

THE CALCULUS OF INSURER LIABILITY IN ASBESTOS-RELATED DISEASE LITIGATION: MANIFESTATION + INJURIOUS EXPOSURE = CONTINUOUS TRIGGER

An insidious disease is one that progresses with few or no symptoms to indicate its gravity.¹ Asbestosis,² neoplasia,³ mesothelioma,⁴ and bronchogenic carcinoma⁵ are all examples of insidious diseases. These diseases have been contracted, for the most part, by asbestos insulation installers as a result of inhaling asbestos fibers over a period of many years.⁶ Recently, these workers, or their survivors, have brought numerous suits against the manufacturers of asbestos-containing products.⁷ In these suits, the plaintiffs typically attempt to

¹ STEDMAN'S MEDICAL DICTIONARY 637 (22nd edition 1972); DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 785 (25th edition 1974).

² Asbestosis is a fibrous condition of the lungs which is caused by asbestos fibers reaching the alveoli, the sac-like space in the lungs. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 n.3 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3716 (U.S. Mar. 9, 1982), *reh'g denied*, 50 U.S.L.W. 3859 (U.S. Apr. 27, 1982). In *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the development of asbestosis was described:

The disease is difficult to diagnose in its early stages because there is a long latent period between initial exposure and apparent effect. This latent period may vary according to individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used. In some cases, the disease may manifest itself in less than ten years after initial exposure. In general, however, it does not manifest itself until ten to twenty-five or more years after initial exposure. This latent period is explained by the fact that asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible. Even if no additional asbestos fibers are inhaled, tissue changes may continue undetected for decades. By the time the disease is diagnosable, a considerable period of time has elapsed since the date of injurious exposure. Furthermore, the effect of the disease may be cumulative since each exposure to asbestos dust can result in additional tissue changes.

Id. at 1083.

³ Neoplasism is "[a] new growth, especially a tumor, either benign or malignant; a cancer." 2 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE at N-16 (1981).

⁴ Mesothelioma is a malignant tumor of the lining of the lungs of the peritoneum, which surrounds the organs of the gastrointestinal tract. It is well-established that prolonged inhalation of asbestos fibers causes mesothelioma. The disease can develop many years after inhalation ceases, and can manifest itself months after it begins to develop.

Keene Corp. v. Insurance Co. of N. Am., 667 F.2d at 1038 n.3 (D.C. Cir. 1981). See *Asbestosis and Neoplasia*, *supra* note 1, at 490.

⁵ Bronchogenic carcinoma is "a carcinoma or malignant tumor which grows from the epithelium or the lining of a bronchus [one of the two large tubes which conduct air to and from the lungs]." 1 SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE at B-87 (1981). "Lung cancer, or bronchogenic carcinoma, is also generally thought to be caused by prolonged inhalation of asbestos. It too can develop and manifest itself long after inhalation ceases." *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 n.3 (D.C. Cir. 1981).

⁶ See *Haley, Asbestosis: A Reassessment of the Overall Problem*, 64 J. PHARM. SCI. 1435, 1435 (1975); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1214-15 (6th Cir. 1980), *cert. denied*, 102 S. Ct. 686, *reh'g denied*, 50 U.S.L.W. 3716 (U.S. Mar. 9, 1982).

⁷ One manufacturer has been named as a codefendant with several other companies in over 6000 lawsuits alleging injury caused by exposure to its asbestos products. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 (D.C. Cir. 1981). Because many other manufac-

recover for personal injury or wrongful death resulting from the insidious disease.⁸ The plaintiffs allege that the manufacturer's failure to warn the workers of the dangers of the asbestos was the cause of the insidious disease.⁹ Then, if the manufacturers are found liable, the manufacturers look to their insurers for indemnification, based on the terms of insurance policies which the manufacturers carry.¹⁰ The language of these policies is ambiguous, however, as applied to the insidious disease context.¹¹ Consequently, the courts must interpret the language of the policies.¹² The interpretation that a court adopts will determine which insurer or insurers are potential indemnitors of the manufacturer.¹³

The asbestos-related disease cases¹⁴ aptly illustrate the difficulties a court encounters in determining an insurer's liability in insidious disease cases. Although it is not known exactly how much exposure is required to cause asbestos-related diseases, exposure to asbestos fibers may occur over a long period of time.¹⁵ In asbestos-related disease cases, exposure or inhalation may begin during one policy period, the resulting insidious disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period.¹⁶ For an insured asbestos-products manufacturer, different

turers are similarly situated, the number of suits filed provides a telling index to the magnitude of the problem. By February 1977, Forty-Eight Insulations, an asbestos insulation manufacturer, had been named in 251 lawsuits that arose out of injury or death as a result of lung diseases caused by exposure to the company's products. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1233 (E.D. Mich. 1978). By the end of 1978, Forty-Eight Insulations had been named as a defendant in over 800 such suits. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1215 (6th Cir. 1980). By the summer of 1979, over 1370 cases had been filed. *Id.* By September, 1981, Eagle-Picher Industries, Inc., also a manufacturer of products containing asbestos, had been named as a defendant in approximately 5500 lawsuits in which the plaintiffs alleged that they had contracted asbestos-related diseases as a result of contact with asbestos-containing products manufactured by Eagle-Picher between 1931 and 1971. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. 110, 111 (D. Mass. 1981).

⁸ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 (D.C. Cir. 1981).

⁹ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1213 (6th Cir. 1980).

¹⁰ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1039 (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

¹¹ "[T]he contractual terms in issue . . . 'bodily injury' and 'occurrence' are inherently ambiguous as applied to the progressive disease context" *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1222 (6th Cir. 1980). *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981).

¹² *See Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1222 (6th Cir. 1980).

¹³ *See Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981) ("The Court's interpretation of the policies will determine which insurance company or companies, if any, must . . . pay any damages for the increasingly numerous underlying claims against Eagle-Picher.")

¹⁴ *See, e.g., Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981).

¹⁵ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

¹⁶ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

products liability insurers are likely to be providing coverage at different points in the development of each plaintiff's disease.¹⁷ Furthermore, the manufacturer may be uninsured during some stages of the disease's development.¹⁸

Thus, in insidious disease cases, the courts must identify the insurance company or companies that are liable to indemnify a manufacturer for the injury caused by the manufacturer's products. To do so, the courts must interpret a standard provision of the manufacturer's comprehensive general liability policy (CGL)¹⁹ which specifies that the insurer's obligation to indemnify the manufacturer depends upon when the injury actually occurred.²⁰ The insurance contract²¹ provides no guidance in determining when the injury oc-

¹⁷ *Id.* For example, Keene Corp., a common defendant in cases involving asbestos-related diseases, had four different insurers during the time period from Dec. 31, 1961 to Oct. 1, 1980. *Id.* at 1053-57. Appendix A. Forty-Eight Insulations, Inc., another common defendant, was insured by five different insurers under twelve policies from Oct. 31, 1955 to Jan. 1, 1978. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1227, App. A (6th Cir. 1980).

