbestosis in order to protect the manufacturer's rights under the insurance policies. Accordingly, the court found that insurers providing coverage from the time of plaintiff's initial exposure to asbestos to the manifestation of a related disease were fully liable once coverage was triggered.

It was against this background that the First Circuit, in Eagle-Picher, began its analysis of whether the lower court's application of the manifestation theory of liability to the respective CGL policies gave effect to the intentions of the parties.

rejected the defendant-insurers' argument that each exposure to asbestos should be characterized as a new and discrete injury. The court reasoned that if defendants' argument were accepted, an insurer could argue that it is responsible only for the discrete injuries which occurred during its policy periods. For a discussion of the exposure-in-residence theory, see note 43 supra.

The court also decided that the manifestation of the asbestos-related disease was a third trigger of an insurer's liability for the underlying personal injury suits brought against the insured. The D.C. Circuit concluded that the reasonable expectations of Keene in entering into the policies were, at the very least, assurances that they would be covered for future manifestations of asbestos-related disease. For a discussion of the manifestation theory, see notes 39 & 41-42 and accompanying text supra.

59. 667 F.2d at 1046. The D.C. Circuit reasoned that during the time period between plaintiff's initial exposure to asbestos and the time of manifestation of disease, the existence of latent injury and potential liability became known to the parties. Hence, insurers and insureds knew that past occurrences were likely to have set in motion injurious processes for which Keene might ultimately be liable. Thus, allowing insurers to terminate coverage prior to the manifestation of many cases of disease would deprive Keene of its purchased protection. For a discussion of the Forty-Eight court's contrary conclusion despite its similar attempt to construe the insurance policies before it to meet the expectations of the parties, see note 49 supra.

60. 667 F.2d at 1048. The circuit court stated that once triggered, each policy covered Keene's entire liability until its coverage limits were exhausted. To avoid "stacking" or layering of applicable policy's limit of liability, the court held that Keene could select the policy under which it wished to be fully indemnified with the proviso that only one policy's limits could apply to each injury. The court held that Keene could select the policy under which it wished to be fully indemnified with the proviso that only one policy's limits could apply to each injury. For a discussion of the apportionment of the insurer's liability, see note 49 supra.

61. For a discussion of the manifestation theory, see notes 39 & 41-42 and accompanying text supra.

The exposure theorists in Eagle-Picher had sought a pre-trial ruling in the district court to determine whether the interpretation of the policies should be controlled by the law of Ohio, Illinois, or England. The district court found no conflict among the potentially applicable laws and thus did not decide which law should apply. For the appeal, the First Circuit sought to be consistent with Illinois and Ohio law since the parties had failed to show how the law of England might differ.

62. 682 F.2d at 16-19. The First Circuit examined the language of the insurance contracts at issue. The American Motorists policy in Eagle-Picher provided indemnification for liability due to "personal injury caused by... an occurrence which takes place during the policy period." For a discussion of the manifestation theory, see notes 39 & 41-42 and accompanying text supra.

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In its review of the lower court's decision, the First Circuit evaluated the exposure theorists' contention that the district court had erred when it excluded extrinsic evidence of Eagle-Picher's intent in obtaining the policies.\textsuperscript{63} The exclusion of such evidence, the First Circuit concluded, was harmless error.\textsuperscript{64}

According to the First Circuit, the principal issue on appeal was whether the asbestos-related disease "results" soon after exposure, or whether the insured shall become legally obligated to pay as damages because of bodily injury caused by an occurrence." Id. For a more detailed discussion of the language of the policies at issue in Eagle-Picher, see notes 3-8 supra.

In examining these contracts, the court stated that its dominant purpose in construing these policies was "to give effect to the intentions of the parties." 682 F.2d at 18, 23. The court noted that the American Motorists policy contained a definition of "occurrence" identical to that contained in other companies' policies. This definition required the resulting injury, not the exposure, to take place during the policy period. Id. at 24. Given the identical definition of "occurrence" in all the policies, the court decided that Eagle-Picher could reasonably expect coverage from American Motorists similar to that provided by its other insurers. Id. For a discussion of the principles of contract law which the courts use when construing insurance agreements, see note 45 supra.

63. 682 F.2d at 16. Because the parties had agreed that the policy language was unambiguous, the district court had refused to consider the exposure theorists' extrinsic evidence of the intentions of the parties. Id. at 18. The extrinsic evidence rejected by the district court consisted primarily of an exchange of correspondence between Eagle-Picher's corporate insurance manager and Liberty Mutual's claims-supervising personnel regarding three asbestos-related claims between 1969 and 1971. Id. at 21-22 & n.7. The district court found the excluded letters to reflect tentative positions and compromise rather than establishing the exposure theory as the proper interpretation of the policies. Id. at 222.

The First Circuit concluded that this evidence did not constitute a "course of dealing" between Eagle-Picher and its insurers which established that coverage would be based on the exposure theory. Id. (citing Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1045-46 (5th Cir. 1971)). See U.C.C. § 1-205(1) (course of dealing defined as a sequence of previous conduct between parties to particular transaction which is fairly regarded as establishing common basis of understanding for interpreting their expressions and other conduct). In addition, the court stated that no evidence of "usage of trade" in the insurance industry as a whole was proffered by the parties. 682 F.2d at 22. See U.C.C. § 1-205(2) (defining usage of the trade as any practice or method of dealing having regularity of observance in a place, vocation or trade as to justify expectation that it will be observed with respect to the transaction in question and whose existence is to be proved as fact).