¹⁸ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981). The manufacturer may be uninsured by choice. Eagle-Picher manufactured asbestos-containing products between 1931 and 1971 but was insured for asbestos-related diseases only after 1968. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981). By contrast, a manufacturer may be unable to secure insurance coverage: "Insurance companies know which particular manufacturers over the years have generated a large risk pool of victims whose disease may become manifest. Carriers, knowing that they would otherwise have to pay the full unprorated amount of a number of asbestosis claims [if the manifestation theory were adopted], would most likely refuse to insure such manufacturers." *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting). See *infra* text and notes at notes 133-87 for a discussion of the manifestation theory.

¹⁹ The National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau promulgated revised standard provisions for comprehensive general liability (CGL) policies effective October 1, 1966. Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNSEL J. 223, 223 (1966). These revised provisions were filed with state insurance departments and were distributed to member companies. *Id.* One of the principle changes in the policy was the transition from an "accident" basis of coverage to an "occurrence" basis of coverage. *Id.* See *infra* note 20.

²⁰ The insuring clause of the CGL policy reads as follows:

The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies caused by an occurrence. "Occurrence" is defined to mean:

... an accident, including injurious 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.

Tarpey, *supra* note 18 at 223. The Keene court noted: "The language of each [CGL] ... clearly provides that an 'injury,' and not the 'occurrence' that causes the injury, must fall within a policy period for it to be covered by the policy." *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

²¹ Insurance policies are generally held to be subject to the same rules of interpretation as are other business contracts. *Hartford Fire Ins. Co. v. Shapiro*, 270 Ala. 149, 117 So. 2d 348 (1960); *Whaley v. American Nat'l Ins. Co.*, 30 Ill. App. 3d 32, 331 N.E.2d 571 (1975); *Lang v. General Ins. Co. of Am.*, 268 Minn. 36, 127 N.W.2d 541 (1964); *Pettit v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976); *Raymond v. Great Am. Indem. Co.*, 86 N.H. 93, 163 A. 713 (1932); *F.S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co.*, 252 N.Y. 75, 168 N.E. 834 (1929); *Kelley v. Indemnity Ins. Co. of N. Am.*, 252 A.D. 58, 297 N.Y.S. 228 (1937); *Bailey v. Life Ins. Co.*, 222 N.C. 716, 24 S.E.2d 614 (1943); *McCain v. Hartford Live Stock Ins. Co.*,

curred,²² however, because the standard CGL policy does not clearly specify a point in the development of an insidious disease at which coverage is triggered.²³ Because insidious diseases develop over a long period of time,²⁴ the courts are not inevitably directed to a particular interpretation of when a coverage-triggering injury occurs.²⁵ In their struggle to determine how to apportion liability, the courts have attempted to draw analogies from other cases in the liability insurance area.²⁶ Courts have also heard expert medical testimony in order to ascertain when injury occurs.²⁷

Courts have formulated three theories for determining when injury occurs, and thus which insurers are liable, in the insidious disease area. The two most widely accepted theories are the manifestation theory and the injurious exposure theory. If the court applies the manifestation theory, only the carrier providing coverage at the time the injury or disease becomes medically diagnosable is liable for the judgment.²⁸ In contrast, under the injurious exposure theory, all insurers providing coverage from the time of initial exposure through the manifestation of the resulting disease are liable to indemnify the manufacturer.²⁹ Under the injurious exposure theory, however, an insurer would not incur liability for any period during which the plaintiff was not exposed to asbestos manufactured by the insured.³⁰ At least one court has decided, however, that the adoption of either the injurious exposure theory or the manifestation theory would defeat the allocation of rights and obligations

190 N.C. 549, 130 S.E. 186 (1925); *Carraco Oil Co. v. Mid-Continent Casualty Co.*, 484 P.2d 519 (Okla. 1971); *Farmers Mut. Ins. Co. v. United Pac. Ins. Co.*, 206 Or. 298, 292 P.2d 492 (1956); *Farmers Ins. Co. v. Miller*, 87 Wash. 2d 70, 549 P.2d 9 (1976); *Ehlers v. Colonial Penn. Ins. Co.*, 81 Wis. 2d 64, 259 N.W.2d 718 (1977). Yet, because of the inequality of bargaining power and consequent failure of the parties to negotiate at arms length, a few courts have concluded that somewhat different standards of interpretation should be applied in construing insurance policies as opposed to other contracts. See *Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63 (Alaska 1977); *Linden Motor Freight Co. v. Travelers Ins. Co.*, 40 N.J. 511, 193 A.2d 217 (1963).

²² "Neither the case law nor the terms of the policies lead us directly to a resolution of the coverage issues raised in this case." *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981).

²³ *Id.* at 15. See *supra* note 20.

²⁴ See *Asbestosis and Neoplasia*, *supra* note 1 at 487-88, and *The Occurrence of Asbestosis Among Insulation Workers*, *supra* note 1 at 146-47.

²⁵ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 (D.C. Cir. 1981).

²⁶ Courts have attempted to draw analogies from the statute of limitations cases which deal with the "discovery rule," the worker's compensation cases, and the health insurance cases. See *infra* text and notes at notes 77-108, 207-24.

²⁷ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 115, 116 (D. Mass. 1981).

²⁸ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981). Manifestation is measured by the date of actual diagnosis or, with respect to those cases in which no diagnosis is made prior to death, the date of death. *Id.*

²⁹ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225 (6th Cir. 1980).

³⁰ *Porter v. American Optical Corp.*, 641 F.2d 1124, 1145 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 686 (1981).

established by the insurance policies.³¹ Instead, the court concluded that either exposure to asbestos or manifestation of asbestos-related disease during the insurer's policy period should trigger coverage under the CGL policy.³² Thus, the court adopted the continuous trigger theory.

The theory chosen by a court will affect the manufacturers and the injured parties as well as the insurers. Depending on the facts of a case, the court's adoption of either the injurious exposure or manifestation theory could place the ultimate burden of loss on the manufacturer. If a court's interpretation of the CGL policy places the loss on a manufacturer, in many cases the manufacturer will be unable to satisfy all the claims against it.³³ A manufacturer's inability to satisfy claims, consequently, would harm the injured parties whose claims would remain unsatisfied, for the injured parties are the ultimate beneficiaries of the liability policies.³⁴

The current volume of litigation centering upon manufacturers' liability for asbestos-related diseases³⁵ requires an equitable resolution of the insurer liability dispute. Moreover, the number of future suits may far exceed the number currently filed.³⁶ The current widespread use of asbestos and products

³¹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³² *Id.* In addition, the court noted that exposure in residence should trigger insurance coverage. *Id.* The human body is continuously exposed to the harmful asbestos particles previously inhaled, even after current inhalation of such particles has ceased. *See supra* note 1. The body's attempt to accommodate the continuous exposure often leads to asbestosis. *See id.* As the court in *Forty-Eight* observed:

Asbestosis occurs when fibrous lung tissue surrounds small asbestos particles in the lungs to prevent the particles from moving around or causing irritation to neighboring cells. Ordinarily, this encapsulation of the asbestos particles is a good thing. However, if too many asbestos particles are inhaled, then the encapsulation process diminishes pulmonary function and makes breathing difficult. When this occurs, the disease of asbestosis is said to be present.

Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1214 (6th Cir. 1980).

³³ Granelli, *The Asbestos Case Explosion*, THE NAT'L L.J., Oct. 19, 1981, 1, col. 1, at 24, col. 3.

³⁴ Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

³⁵ Granelli, *supra* note 33, at 24, col. 1. One estimate of the volume of asbestos disease cases now pending sets the number at 12,000 to 15,000 cases, with 5000 cases in the California courts alone. *Id.*

³⁶ *Id.* at 1, col. 1. "Two new federal appellate court rulings and a new medical study could radically expand the size and number of damage awards for asbestos-related diseases, already the single largest source of product liability cases in the nation." *Id.* The Circuit Court of Appeals for the Fourth Circuit has ruled recently that seamen and shipyard workers, the vast majority of asbestos plaintiffs, can use admiralty law to take their cases to federal court and thus avoid the state statutes of limitations that had cut off many of their claims. *White v. Johns-Manville Corp.*, Nos. 79-1854, 79-1580 (4th Cir. 1981). The District of Columbia Circuit Court of Appeals has also expanded the liability of insurance companies in asbestos cases. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). An American Lung Association study found that 10 percent of a group of 305 shipyard workers' wives who had never gone into the shipyards had contracted asbestosis. If the courts were to allow recovery for these secondary exposure cases, the number of cases filed would certainly increase. Granelli, *supra* note 33, at 1, col. 1. One report estimated that the number of lawsuits filed against asbestos manufacturers is growing at the rate of 400 a month. *Court Refuses to Hear Insurers' Asbestos Pleas*, N.Y. Times, Mar. 9, 1982, § D1, col. 1, § D7, col. 1.

containing asbestos³⁷ will, no doubt, contribute to this increase, as those exposed to asbestos file suits when their asbestos-related diseases become manifest.³⁸ Resolution of the insurer liability dispute also will prevent the insurance companies from advocating fluctuating theories of liability depending on the companies' economic interests in the case.³⁹

This note will examine the insurer liability dispute in the insidious disease area by analyzing cases involving asbestos-related disease. After looking at the language of the comprehensive general liability policy, the discussion will turn to the case law that illustrates the various theories which courts have used to allocate liability. The *Insurance Company of North America v. Forty-Eight Insulations, Inc.*⁴⁰ decision will be used to illustrate the injurious exposure theory; *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*⁴¹ will serve as an example of the manifestation theory. *Keene Corporation v. Insurance Company of North America*⁴² will be used to illustrate an alternative approach which combines some of the characteristics of both the injurious exposure and manifestation theories. In the discussion of each case, the factors considered by the court in choosing the appropriate theory to apply will be examined. In this regard, the emphasis that courts have placed on the CGL policy language, on analogous problems in insurance law, and on public policy considerations will be scrutinized. Next, the theories which courts have adopted will be compared. Finally, it will be submitted that in order to protect the manufacturer's reasonable expectation of coverage, all stages of the injurious process, from initial exposure to manifestation, should trigger coverage under the CGL policy. Liability should be allocated among all those who voluntarily assumed the risk of liability during the injurious process. This approach, which was adopted by Judge Wald in *Keene*,⁴³ should be applied by the courts in all future insidious disease cases involving an interpretation of the standard CGL policy.

I. THE COMPREHENSIVE GENERAL LIABILITY POLICY

The dispute between insurance companies and their insureds in insidious disease cases results from the parties' disagreements over the interpretation of

³⁷ The production of asbestos during the last fifty years has increased by a factor of one thousand. Reeves, *The Carcinogenic Effect of Inhaled Asbestos Fibers*, 6 ANNALS CLIN. & LAB. SCI. 459, 461 (1976). There are more than 3,000 known uses of asbestos. See *Asbestosis and Neoplasia*, *supra* note 1, at 492. These uses involve the employment of millions of workers. Haley, *Asbestosis: A Reassessment of the Overall Problem*, 64 J. PHARM. SCI. at 1435 (1975).

³⁸ A team of medical researchers warned in 1967 that "[t]he [tumors] associated with current utilization and exposure to asbestos will not be evident until the 1990's." *Asbestosis and Neoplasia*, *supra* note 1, at 494.

³⁹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1058 (D.C. Cir. 1981) (Wald, J., concurring).

⁴⁰ 633 F.2d 1212 (6th Cir. 1980).

⁴¹ 523 F. Supp. 110 (D. Mass. 1981).

⁴² 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3716 (U.S. Mar. 9, 1982), *reh'g denied*, 50 U.S.L.W. 3859 (U.S. Apr. 27, 1982).

⁴³ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1034 (D.C. Cir. 1981) (Wald, J., concurring).

the various CGL insurance policies issued to the insureds.⁴⁴ The parties disagree on the proper interpretation of when coverage triggering bodily injury occurred within the meaning of the policies. Thus, when the parties call upon a court to resolve this dispute,⁴⁵ the court's determination of insurer liability depends ultimately upon its interpretation of the CGL policy language. This section will review the CGL policy and its coverage provisions.

In 1959, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau undertook to develop a standard form for insurance policies which protect manufacturers against legal liability.⁴⁶ The Bureau's work was completed in 1966 when it issued the Comprehensive General Liability (CGL) insurance policy,⁴⁷ which continues to be the prototype for this form of insurance.⁴⁸ The standard CGL policy is structured to economize on insurer time and costs and to simplify the contract language for the insured's ease of understanding.⁴⁹ The CGL policy is widely used⁵⁰ for these reasons and because it facilitates risk distribution by standardizing the type of risk insured.⁵¹

Because the CGL policy is designed to cover a wide variety of situations, the policy contains broad language. This broad language fails to address specifically the complex problems created by asbestos-related diseases.⁵² Rights of the insured and obligations of the insurer under the CGL policy arise upon the occurrence of a bodily injury.⁵³ A court, therefore, must ascertain when a bodily injury occurred in order to determine which insurance company was

⁴⁴ *Id.* at 1039; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216-17 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

⁴⁵ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

⁴⁶ Comment, *Liability Insurance for Insidious Disease: Who Picks Up the Tab?*, 48 FORDHAM L. REV. 657, 667 n.50 (1980).