64. 682 F.2d at 22. The court noted that it is harmless error to refuse to admit extrinsic evidence to support the findings of the trial judge. Id. at 18, 22. Since there was ample evidence in Eagle-Picher to support the district court's findings, any error in excluding such evidence was harmless. Id. The First Circuit added the caveat that had it been argued below that the policy language was ambiguous, and therefore that parol evidence should have been admitted to shed light on the meaning of the terms, a more compelling case for reversible error would have existed. Id. at 21.

The exposure theorists also argued on appeal that the district court had erred by refusing to admit evidence of Eagle-Picher's insurance sophistication and bargaining power. Id. at n.6. The circuit court in Eagle-Picher reasoned that any error in excluding such evidence was also harmless, concluding that the offer of proof did not show that Eagle-Picher participated in the drafting of the agreement to such an extent so as to deny it the benefit of favorable policy construction. Id. (citations omitted).
the disease "results" when it becomes clinically evident or manifest.\textsuperscript{65} In determining when the asbestos-related disease "results," the court found that sub-clinical, or undiscoverable, injury to the lung does not occur simultaneously with the first inhalation of an asbestos fiber.\textsuperscript{66} It also noted that injury is not an inevitable by-product of exposure to asbestos.\textsuperscript{67} Apart from the medical evidence, the \textit{Eagle-Picher} court found that a plain reading of the policy language revealed that it is a discoverable injury which must take place, or manifest itself, during the policy period in order to trigger coverage.\textsuperscript{68}

\textsuperscript{65} Id. at 17. The court framed the issue to be resolved with specific reference only to the disease of asbestosis. Id. Since the parties did not argue that the various asbestos-related diseases should be treated differently under the policies, the First Circuit did not differ with the lower court's decision not to consider mesothelioma and lung cancer separately from asbestosis. \textit{Id.} at 19 n.3.

\textsuperscript{66} Id. at 18. The district court had received expert medical testimony from Dr. Bernard Gee, a research scientist and clinician with vast experience in the area of asbestos-related disease, and from Dr. Edward Burger, a researcher and administrator. \textit{Eagle-Picher}, 523 F. Supp. at 115. The testimony of these medical experts showed that sub-clinical injuries—which are injuries that are undiscoverable—do not occur with initial exposure to asbestos fibers. \textit{Id.} This testimony thus contradicted the central contention of the exposure theory proponents that exposure and injury are simultaneous. The testimony of the experts revealed that the destructive process begins only after those fibers which reach the tissues of the lung become deposited there. \textit{Id.} It is at this point that the human body's production of enzymes, in an attempt to destroy the non-biodegradable fiber, actually begins to scar the tissue surrounding the fiber. \textit{Id.} See note 18 supra.

The First Circuit further observed that contemporaneous bodily injury and exposure to asbestos appears to be even more remote with respect to mesothelioma and lung cancer whose development, although dose-related, is not cumulative in nature like asbestosis. \textit{Id.} at 19 n.3 (citing Vagley & Blanton, supra note 20). See note 21 supra.

\textsuperscript{67} 682 F.2d at 18. The expert testimony which had been presented to the district court had concluded that along its route to the lungs, an asbestos fiber is likely to be removed from the body either physiologically or biologically. \textit{Eagle-Picher}, 523 F. Supp. at 115. Natural filters of the nose, throat, or lining of the pulmonary system and cells in the lymphatic system all serve as defenses which an asbestos fiber must overcome on its way to becoming embedded in the lung. \textit{See id. Cf. Forty-Eight} 451 F. Supp., 1230, 1236 (E.D. Mich. 1978) (asbestos fibers of a certain length cannot be removed and become embedded in the lung tissue). However, even when a fiber has become embedded in the lung and the scarring process has begun, disabling disease or death is not inevitable. \textit{Eagle-Picher}, 682 F.2d at 18 (citing \textit{Eagle-Picher}, 523 F. Supp. at 115). The circuit court's conclusion that asbestosis is not inevitable following exposure to asbestos appears to be based, at least in part, on Dr. Gee's testimony in the lower court that over 90% of urban dwellers have some asbestos-related scarring. Only a tiny percentage of these people, however, ever develop clinical asbestosis. \textit{Eagle-Picher}, 523 F. Supp. at 115.

\textsuperscript{68} 682 F.2d at 19. The circuit court reasoned that the policies clearly distinguished between the event which causes the injury, either an accident or exposure, and the resulting injury or disease. If the exposure and injury are not simultaneous, and sub-clinical injury is not an inevitable by-product of exposure, then "resulting injury" within the meaning of the policies cannot be triggered by exposure to asbestos. \textit{See id.}

Judge Coffin also noted that had the parties intended that a single exposure to asbestos trigger coverage, the policy language could easily have reflected that intent.
Furthermore, the First Circuit found that the common, ordinary meaning of the policy language also mandated application of the manifestation theory. Writing for the court, Judge Coffin reasoned that it would be difficult to consider sub-clinical insults to the lungs as an injury since "injury" has been generally defined as "something that causes loss, pain, distress or impairment." The court also decided that to consider the sub-clinical changes in the body as the occurrence of a disease would be to subvert the plain meaning of the policy term "disease."

Having concluded that sub-clinical changes in the lungs were neither "bodily injury" nor "disease," the First Circuit went on to reason that individual health insurance cases which hold that a disease results only when it becomes "manifest or active" provided support for its view that the plain meaning of the policy language militated against an exposure interpretation of such had been the parties' intention, Liberty Mutual's policies would not have defined an "occurrence" in part as a "continuous or repeated" exposure to conditions. For a discussion of the Liberty Mutual policies' language, see notes 3-4 supra.