⁴⁷ Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNSEL J. at 223 (1966).

⁴⁸ Fordham Comment, *supra* note 46 at 667 n.50.

⁴⁹ R. KEETON, *INSURANCE LAW* § 2.10(a) (1971).

⁵⁰ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1216 (6th Cir. 1980).

⁵¹ KEETON, *supra* note 49, at § 2.10(a).

⁵² *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981). At least one commentator believes, however, that the policy language clearly indicates the triggering event which is prerequisite to coverage. Tarpey, *supra* note 19 at 223.

Probably the most significant portion of the definition for occurrence is the phrase "during the policy period." It will now be required, to bring the policy provision into play, that the bodily injury . . . resulted during the policy period. This should remove problems of interpretation where causative factors operate over a long time before any harm results and also where the negligent act or the operative legal fact is far removed in time from the happening of the injury (e.g. a defect in manufacture, the sale of the product).

Id.

⁵³ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981). See *supra* note 19.

bearing the risk of the insured's liability at the time of bodily injury.⁵⁴ The CGL policy attempts to provide a solution by defining "bodily injury" and "occurrence." "Bodily injury" is defined as "bodily injury, sickness or disease sustained by any person."⁵⁵ "Occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury. . . ."⁵⁶ In most suits involving the CGL policy, the manifestation of an injury and the occurrence which causes the injury transpire at the same time or in close temporal proximity to one another.⁵⁷ Since the occurrence and the manifestation of injury occur during the same policy period, the court can easily identify the insurer whose policy was in effect when the injury occurred.

In cases involving insidious diseases, however, the event that causes the injury often takes place substantially before the manifestation of that injury.⁵⁸ In fact, exposure to the hazardous material, the development of the disease, and the ultimate manifestation of the disease may all take place in different policy periods.⁵⁹ In this situation, it is much more difficult for a court to identify the insurer or insurers whose policy or policies were in effect at the time bodily injury occurred.

Whether a court adopts the injurious exposure, manifestation, or an alternative theory depends on the court's interpretation of ambiguous CGL language. In determining insurer liability a court is guided also by contract principles,⁶⁰ medical evidence,⁶¹ insurance law,⁶² and public policy considerations. An examination of these factors, in the context of specific asbestos-related disease cases, is instructive in discovering why a court might choose a particular insurer liability theory.

⁵⁴ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

⁵⁵ *Id.* at 1053-57, App. A; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1227-28, App. B (6th Cir. 1980).

⁵⁶ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1053-57, App. A (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1227-28, App. B (6th Cir. 1980).

⁵⁷ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

⁵⁸ *Id.* at 1040. The asbestos-related disease may be asbestosis, mesothelioma, or lung cancer (bronchogenic carcinoma). "The physical symptoms caused by these three diseases do not manifest themselves to an injured individual until years after the initial inhalation of asbestos. With asbestosis, sometimes 15 or 20 years will pass before an individual develops shortness of breath and a cough. The waiting period is even longer with those who develop bronchogenic carcinoma due to asbestos inhalation." *Keene Corp. v. Insurance Co. of N. Am.*, 513 F. Supp. 47, 49 (D.D.C. 1981); accord *The Occurrence of Asbestosis Among Insulation Workers*, *supra* note 1, at 147-49.

⁵⁹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1040 (D.C. Cir. 1981).

⁶⁰ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 115-16 (D. Mass. 1981). See also *supra* note 21.

⁶¹ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1218, (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 114-15 (D. Mass. 1981).

⁶² *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981); In-

II. THE THEORIES OF INSURER LIABILITY

A. *Injurious Exposure*

The injurious exposure theory is one judicial interpretation of the CGL's ambiguous policy language, applied by courts to allocate insurer liability in the insidious disease area. When a court adopts the injurious exposure theory, the court deems bodily injury to have occurred upon initial exposure to the hazard.⁶³ Therefore, the insurance company whose policy was in effect at the time the plaintiff was exposed to the hazardous condition is a potential indemnitor of the insured manufacturer.⁶⁴ As a potential indemnitor, the insurer must indemnify the manufacturer for the damages the manufacturer pays as a consequence of injury resulting from the exposure.⁶⁵ The insurer is held as a potential indemnitor even if it no longer covers the insured at the time suit is brought.⁶⁶ These basic features of the injurious exposure theory are illustrated by *Insurance Company of North America v. Forty-Eight Insulations, Inc.*⁶⁷

Insurance Company of North America v. Forty-Eight Insulations, Inc. was a landmark decision in the insidious disease area. In that case, the Insurance Company of North America (INA) sought a declaratory judgment to determine its liability to indemnify Forty-Eight Insulations, Inc. (Forty-Eight), a manufacturer of asbestos products, in its underlying products liability suits.⁶⁸ Forty-Eight faced potential liability because of numerous lawsuits filed across the country by persons who had inhaled asbestos fibers allegedly manufactured by the company.⁶⁹ The alleged basis for Forty-Eight's liability was that Forty-Eight had failed to warn asbestos workers and other ultimate users of its products that asbestos was a dangerous product which, if inhaled, could cause cancer or other diseases.⁷⁰ Forty-Eight had held various products liability insurance policies issued by five different insurance companies, over a twenty-year period.⁷¹ The issue before the Sixth Circuit Court of Appeals was which of the insurance companies was obligated to provide indemnification if Forty-Eight were found ultimately liable.⁷² The court found that injury "occurred" shortly

urance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1219-21 (6th Cir. 1980); Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co., 523 F. Supp. at 115-16 (D. Mass. 1981).

⁶³ Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1223 (6th Cir. 1980).

⁶⁴ *Id.* at 1223, 1224.

⁶⁵ *Id.* at 1224.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1212.

⁶⁸ *Id.* at 1216.

⁶⁹ Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1213 (6th Cir. 1980).

⁷⁰ *Id.* See generally, Reeves, *The Carcinogenic Effect of Inhaled Asbestos Fibers*, 6 ANNALS CLIN. & LAB. SCI. 459; *Asbestosis and Neoplasia*, *supra* note 1 (explains development of cancer caused by inhaled asbestos fibers).

⁷¹ Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1213 (6th Cir. 1980).

⁷² *Id.* at 1213-14.

after the initial inhalation of asbestos fibers.⁷³ Consequently, the court held that the insurer providing coverage when the plaintiff was allegedly exposed to the injurious condition was the potential indemnitor.⁷⁴ In order to choose the injurious exposure theory, the court had to distinguish the statute of limitations cases, the worker's compensation insurance cases, and the health insurance cases from cases involving product liability insurance in the insidious disease context. The court relied on medical evidence⁷⁵ and on insurance law principles of construction⁷⁶ in arriving at its holding.