69. 682 F.2d at 19. The court relied upon Webster's Dictionary to determine the plain, ordinary meaning of language in the policies at issue. Id. at 19 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1966)). The First Circuit noted that several Ohio courts have relied on Webster's to determine the meaning of policies brought before them. Id. at n.4 (citing Fuerstenburg v. Mowell, 63 Ohio App. 2d 120, 409 N.E.2d 1035, 1036-37 (1978); Olmstead v. Lumberman's Mutual Ins. Co., 23 Ohio App. 2d 185, 261 N.E.2d 671, 674 (1969), aff'd, 22 Ohio St. 2d 212, 259 N.E.2d 123, 126 (1970)). The First Circuit reasoned that where the relevant language is unambiguous and the application of the policy to the relevant facts is clear, that intent must be ascertained by the plain and ordinary meaning of the contract language. Id. at 17.

70. Id. at 19. The court found that Webster had defined injury to mean "hurt, damage or loss sustained . . . ." Id. (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1966)). Combining the dictionary definition and a layman's view that injury occurs when it impairs his sense of well-being, the circuit court concluded that sub-clinical insults to the lung do not cause, "loss, pain, distress or impairment . . . until, or if ever, they become clinically evident or manifest." Id. (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1966)).

71. Id. at 19-20. The court pointed out that Webster defines "asbestosis" as "a form of pneumoconiosis." Id. at 19 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1966)). This latter term is then defined by Webster as a "disease of the lungs." Id. The court engaged in the factual presumption that every disease is preceded by some sub-clinical change in the body. Id. Therefore, the court concluded, to state that disease occurs when sub-clinical alterations take place would be to subvert the meaning of the term "disease" in the policy because disease does not inevitably follow from these sub-clinical changes. Id. at 19-20.

72. Id. at 20 & n.5. Health insurance policies often require that an illness or disease originate after a certain date for coverage to ensue. Id. Judge Coffin stated that courts have consistently ruled that disease does not result until it becomes "manifest or active;" however, coverage is not defeated because the disease is latent prior to the date of coverage. Id. (citations omitted).

The court stated that further support for the manifestation theory comes from courts in some jurisdictions which have concluded that the statute of limitations for asbestos-related personal injury suits does not begin to run until the disease manifests itself. Id. at n.5 (citations omitted). The court also noted that in at least one workmen's compensation case, an industrial disease was held to occur when "it manifests
RECENT DEVELOPMENT

Conclusion that any remaining doubts about the interpretation of the policies should be resolved in favor of the insured, the Eagle-Picher court decided that the policies' purpose of providing coverage would also be effectuated by a manifestation trigger of liability.

On cross-appeal, Eagle-Picher contended that "all insurers on the risk from the period of initial exposure to the time of manifestation must provide coverage." This theory of coverage, which had been adopted by the District of Columbia Circuit in *Keene*, was rejected by the Eagle-Picher court.

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73. Id. (citing Grain Handling Co. v. Sweeney, 102 F.2d 464, 466 (2d Cir.), cert. denied, 308 U.S. 570 (1939)).

74. Id. at 20. In concluding that various insurance-related cases support a manifestation construction, the circuit court found it instructive to refer to language from an opinion authored by Judge Learned Hand:

> Few adults are not diseased, if by that disease one means only that the seeds of future troubles are not already planted; and it is common place that health is a constant warfare between the body and its enemies: an infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs.

75. 682 F.2d at 23. The circuit court agreed with the district court's contention that the public policy underpinnings of insurance law support the manifestation theory. Id. Judge Coffin reasoned that since Eagle-Picher was uninsured during the longest period potential plaintiffs were exposed to its asbestos products, and since the number of asbestos-related claims was accelerating during the policies' period of coverage, "coverage based on manifestation was more desirable than coverage based on exposure." Id.

76. For a discussion of Eagle-Picher's cross-appeal, see note 16 supra.

77. 682 F.2d at 23. Although Eagle-Picher had argued in the district court for a manifestation interpretation of the policies, on its cross-appeal it argued that all insurers of the risk from the period of initial exposure to the time of manifestation must provide it with coverage. Id. at 16, 23.

78. Id. at 23. For a discussion of the decision in *Keene*, see notes 55-60 and accompanying text supra. The First Circuit also refuted the exposure theorists' conten-
The court, in distinguishing *Keene* on its facts, reasoned that the insured in *Keene* had claimed before the district court that obtaining maximum coverage had been its intention. Consequently, the First Circuit reasoned that the *Keene* court had simply construed the policies in favor of the insured's reasonable expectations. In contrast, the First Circuit found that Eagle-Picher had no such expectation of maximum coverage because it did not argue such a theory in the district court.

Although it affirmed the lower court's decision to embrace the manifestation theory, the circuit court of appeals modified the district court's judgment that the date of diagnosis or the date of death triggers coverage. Noting that a policy of adherence to sound principles of contract construction outweighs one of fashioning rules of administrative convenience, the First Circuit stated that "[t]he policy language clearly required that exposure result in bodily injury during the policy period, not that bodily injury be medically diagnosed during the policy period." Consequently, the First Circuit in *Eagle-Picher* flatly disagreed with the *Forty-Eight* court's analysis of relevant policy language and medical evidence. 682 F.2d at 23. Although Judge Coffin agreed with *Keene*'s conclusion that ambiguity in the insurance agreement should be resolved in favor of the insured, he emphasized that this principle must not override the court's primary objective of ascertaining the intention of the parties. *Id.* Judge Coffin therefore concluded that the Sixth Circuit's statement that a court should "first 'give effect to the policies' dominant purpose of indemnity' is to weight too heavily a presumed intention to maximize coverage." *Id.* (citing *Keene*, 667 F.2d at 1041) (emphasis supplied by court).