In the statute of limitations cases, courts often use a manifestation approach or discovery rule⁷⁷ to avoid the harsh result of a strict application of the statute of limitations.⁷⁸ The discovery rule mandates that the statute of limitations does not begin to run until the plaintiff has in fact discovered his injury, or until he should have discovered the injury by the exercise of reasonable diligence.⁷⁹ Because a plaintiff usually cannot discover his injury until it has become manifest, the discovery rule is also referred to as the manifestation rule. Therefore, under the manifestation rule in the statute of limitations context, a plaintiff is considered injured only when the accumulated effects of the hazard manifest themselves.⁸⁰ The rule is used to avoid the inequitable result which would occur if the statute of limitations began to run on the date of a disease's origin and if the plaintiff were unaware of the disease's presence until after the limitations period had expired.⁸¹

⁷³ *Id.* at 1222.

⁷⁴ *Id.* at 1223, 1224.

⁷⁵ *Id.* at 1218.

⁷⁶ *Id.* at 1219-21.

⁷⁷ See *United States v. Kubrick*, 444 U.S. 111, 122-25 (1979); *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 570, 574-75 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975); *Roman v. A. H. Robins Co.*, 518 F.2d 970, 972 (5th Cir. 1975); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 924 (8th Cir. 1970); *R. J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 780 (5th Cir. 1963); *Brush Beryllium Co. v. Meckley*, 284 F.2d 797, 800 (6th Cir. 1960); *Sylvania Elec. Prods., Inc. v. Barker*, 228 F.2d 842, 847-48 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); *Thrift v. Tenneco Chems. Inc.*, 381 F. Supp. 543, 546 (N.D. Tex. 1974); *Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878, 881 (S.D. Ind. 1970); *Velasquez v. Fibreboard Paper Prods. Corp.*, 97 Cal. App. 3d 881, 889, 159 Cal. Rptr. 113, 118 (1979); *Steiner v. Ciba-Geigy Corp.*, 364 So. 2d 47, 48-49 (Fla. Dist. Ct. App. 1978); *Chrischilles v. Griswold*, 260 Iowa 453, 463, 150 N.W.2d 94, 100 (1967); *Harig v. Johns-Manville Prods. Corp.*, 284 Md. 70, 71, 394 A.2d 299, 300 (1978); *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 175-76, 371 A.2d 170, 177 (1977); *Frohs v. Greene*, 253 Or. 1, 2-4, 452 P.2d 564, 565 (1969); *Gilbert v. Jones*, 523 S.W.2d 211, 213 (Tenn. Ct. App. 1974).

⁷⁸ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220 (6th Cir. 1980).

⁷⁹ W. PROSSER, *THE LAW OF TORTS* § 30 (1971).

⁸⁰ *Urie v. Thompson*, 337 U.S. at 170 (1949) (quoting *Associated Indem. Corp. v. Industrial Accident Comm'n*, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

⁸¹ "In the past, defendants have argued that since a disease 'occurs' at or shortly after exposure to a foreign substance, that is the time when the statute of limitations should start running. The problem is that such a ruling would bar relief to the many plaintiffs who were unaware that they were being injured until years later when the disease manifests itself." *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220 (6th Cir. 1980).

The *Forty-Eight* court found the equities in the insidious disease cases directly opposite to the equities which dictated that the manifestation rule be applied in latent injury statute of limitations cases.⁸² The manifestation rule is applied in the statute of limitations cases to avoid unfairly barring a plaintiff's potentially meritorious claim.⁸³ The *Forty-Eight* court observed that a manifestation rule, if applied in an attempt to resolve the insurer liability dispute, would inequitably deny coverage to a manufacturer facing future product liability suits.⁸⁴ Manufacturers that have generated a large pool of potential claimants would be unable to obtain insurance because the insurance companies, knowing they would incur liability on a large number of future claims, would refuse to insure these manufacturers.⁸⁵ Some of the potential claimants' suits might then effectively be barred by the manufacturer's lack of insurance, because such a manufacturer most likely could not satisfy all of the claims against it without insurance coverage.⁸⁶

The *Forty-Eight* court noted other differences between the statute of limitations issue and the insurer liability issue. The court observed that in insidious disease cases, it is the injury, not its discovery, that leads to the manufacturer's liability in the underlying tort suit.⁸⁷ This underlying liability should trigger the insurance coverage as well, the court reasoned, so that coverage would parallel the theory of tort liability.⁸⁸ Furthermore, the identical language in the statutes of limitation and in the insurance policies did not require identical interpretation, the court urged, because such linguistic uniformity should not dictate how contracts are interpreted.⁸⁹ In essence, the court found that the statute of limitations cases have no bearing on the determination of insurer liability.

The *Forty-Eight* court also found the decisions in the worker's compensation area to be only minimally instructive. Under the worker's compensation statutes, employers are strictly liable for their employees' injuries arising out of

⁸² *Id.*

⁸³ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17 (D.C. Cir. 1981).

⁸⁴ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220 (6th Cir. 1980).

⁸⁵ *Id.*; *See also id.* at 1230 (Merritt, J., dissenting).

⁸⁶ The manufacturer may first go bankrupt in an attempt to satisfy these claims. *See supra* note 33.

⁸⁷ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1220 (6th Cir. 1980).

⁸⁸ *Id.* at 1219. The court asserted:

The underlying theory of tort liability is that the asbestos manufacturers continually failed to warn the asbestos workers and that, as a result of this, continuous breathing of asbestos particles allowed asbestosis to progress to the point where it caused death or injury. The insurance policies . . . are comprehensive general liability policies which are designed to insure the manufacturer against products liability suits. The contracting parties would expect coverage to parallel the theory of liability.

Id.

⁸⁹ *Id.* at 1220. The court remarked: "Linguistic uniformity should not dictate how contracts or statutes are interpreted. Statutes of limitation are meant to protect defendants against stale claims, not bar injured plaintiffs who have acted in good faith. Insurance contracts are meant to cover the insured." *Id.* (citations omitted).

their employment, without regard to either the employee's or the employer's negligence.⁹⁰ To allocate the insurers' liability to indemnify the employer, courts have formulated the "last insurer pays" rule.⁹¹ Under this rule, the insurance company that last insured the employer during the injured employee's term of employment must indemnify the employer.⁹² The *Forty-Eight* court found this rule inapplicable to insidious disease cases in the products liability area, even assuming that the rule would apply to worker's compensation cases involving a progressive disease like asbestosis.⁹³ The *Forty-Eight* court noted that the rule for worker's compensation cases is based on the overriding importance of efficient administration in that area.⁹⁴ In worker's compensation cases, efficient administration is necessary to provide injured workers with needed, immediate relief and to avoid the friction between employer and employee that expensive, complex litigation would cause.⁹⁵ The *Forty-Eight* court observed that there is a need for efficient administration of products liability insurance claims.⁹⁶ The court did not consider this need important enough, however, to override the rules of contract interpretation that are central to a determination of insurer liability under the CGL policy.⁹⁷ The court also suggested that administrative considerations are of greater significance in worker's compensation cases because all that is needed to establish liability in such cases is a work-related injury.⁹⁸ Thus, because the "last insurer pays" rule is premised upon the courts' concern for efficiency in worker's compensation cases, the *Forty-Eight* court did not find this rule controlling in the product liability insurance context.⁹⁹

The court next considered an analogy to the health insurance cases. In the health insurance cases, the courts must decide whether a disease began during a policy period.¹⁰⁰ By the terms of a typical health insurance policy, if the

⁹⁰ W. PROSSER, *THE LAW OF TORTS* § 80 at 531 (1971).

⁹¹ *Travelers Insurance Co. v. Cardillo*, 225 F.2d at 145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). The court in *Travelers Insurance Co. v. Cardillo* derived the last insurer pays rule from the "last employer" pays rule. *Id.* "This [last employer pays] rule . . . is the general rule applicable in worker compensation cases." *Id.* Illinois has passed specific worker's compensation legislation to deal with asbestosis and silicosis cases. Under this legislation, the last employer where the worker was exposed to asbestos is liable. ILL. REV. STAT. ch. 48, § 172.36(d) (1975). New Jersey law is similar. *See Bucuk v. Zusi Brass Foundry*, 49 N.J. Super. 187, 139 A.2d 436 (1958).

⁹² *Travelers Ins. Co. v. Cardillo*, 225 F.2d at 145 (2d Cir. 1955).

⁹³ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221 (6th Cir. 1980).

⁹⁴ *Id.*

⁹⁵ SCHNEIDER, 1 *WORKMEN'S COMPENSATION* § 3 (1932).

⁹⁶ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221 (6th Cir. 1980).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17 (D.C. Cir. 1981). The court asserted: "The problem [in the health insurance cases] is to determine when a disease begins in order to decide whether it began during a policy period." *Id.*

disease originated prior to the effective date of the policy, insurance coverage would not apply.¹⁰¹ The courts that have considered the health insurance issue have decided that a disease does not originate until it is capable of diagnosis.¹⁰² These courts have held that if a disease manifested itself during a policy period, then that policy covered the disease even if the origin of the disease could be traced back prior to the policy period.¹⁰³ The *Forty-Eight* court urged that the health insurance cases supported the injurious exposure theory even though the court conceded that the cases appeared to provide support for the manifestation theory.¹⁰⁴ The court reasoned that the health insurance decisions stand for strict construction of the policies to promote coverage and for the proposition that the legitimate expectations of the parties must be honored.¹⁰⁵ The court observed that people buy health insurance policies with the expectation that they will be protected in case of disability sickness.¹⁰⁶ In addition, the court stated that it would be unfair to the insured, and contrary to his expectations, if the health insurance coverage that the insured bought was defeated.¹⁰⁷ The courts' concern with the legitimate expectations of the insured and the courts' policy of construing insurance contracts strictly in favor of the insured persuaded the *Forty-Eight* court that the health insurance cases were the most instructive of the analogous insurance law cases.¹⁰⁸

After the court examined the analogous insurance law cases, it turned to the expert medical testimony.¹⁰⁹ The district court had heard expert medical testimony as an aid in determining when asbestos-related injury "occurred" to trigger coverage.¹¹⁰ The court noted that bodily injury, in the form of lung tissue damage, occurred in substantial contemporaneity with the initial inhalation of asbestos fibers and continued progressively.¹¹¹

¹⁰¹ *E.g.*, *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 209, 60 P.2d 1070, 1072 (1936); *Cohen v. North Am. Life & Cas. Co.*, 150 Minn. 507, 508, 185 N.W. 939, 939 (1921).

¹⁰² *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221 (6th Cir. 1980). *See, e.g.*, *Royal Family Ins. Co. v. Grimes*, 42 Ala. App. 481, 168 So. 2d 262 (1964); *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. 205, 60 P.2d 1070 (1936); *Broccolo v. Horace Mann Mut. Cas. Co.*, 37 Ill. App. 2d 493, 186 N.E.2d 89 (1962); *Cohen v. North Am. Life & Cas. Co.*, 150 Minn. 507, 185 N.W. 939 (1921); *Kissil v. Beneficial Nat. Life Ins. Co.*, 64 N.J. 555, 319 A.2d 67 (1974); *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942). *See generally Annot.*, 53 A.L.R.2d 686 (1957).

¹⁰³ *See, e.g.*, *Wilkins v. Grays Harbor Community Hospital*, 71 Wash. 2d 178, 427 P.2d 716 (1967); *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942).

¹⁰⁴ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221 (6th Cir. 1980).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1221-22.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1222.

¹¹⁰ *Id.* at 1217.

¹¹¹ *Id.* at 1222. *See supra* note 2. The district court described the fibrotic process: Asbestos fibers irritate the extremely delicate lung tissue when inhaled. They land in the alveoli where it is suspected they cause mechanical damage due to their

Thus, the court concluded that the medical evidence,¹¹² in concert with insurance law principles,¹¹³ public policy considerations¹¹⁴ and the court's interpretation of the policy language,¹¹⁵ allowed the court to apply the injurious exposure theory. The court observed that the "bodily injury" requirement of the CGL, according to insurance law principles,¹¹⁶ could be met by a mere injury; the abnormal condition need not rise to the level of disease.¹¹⁷ Thus, the court adopted an interpretation of "bodily injury" that included the tissue damage which took place upon initial inhalation of asbestos.¹¹⁸ The court commented that this construction of the insurance policy language maximized coverage in this case and best represented the intentions of the contracting parties.¹¹⁹

The court was concerned also with the future insurability of manufacturers. If the manifestation theory were adopted, the court feared that manufacturing companies would be unable to buy full products liability insurance coverage,¹²⁰ and that potential claims against the manufacturer might remain unsatisfied in the absence of insurance coverage.¹²¹ If manifestation triggered coverage, few insurers would underwrite protection for an asbestos-product manufacturer with uncounted exposed potential claimants whose diseases had a high probability of manifesting themselves in the future.¹²² For these reasons, the *Forty-Eight* court adopted the injurious exposure theory. Therefore, in this case, the coverage provisions of an insurer's policy were triggered only if there was exposure, during the policy period, to an asbestos-containing product manufactured by the insured.

After holding that insurer liability would be determined under the injurious exposure theory, the court turned to the question of allocating liability once the insurers' policies were triggered. The court held that, in allocating the cost of indemnification under the injurious exposure theory, each insurer was liable for a pro rata share.¹²³ This liability was individual and proportionate

stiffness. Additionally, in an effort to cleanse the lung, macrophages attempt to engulf the fibers. The fibers are too long frequently to be engulfed and the macrophages die, releasing proteolytic enzymes which further damage the lung. The end result of this tissue injury and reaction to the asbestos fibers is the formation of . . . scar tissue, which is termed fibrosis.