The First Circuit in *Eagle-Picher* flatly disagreed with the *Forty-Eight* court's analysis of relevant policy language and medical evidence. 682 F.2d at 23. Although Judge Coffin agreed with *Keene*'s conclusion that ambiguity in the insurance agreement should be resolved in favor of the insured, he emphasized that this principle must not override the court's primary objective of ascertaining the intention of the parties. *Id.* Judge Coffin therefore concluded that the Sixth Circuit's statement that a court should "first 'give effect to the policies' dominant purpose of indemnity' is to weight too heavily a presumed intention to maximize coverage." *Id.* (citing *Keene*, 667 F.2d at 1041) (emphasis supplied by court).

82. *Id.* at 25. Eagle-Picher had also argued that a remand was appropriate so that the district court could determine the extent of coverage once a policy had been triggered. *Id.* at n.12. Eagle-Picher claimed that manifestation of the asbestos-related disease in one claimant during the policy period should trigger coverage for all claimants whose disease manifests itself during the policy period. *Id.* However, the First Circuit decided that such an argument was without merit because the policies were geared to individual claimants, not to all claimants injured by the same exposure. *Id.*

83. *Id.* at 24. Although the district court had recognized that injury results when the disease is "capable of diagnosis," it had held that the date of diagnosis, or death if it occurred prior to diagnosis, triggers coverage in order to ensure that the availability of coverage could be easily ascertained and demonstrated. *Eagle-Picher*, 523 F. Supp. at 115, 118. The First Circuit found the district court's goal of adminis-
cuit concluded that an asbestos-caused disease results under the policies when it becomes “reasonably capable of diagnosis.”

In reviewing the decision in *Eagle-Picher*, it is submitted that the language of the policies at issue, excluding that of American Motorists, mandated application of the manifestation theory. The language of the Liberty Mutual and the London Market policies requires that “bodily injury” or “disease” must be caused by an “occurrence.” This wording suggests that the “injury or disease” take place at a different point in time than the “occurrence.” Thus, the manifestation theory—which postulates that

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84. 682 F.2d at 25. The First Circuit supported its modification of the lower court's definition of the manifestation date by citing courts and commentators in analogous health insurance situations who had reached a similar conclusion: that disease results “when there is a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease.” *Id.* at 24-25 (citations omitted).

85. For a discussion of the language of the American Motorists policy, see note 6 *supra*. For a discussion of the First Circuit’s rationale for distinguishing between the two types of policies, see note 65 *supra* and note 86 and accompanying text *infra*.

86. See 682 F.2d at 18-21. It is apparent that the First Circuit partially based its interpretation of the policy terms according to their plain meaning upon the parties’ tacit agreement that the policy language was unambiguous. *See id.* at 18, 21. Since it was not argued that the contract language was ambiguous, it can be inferred that the parties found it to be unambiguous. *See id.* The parties were, however, “diametrically opposed in their reading of what was plainly and clearly stated.” *Id.* at 18.

Because the First Circuit concluded that the language of the Liberty Mutual and London Market policies was unambiguous, its primary focus in interpretation was upon the precise language used by the parties. *Id.* at 17-21. In comparison, both the *Forty-Eight* and *Keene* courts found similar policy language to be ambiguous, and therefore applied the canon of construction resolving doubts in favor of maximizing coverage. *See Keene, 667 F.2d at 1041; Forty-Eight, 633 F.2d at 1222*. For a discussion of the legal principles behind these differing theories of construction, see note 45 *supra* and notes 93 & 94 *infra*.

87. 682 F.2d at 17. For a description of the wording of the policies at issue in *Eagle-Picher*, see notes 3-8 and accompanying text *supra*.

88. See 682 F.2d at 18-20; note 71 *supra*. The First Circuit’s conclusion that “occurrence” and “injury” are separate events under the policies seems based, at least in part, on the district court’s finding that the definitional language explicitly focuses on the result rather than the cause as the component to which coverage is linked. *See 682 F.2d at 19-20*. The district court had stated that the time limitation clause “during the policy period” always followed the word “results” and was commonly set off by commas; thus, it had concluded that the time-limiting clause could only modify the verb “results.” *Eagle-Picher, 523 F. Supp. at 114*.

The First Circuit in *Eagle-Picher* also stated that the failure of the insurer to include a provision stating that in cases of insidious disease “bodily injury” will be
asbestos-related disease results when it becomes clinically evident—9—is more consistent with the policy language than is the exposure theory, which hypothesizes that the disease results simultaneously with the exposure. Additionally, since the touchstone of insurance contract construction is the intention of the parties, the subsequent construction of the policies on a manifestation basis by Eagle-Picher and its primary insurer provides strong support for the court's adoption of the manifestation theory.

It is submitted, however, that the Eagle-Picher court could have reached a similar result even if it had found the language of the Liberty Mutual and London Market policies to have been ambiguous. Language of an insurance contract which is unambiguous should be construed by a court according to the plain meaning of its terms. However, if the language is ambiguous, a court should generally construe this uncertain language against the insurer and in favor of the insured.

It is submitted that although the language of deemed to be coincident with exposure supported the inference that an exposure theory was not the intent of the parties. However, it is equally plausible that the failure to provide any express requirement that an injury be manifest in order to trigger coverage may imply that a manifestation trigger was not the intent of the parties. See Comment, supra note 39, at 685.

For a discussion of the manifestation theory, see notes 39, 41 & 42 and accompanying text supra.

For a discussion of the exposure theory, see notes 40, 43 & 44 and accompanying text supra.

If a policy is unambiguous, a court should construe it without reference to conduct of the parties. Id. at 134. However, if the policy is ambiguous, the court will look to the construction evidenced by the conduct of the parties acting thereunder, "since such construction is considered the best evidence of what the contract actually was intended to mean." Id. at 134-35. For a discussion of basic contract principles applicable to insurance agreements, see note 45 supra.