Keene Corp. v. Insurance Co. of N. Am., 513 F. Supp. 47, 49 n.3 (D.D. C. 1981).

¹¹² Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1218 (6th Cir. 1980).

¹¹³ *Id.* at 1219-20.

¹¹⁴ *Id.* at 1221-22, 1223.

¹¹⁵ *Id.* at 1223.

¹¹⁶ *Id.* at 1222 (citing J. APPLEMAN, INSURANCE LAW AND PRACTICE § 355 (1965)).

¹¹⁷ *Id.* (citing J. APPLEMAN, INSURANCE LAW AND PRACTICE § 355 (1965)).

¹¹⁸ *Id.* at 1223.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1219.

¹²¹ The manufacturer may first go bankrupt in an effort to satisfy these claims. See note 33 *supra*.

¹²² Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting).

¹²³ *Id.* at 1225.

rather than joint and several.¹²⁴ Under the court's formula for allocating insurer liability, liability was prorated according to time among all of the insurance companies that provided coverage while an injured victim was inhaling asbestos.¹²⁵ The court noted that where an insurer could show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer could not be liable for those years.¹²⁶ The court commented that the manufacturer should be treated as self-insured for those years in which the manufacturer did not have insurance. Therefore, the manufacturer is responsible for a pro rata share of the cost of indemnification for those years in which it was uninsured.¹²⁷

Based on the medical evidence,¹²⁸ insurance law principles,¹²⁹ and public policy considerations,¹³⁰ the *Forty-Eight* court interpreted the CGL policy language in accordance with the injurious exposure theory. Under the theory, the court held that the coverage provisions of an insurer's policy were triggered only if there was exposure, during the policy period, to an asbestos-containing product manufactured by the insured.¹³¹ The court decided that after an insurer's policy was triggered, insurer liability was to be allocated on a pro rata basis determined by the amount of time the insurer provided coverage while exposure was taking place as a proportion of the total time of exposure.¹³²

B. *Manifestation*

The manifestation theory, like the injurious exposure theory, is a court-adopted theory for allocating insurer liability in insidious disease cases. When applying the manifestation theory, a court construes the term "bodily injury" in the CGL policy to include only bodily injury that becomes manifest during the policy period.¹³³ Consequently, under the manifestation theory, only the insurance carrier providing coverage at the time the plaintiff's injury or disease

¹²⁴ *Id.* Under joint and several liability, the manufacturer that is insured by Insurer X for one year of exposure and insured by other insurers for all the other years of exposure may be indemnified by Insurer X for the total damages.

¹²⁵ *Id.* at 1224. The formula for determining ultimate liability is as follows:

$$\begin{array}{lcl} \text{Insurance} & & \text{number of years of exposure} \\ \text{Company X's} & & \text{to manufacturer's products} \\ \text{pro rata share} & = & \frac{\text{during company X's policy period}}{\text{Total number of years of exposure}} \times \text{Manufacturer's} \\ & & \text{to manufacturer's products} \quad \text{total liability} \end{array}$$

¹²⁶ *Id.* at 1225.

¹²⁷ *Id.* at 1224.

¹²⁸ *Id.* at 1218.

¹²⁹ *Id.* at 1219-21.

¹³⁰ *Id.* at 1221-22, 1223.

¹³¹ *Id.* at 1225.

¹³² *Id.* at 1224.

¹³³ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. 110, 115 (D. Mass. 1981).

becomes manifest is liable to indemnify the manufacturer.¹³⁴ An example of a case in which the manifestation theory was adopted is *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Company*.¹³⁵

The facts underlying the *Eagle-Picher* case were quite similar to the facts in *Forty-Eight*.¹³⁶ The plaintiffs in the underlying product liability suits alleged that they contracted asbestos-related diseases as a result of contact with asbestos-containing products.¹³⁷ The duration and timing of Eagle-Picher's insurance coverage, however, differed markedly from the insurance coverage pattern in *Forty-Eight*. Eagle-Picher manufactured asbestos-containing products between 1931 and 1971.¹³⁸ Prior to 1968, Eagle-Picher was uninsured for the underlying asbestosis and asbestos-related claims.¹³⁹ During the years after 1971, the company ceased to produce asbestos-containing materials, but it continued to purchase, and in increasing amounts, insurance coverage for damages caused by asbestos exposure.¹⁴⁰ Eagle-Picher requested a declaratory judgment to determine the rights, liabilities and obligations of the parties to these insurance policies.¹⁴¹ The defendants were the various insurance companies that had provided Eagle-Picher with comprehensive general liability insurance from 1968 to 1979.¹⁴² In determining the defendants' liability, the *Eagle-Picher* court examined many of the same factors considered by the *Forty-Eight* court.¹⁴³ The *Eagle-Picher* court examined the medical evidence relating to the development of asbestos-related insidious disease,¹⁴⁴ insurance law principles of insurance policy construction,¹⁴⁵ and the expectations of the contracting parties.¹⁴⁶ Although the *Eagle-Picher* court considered the same factors as the *Forty-Eight* court, the *Eagle-Picher* court reached a different result by adopting the manifestation theory.

In *Eagle-Picher*, the medical evidence demonstrated that exposure to asbestos fibers and injury did not occur simultaneously.¹⁴⁷ Thus, the court observed that a central contention of the injurious exposure theorists had been discredited.¹⁴⁸ The injurious exposure theory proponents had argued that exposure and injury occurred either simultaneously, or so nearly so that coverage for injury could be linked to the time of exposure.¹⁴⁹ The court found that some

¹³⁴ *Id.* at 118.

¹³⁵ 523 F. Supp. 110 (D. Mass. 1981).

¹³⁶ See *supra* text and notes at notes 68-72.

¹³⁷ 523 F. Supp. at 111.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 118.

¹⁴¹ *Id.* at 111.

¹⁴² *Id.*

¹⁴³ See *supra* text and notes at notes 110-22.

¹⁴⁴ 523 F. Supp. at 115.

¹⁴⁵ *Id.* at 115-16, 118.

¹⁴⁶ *Id.* at 118.

¹⁴⁷ *Id.* at 115.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* See *supra* text and note 111.

amount of time necessarily passes before any destructive process begins.¹⁵⁰ The medical evidence, standing alone, was damaging to the injurious exposure theorists' argument that exposure to asbestos resulted immediately in coverage triggering bodily injury.