See 682 F.2d at 20, 23. The circuit court took notice of the April 1972 agreement between Eagle-Picher and Liberty Mutual which provided that the parties would interpret their policies on a manifestation basis. Id. at 23. However, for the purposes of determining the date of the trigger of coverage, the First Circuit concluded that 1) such agreement could not be used to modify the unambiguous language unless it constituted a binding modification or reformation of the prior policies and 2) the parol evidence rule would bar the use of the 1972 letter to modify the clear items of the subsequent policies. Id. at 24 n.11. It would appear that the use of this document in the interpretation of the policies is inconsistent at best. See note 89 supra.

In accordance with principles of insurance law, the First Circuit combined dictionary definitions of the terms used in the policies with a determination of how these terms would be used by lay persons. Id. at 19. One commentator has suggested, however, that it may be beyond the personal ability of the layperson to determine when his disease first began. Comment, supra note 39, at 680. This commentator further noted that some courts alternatively prefer to view the plain meaning of the policy terms from the vantage point of the insured, or the reasonable expectation of someone standing in the position of the insurer, or a reasonable assessment of the mutual understanding of the parties. Id. at 679-80.

For a discussion of the First Circuit's use of dictionary definitions in construing the terms of the policies at issue, see notes 70 & 71 supra.

One commentator has stressed that a liberal construction rule does not justify departure from the general principles of construction if to do
the Liberty Mutual and London Market policies may be more clear and commonsensical than that of the American Motorists policy. Clarity of the policy language should not be dispositive on the question of ambiguity. It is suggested that in the latent disease context, the language of both types of policies yields uncertainty; therefore, they are "inherently ambiguous" and, as such, could be construed to promote coverage.

If the court found these policies to be ambiguous and followed the above-mentioned principles of contract construction, it is submitted that the First Circuit would have reached the same manifestation result since the court noted in its opinion that the manifestation theory would best promote insurance of Eagle-Picher.

so would yield an interpretation that changes the meaning of the contract and the intent of the parties. Comment, supra note 39, at 679. Followed to an extreme, the doctrine of liberal construction effectively turns a court's inquiry back to its initial point of departure—namely, the need to define the meaning of the CGL policy and ascertain the intention or reasonable expectations of the parties. See id. at 679. This theory would appear to support the Eagle-Picher court's emphasis on the intention of the parties in determining the meaning of the policies at issue. See 682 F.2d at 18, 23.

For a description of the language of the policies at issue in Eagle-Picher, see notes 3 & 4, 6-8, & 35 & 36 and accompanying text supra.

See Comment, supra note 39, at 678. Appleman has stated that language "is ambiguous when its meaning is doubtful" as understood by the ordinary person or untrained mind. 13 J. APPLEMAN & J. APPLEMAN, supra note 45, § 7386, at 159. One commentator has suggested that, "[i]n lieu of the rather simple, nontechnical and straightforward linguistic structure used in the policies to define 'bodily injury' and 'occurrence,' any argument alleging ambiguity seems dubious." Comment, supra note 39, at 678. In light of this approach, the distinction drawn by the First Circuit between the two types of policy language is entitled to some merit. See 682 F.2d at 19-20.

However, a second approach to determine whether ambiguity exists in policy language has been developed. See Comment, supra note 39, at 678. Under this second approach, if the language as applied to a particular set of facts yields uncertainty, this language might be ambiguous. Id. at 678-79.

See Comment, supra note 39, at 679; Comment, supra note 45, at 256. Some parties litigating the successive insurer liability issue in cases of insidious disease have, however, argued that the CGL policy language is ambiguous, while others assert that it is clear and unambiguous. Id. at 677-78. They argue that controversy over the meaning of this language is insufficient to sustain a finding of ambiguity even though reasonable minds differ as to when bodily injury occurs within the policy period. Id. at 678. Cf. Forty-Eight, 633 F.2d at 1223 (noting that CGL policy language is at least somewhat ambiguous because insurance industry is divided between manifestation and exposure theories).

Forty-Eight, 633 F.2d at 1222. See Keene, 667 F.2d at 1041 (the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related disease). See also Comment, supra note 30, at 1149 (CGL policy language is ambiguous).

See 682 F.2d at 23. The First Circuit noted that since Eagle-Picher was uninsured for the longest period of exposure to its asbestos products, a manifestation approach was better for Eagle-Picher than an approach in which coverage is based on exposure. Id. Thus, as an additional strand of support for its holding, the circuit court agreed with the lower court that a manifestation approach served to maximize the coverage provided to Eagle-Picher in the underlying lawsuits. Id. Moreover, the First Circuit stated that even if the terminology of a medical expert were adopted, as
It is further suggested that, of the two theories, the manifestation theory is not only more compatible with the language of the Eagle-Picher policies, it is also more compatible with medical evidence. Yet, while the court's attempt to construe the policies in light of the most recent medical data on asbestos-related disease is laudable, it is submitted that neither the manifestation nor the exposure theory adequately reflect the cumulative nature of the disease. Rather than state that asbestos-related injury occurs at a particular point in time, the Forty-Eight, Porter, and Keene courts, when faced with the same medical evidence and similar policy language, concluded that exposure to asbestos starts an injurious process which results in disease.

opposed to that of a layman, the policy language did not support the exposure theory. Id. at 19. See notes 87-90 and accompanying text supra.

100. See 682 F.2d at 18-19. For a discussion of the Eagle-Picher court's reasoning in concluding that the manifestation theory was more compatible with the most recent medical evidence than the exposure theory, see notes 66-68 and accompanying text supra.

101. In concluding that exposure and injury are distinguishable, the First Circuit combined medical testimony to that effect with a legal construct, namely, that a court should interpret the policy through a plain and clear reading of the policy language. 682 F.2d at 18-20. One commentator has suggested that forming a nexus between legal principles and the medical evidence of what is known about the pathogenesis of an insidious disease is the better method of determining the liability of insurers in these declaratory judgment actions. Comment, supra note 39, at 693. This author also suggests that such an analysis would hold more precedential value, since unlike contract interpretation and varying policy rationales which may vary from jurisdiction to jurisdiction, the medical evidence remains constant. Id.

It is noted that at least one United States Circuit Court has accepted the Eagle-Picher court's interpretation of the medical evidence on asbestos exposure in the context of a statute of limitations dispute. See Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570, 573 (1982).

102. While both the First Circuit and the lower court found that not every exposure to asbestos fibers results in bodily injury, they nonetheless acknowledged that asbestosis is a cumulative process beginning with exposure and ending with the manifestation of disease or death. 682 F.2d at 18; 523 F. Supp. at 116. However, by concluding that clinically diagnosable manifestation of asbestosis is the "injury" which triggers coverage, the First Circuit did not adequately take into account this medical determination that asbestosis is an ongoing injury to the body. See 682 F.2d at 18.

103. See Keene, 667 F.2d at 1246; Porter, 641 F.2d at 1133, 1144; Forty-Eight, 633 F.2d at 1214. The Forty-Eight court, based on medical evidence received in the lower court, concluded that asbestosis is a slowly progressive disease with injury occurring shortly after initial inhalation of asbestos fibers. 633 F.2d at 1218. The Forty-Eight court stated that the human lung can absorb a fair amount of asbestos particles without adverse effect. Id. at 1214. Further, the Sixth Circuit noted that the testimony of one doctor revealed that a physician would not regard asbestosis as a disease until medically diagnosable, whereas an histologist would regard asbestosis as a disease from the first subclinical change to the body. Id. at 1218. Based on evidence virtually indistinguishable from that reviewed by the Sixth Circuit in Forty-Eight, the Eagle-Picher court favored the manifestation approach over the exposure theory. 682 F.2d at 18-20. For a discussion of the medical evidence adduced in Eagle-Picher, see notes 66-68 supra. For a discussion of the decision in Forty-Eight, see notes 46-51 and accompanying text supra.

The Porter court found that "asbestosis is a cumulative and progressive disease." 641 F.2d at 1133. The medical evidence showed that although "each introduction of
Rather than tailoring its decision to the facts before it, it is submitted that the First Circuit might have adopted a rule of more general applicability: the Keene court's multiple trigger theory of coverage. The Keene approach, in addition to closely reflecting medical evidence, ensures certainty of coverage, and accurately reflects the inherent ambiguity of the CGL policy language in the asbestos context. Furthermore, if tempered by the requirement that the manufacturer be liable during the period in which it was insured, but before it could no longer obtain coverage, such a theory fibers into Porter's lungs [constituted] "bodily injury," [the injury becomes] cumulative and progressively more harmful to the victim." Id. at 1144. For a discussion of the decision in Porter, see notes 52-54 and accompanying text supra.

In Keene, the D.C. Circuit recognized that asbestosis is an injurious process beginning with the inhalation of asbestos fibers. 667 F.2d at 1046. For a discussion of the decision in Keene, see notes 55-60 and accompanying text supra. See also Commercial Union Ins. Co. v. Pittsburgh Corning Corp., No. 81-2129, slip op at 22-25 (E.D. Pa. Dec. 4, 1981) (asbestosis diseases are caused by accumulation of asbestos particles over time; particles accumulated during exposure but prior to manifestation of an asbestos-related disease are a cause-in-fact of the disease).

104. Both the district and circuit courts restricted their manifestation holding to claims under the insurance policies at issue. See 682 F.2d at 20-25; 523 F. Supp. at 118.

105. See 667 F.2d at 1042-47. For a discussion of the Keene court's three-pronged theory of coverage under CGL policies in the asbestos context, see notes 58-60 and accompanying text supra.

106. Under the majority approach in Keene, Eagle-Picher would be absolved from any liability despite its having been uninsured from 1931 to 1968. See Keene, 667 F.2d at 1048 (insured fully indemnified even for period uninsured). See also Eagle-Picher, 682 F.2d at 16-17 (Eagle-Picher uninsured from 1931 to 1968). To avoid any inequity in allowing the manufacturer to be exempt from liability for the period for which it was uninsured, it is suggested that liability should be distributed on a pro rata basis among insureds and insurers under the multiple trigger theory of Keene.

107. See Keene, 667 F.2d at 1058 (Wald, J., concurring). See also Comment, supra note 30, at 1168. Judge Wald, in her concurring opinion in Keene, reasoned that the majority opinion was inconsistent with the reasonable expectations of the parties. See 667 F.2d at 1058 (Wald, J., concurring). If an asbestos manufacturer consciously decided not to insure itself during particular years of exposure or manifestation, it is hard to rationalize that its reasonable expectation was for complete coverage from any liability resulting from exposure to its products. Id. Thus, Judge Wald concluded that to reflect the cumulative nature of asbestos-related diseases, "all those who voluntarily assumed risk during the period when the diseases progressed must share the responsibility for the judgment" including self-insurers. Id. Judge Wald's extension of the Keene theory would not apply to periods when the manufacturer could no longer obtain coverage. Id.

As applied to Eagle-Picher, the manufacturer would be insured under the Keene theory, since it held insurance during the injurious process. See id. at 1047. Liability would in turn have to be allocated between both the insurers whose coverage was triggered and Eagle-Picher since the manufacturer was uninsured for 37 years of the injurious process. See id. at 1058 (Wald, J., concurring).

One commentator properly asserts that both the hybrid theory of Judge Wald and that of the majority in Keene are based upon the reasonable expectations of the parties. Comment, supra note 30, at 1173-74. However, this author speculates that under Judge Wald's theory, Eagle-Picher's historical pattern of insurance purchases and the high premiums paid for such insurance indicate a reasonable expectation of full coverage, and hence a court could determine that no ultimate liability should be
would provide an administratively tolerable rule, and more fairly apportion liability among those who should indemnify and defend.

In considering the impact of the Eagle-Picher decision, it is suggested that judicial reasoning has failed to provide a long-range solution to the enormous asbestos liability problem. It is submitted that the First Circuit has further frustrated the creation of a uniform rule regarding the events which trigger coverage under the CGL policies which protect manufacturers and producers of asbestos. While the decision in Eagle-Picher reflects judicial sensitivity to the legal and factual issues presented in individual cases, it also highlights judicial reluctance to adhere to a uniform rule of applicability. As it now stands, asbestos manufacturers and their insurers can antic-
ipate varying approaches to virtually identical issues by the circuit courts of appeal.\textsuperscript{113} Judicial disagreement over when insurance coverage is triggered\textsuperscript{114} will exacerbate the financial hardships\textsuperscript{115} to the insurer,\textsuperscript{116} who

\textsuperscript{113} The circuit courts have suggested that it is desirable to achieve an administratively reasonable solution to the flood of litigation. \textit{See Eagle-Picher, 682 F.2d at 19 n.3; Keene, 667 F.2d at 1041; Forty-Eight, 633 F.2d at 1218.} However, the decision in \textit{Eagle-Picher} has now added a third interpretation to the pot of judicial solutions. \textit{See note 111 supra.}

Without some general court-imposed theory of liability, it is suggested that manufacturers and insurers will be unable to anticipate under which policies they will be found liable for defense and indemnification of the asbestos manufacturer. \textit{Comment, supra} note 39, at 692; \textit{Comment, supra} note 38, at 847. In addition, an insurer whom the court ultimately deems liable will have been unable to anticipate what portion of the judgment it may have to pay. \textit{Id.}

Ordinarily, product liability and insurance matters fall within the province of state courts. Consequently, the Supreme Court is typically reluctant to involve itself. \textit{See Court Refuses to Hear Insurer's Asbestos Pleas, N.Y. Times, Mar. 9, 1982 at D1, D7 col. 1.} It has refused to hear arguments in appeals from the decisions in \textit{Forty-Eight, Porter, and Keene. Keene, 667 F.2d 1034, cert. denied, 102 S. Ct. 1664 (1982); Porter, 641 F.2d 1128, cert. denied, 102 S. Ct. 686 (1982); Forty-Eight, 633 F.2d 1212, cert. denied, 102 S. Ct. 686 (1981).} One result of the Supreme Court's decision not to hear argument on appeal from the varying circuit court opinions will be that decisions will vary from jurisdiction to jurisdiction, with the policyholder's rights and the asbestos victims' chances of recovery being affected by differences in state insurance and contract law. \textit{See State-by-State Asbestos Fight Seen in Wake of Court's Move, N.Y. Times, Mar. 9, 1982, at D7, col. 1.}

\textsuperscript{114} \textit{See Ingram, supra} note 20, at 317. For a discussion of the judicial disagreement over when insurance is triggered in the asbestos context, see notes 108-11 and accompanying text \textit{supra.}

\textsuperscript{115} Ingram, \textit{supra} note 20, at 317 n.2. Some economists have stated that the liability for asbestos-related claims will exceed 38 billion dollars over the next 20 years, more than the combined book value of the major asbestos defendants and 51 insurance companies directly involved in the litigation. \textit{State-by-State Asbestos Fight Seen in the Wake of Court's Move, N.Y. Times, Mar. 9, 1982, at D7, col. 1.} In July 1982, UNR Industries, Inc. (UNR), an asbestos producer saddled with 12,000 pending asbestos claims against it, became the first manufacturer to file for bankruptcy under Chapter 11 of the Federal Bankruptcy Code. \textit{See Kelly, Manville's Bold Maneuver, TIME, Sept. 6, 1982, at 17, 18.}

In 1982, Manville Corporation, another producer of asbestos products, had 16,500 suits already pending against it, and was being named as defendant in new cases at a rate of almost 500 per month. \textit{Wall St. J., Aug. 27, 1982, at 1, col. 6.} Manville also projected that 52,000 such suits could be filed against it, leading to potential costs of 2 billion dollars. \textit{Id.} Since, at that point, its assets would be outweighed by its liabilities, Manville sought protection under Chapter 11 of the Federal Bankruptcy Code. \textit{Id.} The effect of these Chapter 11 filings is to stay all pending lawsuits against both Manville and UNR, with the hope that the federal court, with the aid of UNR's and Manville's creditors, will set up a form of compensation fund for asbestos victims. \textit{Id.} at 8, col. 1. Eagle-Picher subsequently released a statement that it would preserve its $.24 quarterly dividend, and "in no way" was contemplating Chapter 11 proceedings, but noted that it had cash requirements for asbestos litigation of over seven million dollars per year. \textit{Wall St. J., Aug. 30, 1982 at D3, col. 3.}


In November 1982, Amatex Corp., a small Pennsylvania manufacturer of asbes-
must provide a defense and pay judgment costs in the underlying tort actions, and the manufacturer,117 who must defend and indemnify if uninsured.

This uncertainty in the judicial resolution of insurance coverage disputes, coupled with both the refusal of the federal government to accept liability in asbestos litigation118 and the inability of the legal system to handle a mass tort situation,119 will lead asbestos manufacturers and their insurers to look to non-judicial solutions for allocating liability.120 One such

tos cloth, became the third asbestos manufacturer to seek protection under Chapter 11 of the bankruptcy code. Philadelphia Inquirer, Nov. 2, 1982, at C1 & C9, cols. 2 & 3.

116. It is suggested that since the insurer is a profit-making organization, there is a need for certainty in the resolution of the policy language dispute in order to enable them to make legitimate forecasts of their needs and hence set their premiums at a proper level. See Brief for Amicus Curiae, Commercial Union at 14-16, Eagle-Picher, 682 F.2d at 12. See also Comment, supra note 38, at 832.

It has been suggested that reinsurance or excess insurance companies, which have a smaller capital base than primary insurers, will face greater hardship than primary insurers or asbestos manufacturers. See Brief for Amicus Curiae, Commercial Union at 20, Eagle-Picher, 682 F.2d at 12 (citing Reinsurance Association of America, Reinsurance Underwriting Review, 1980 Premiums and Losses, (1981)). As a result, the viability of excess insurance may begin to collapse as one or more of the secondary insurers drop off the line due to exhaustion of resources. Id.

It is noted that Eagle-Picher has commenced a declaratory judgment action to determine coverage by its intermediate and secondary umbrella policies not adjudicated in Eagle-Picher. See Eagle-Picher Indus., Inc. v. Am. Employers Ins. Co., 557 F. Supp. 225 (1983).

117. Eagle-Picher alleged that, as of the time of trial, it had been named as a defendant in lawsuits claiming damages in excess of $100 million. Brief for Appellant Eagle-Picher at 3, Eagle-Picher, 682 F.2d at 12. A recent news article, citing a coalition of asbestos manufacturers, reported that it costs defendant companies an average of $150,000 to put $28,000 into the hands of a successful claimant, with most of the difference going into legal fees and expenses. Asbestos Now Company Peril, N.Y. Times, Aug. 10, 1982, at D2, col. 1.

118. For a discussion of the federal government's refusal to accept liability in the litigation against asbestos manufacturers, see note 32 and accompanying text supra.

119. See Vagley & Blanton, supra note 20, at 648. It has been suggested that latent disease actions, such as those involving asbestos-related disease, may shake the foundations of this country's tort law. Podgers, supra note 26, at 139. It has been argued that the tort system has become so oriented toward achieving no-fault compensation that basic principles of justice and equity for parties is no longer possible. Ward, Coverage for Exposure: Destructive Judicial Legislation, 24 FOR THE DEF. 10, 15 (March 1982). One insurer has suggested that the basic principle underlying tort law, namely compensating the victim, is not being achieved in a situation where fifty cents of every claim dollar is spent in the process of arriving at the damage award or settlement. Brief for Amicus Curiae, Commercial Union at 17-21, Eagle-Picher, 682 F.2d at 12. Further, Commercial Union, as amicus curiae in Eagle-Picher, argued that the "deep pockets theory"—the theory that the manufacturer is in the best position to pay monetary relief for damages caused by its products—is negated where the eventual resources of both manufacturer and insurer are exhausted. See id.

120. Vagley & Blanton, supra note 20, at 656. The Federal government has reacted to problems within the tort system by issuing a proposed model tort law specifically recognizing the inherent problems of mass tort litigation and addressing options such as federal insurance or reinsurance, tax relief permitting reserves for self-
solution might be an alliance among insurers or the insured. Another would be having the insurance industry redraft the CGL policy to reflect the exact nature of the injuries covered, and to define the point in time when such injuries trigger an insurer's liability.

Despite Congress' failure to adopt any response to the asbestos controversy, it is submitted that legislative action is appropriate. Further, it
is urged that the ninety-eighth Congress give asbestos legislation the attention it deserves and adopt a comprehensive plan which will not only provide relief to asbestos victims, but also reduce the spectre of financial ruin in the asbestos and insurance industries.\(^{125}\)

Mark C. Levy

sation system for miners afflicted with black lung disease. \textit{See} Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-45 (1976 & Supp. IV 1980). Despite the success of the 1972 Act in treating these victims of pneumoconiosis, one commentator has criticized the program for creating legal presumptions of disease which frequently led to payment of benefits to some who were not entitled to them. \textit{See Comment, supra}, at 191 (citing Solomons, \textit{A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issue}, 83 W. VA. L. REV. 869 (1981)).

\(^{124}\) \textit{See Forty-Eight}, 663 F.2d at 1229 (Meritt, J., dissenting). One commentator has stated, "If the purpose of the legal system is to give the citizen a sufficient cushion against major disaster, we are faced not with questions of corrective justice in the individual case, but of basic taxing policy . . . [T]hese questions like taxing questions, should be addressed by the legislature, where the interdependence and coordination of many distinct benefit programs can receive comprehensive scrutiny." Epstein, \textit{Products Liability: The Gathering Storm}, 1 REG. 15-16, 19-20 (Sept./Oct. 1977).

\(^{125}\) \textit{See Comment, supra} note 21, at 179, 200. \textit{See also note 115 supra}. One commentator has suggested that an appropriate comprehensive plan to aid asbestos victims may be achieved by combining elements of the Hart, Fenwick and Miller bills proposed during the Ninety-seventh Congress. Comment, \textit{supra} at 191. This commentator suggests that in order to achieve a successful legislative resolution of the asbestos and latent disease crisis, any bill which is adopted \textit{must} include the following items: 1) an eligibility requirement determined by direct medical evidence of latent disease; 2) a provision mandating contribution to the compensation fund by the federal government and the tobacco industry (based on medical findings that cigarette smoking increases risk of lung cancer in asbestos workers); 3) a provision mandating payment by each responsible party, including the federal government, of administrative costs based on its percentage of responsibility, 4) a provision terminating the asbestos litigation pending at the time of the bill's enactment; and 5) language flexible enough to include other occupational diseases arising in the future. \textit{See id.} at 191-200.