This important component of the exposure theorists's argument was undermined further when the court combined its construction of the CGL policy language with the medical evidence. The court interpreted the CGL language in light of insurance law principles.¹⁵¹ The court noted that any conflict between a technical or medical definition of a term in the CGL policy and the meaning an average person would apply to the term should be resolved in favor of the layman's viewpoint.¹⁵² The court then concluded that a layman would define injury as manifest, clinically evident disease.¹⁵³ Thus, the court excluded sub-clinical damage from the definition.¹⁵⁴ The court then suggested another flaw in the reasoning of the injurious exposure theory proponents. The court remarked that once the injurious process begins with the earliest sub-clinical disease, it is not inevitable that clinically evident disease will result.¹⁵⁵ The court observed that the damaging process may cease at any point, even before producing clinically evident disease.¹⁵⁶ The court commented that the *de minimus* scarring of the lungs which can result some time after exposure to asbestos fibers is not a supportable use of the word "injury" in the context of the CGL policy.¹⁵⁷

The *Eagle-Picher* court found further flaws with the injurious exposure proponents' interpretation of the CGL language when the court focused on the literal construction of the coverage clause.¹⁵⁸ The coverage clause of the CGL policies stated that the insurer shall "provide indemnity for all sums for which the insured shall become legally obligated to pay for damages because of bodily injury caused by an occurrence."¹⁵⁹ "Occurrence" was defined in the CGL as "an accident or a continuous or repeated exposure to conditions which results, during the policy period, in personal injury"¹⁶⁰ The court noted that, under the CGL policy, liability is caused by a bodily injury, and bodily injury in turn is caused by an occurrence.¹⁶¹ This construction of the CGL policy, the court remarked, implies that liability, bodily injury, and occurrence, while necessarily related, are distinguishable.¹⁶² The court further commented that

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 115-16, 118. The *Forty-Eight* court also interpreted the CGL language in light of insurance law principles. See *supra* text and notes at notes 116-19.

¹⁵² *Id.* at 116.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 115.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 113-14.

¹⁵⁹ *Id.* at 113.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 114.

¹⁶² *Id.*

these terms of the policy are distinguishable because each of the elements — liability, bodily injury, and occurrence — is expected to occur separately in time.¹⁶³ The court then suggested that bodily injury, which the court had defined as clinically evident disease,¹⁶⁴ was the “result” which must occur during the policy period for coverage to be triggered.¹⁶⁵ The court observed that in the definition of “occurrence,” the time limiting phrase “during the policy period” always followed the word “results,” and by the phrase’s positioning in the policies it could modify only the word “results.”¹⁶⁶ The definitional language of the CGL, the court determined, explicitly focused on the result, rather than on the cause, as the component to which coverage was linked.¹⁶⁷ Thus, the court concluded that insurance coverage was to be provided on a manifestation basis rather than on an exposure basis.

The court bolstered its conclusion with two further observations. It agreed with the *Forty-Eight* court¹⁶⁸ that insurance policies must be construed in favor of the insured to promote coverage,¹⁶⁹ and also that the legitimate expectations of the parties must be honored.¹⁷⁰ In *Eagle-Picher*, as in *Forty-Eight*, the court was faced with one construction of the CGL policy that would have provided coverage and with another that would have left the manufacturer uninsured.¹⁷¹ The *Eagle-Picher* court observed that, in the case before it, the manifestation theory was more likely to maximize the insurance coverage provided to the manufacturer in the underlying products liability suits.¹⁷² Coverage was more likely to be maximized under the manifestation theory than under the injurious exposure theory because of Eagle-Picher’s historical pattern of insurance purchases. As noted above, Eagle-Picher was uninsured during most of the thirty years up to 1971 during which it manufactured asbestos products.¹⁷³ Eagle-Picher did not purchase general liability coverage until 1968.¹⁷⁴ The company ceased production of asbestos-containing materials in 1971.¹⁷⁵ During the years after 1971, however, Eagle-Picher continued to purchase, in increasing amounts, insurance coverage for damages due to injury which was caused by asbestos exposure.¹⁷⁶ The court suggested that there was a small possibility that

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 115.

¹⁶⁵ *Id.* at 114.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ The *Forty-Eight* court had noted: “We are bound to broadly construe the insurance policies to promote coverage.” *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1219 (6th Cir. 1980).

¹⁶⁹ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

claims based on further exposure to the insured's asbestos would be made. The court noted, however, that increasingly numerous manifestations of asbestos-related disease could be predicted with certainty, and these manifestations would give rise to increasingly numerous claims against Eagle-Picher.¹⁷⁷ The court observed that Eagle-Picher had purchased substantial amounts of insurance coverage during a period when no exposures to its asbestos products were taking place.¹⁷⁸ Based on this observation, the court reasoned that the expectation of the contracting parties was that coverage would be provided on a manifestation, rather than an exposure, basis.¹⁷⁹

In summary, the medical evidence,¹⁸⁰ insurance law principles,¹⁸¹ the legitimate expectations of the parties,¹⁸² and the language of the CGL policy itself¹⁸³ all led the *Eagle-Picher* court to adopt the manifestation theory. In reviewing these factors, the court determined that bodily injury, which triggers coverage under the CGL policy, had not occurred until it was manifest.¹⁸⁴ The court measured manifestation by the date of the disease's actual diagnosis.¹⁸⁵ With respect to those cases in which no diagnosis was made prior to death, the court decided that the date of death should be considered the date of manifestation.¹⁸⁶ The court held the insurance carrier that provided coverage on the date of manifestation liable for the entire amount of the plaintiff's asbestos-related damages caused by the insured manufacturer.¹⁸⁷

C. An Alternative Theory: Everybody Pays

An alternative theory, developed by the Court of Appeals for the District of Columbia in *Keene Corporation v. Insurance Company of North America*,¹⁸⁸ combines the characteristics of the manifestation and injurious exposure theories. Under the *Keene* theory, labeled by some attorneys as the "everybody pays" theory,¹⁸⁹ inhalation exposure, exposure in residence,¹⁹⁰ and manifestation of the resultant disease all trigger coverage.¹⁹¹ According to the theory developed

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 115.

¹⁸¹ *Id.* at 115-16, 117-18.

¹⁸² *Id.* at 118.

¹⁸³ *Id.* at 113-14.

¹⁸⁴ *Id.* at 115.

¹⁸⁵ *Id.* at 118.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ 677 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3716 (U.S. Mar. 9, 1982), *reh'g denied*, 50 U.S.L.W. 3859 (U.S. Apr. 27, 1982).

¹⁸⁹ Michael Mealey, managing editor of the *Asbestos Litigation Reporter*, quoted in Granelli, *supra* note 33, at 24, col. 3.

¹⁹⁰ Exposure in residence refers to the development of disease while asbestos fibers are in residence in the body. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1042 (D.C. Cir. 1981).

¹⁹¹ *Id.* at 1047.

by the *Keene* court, "bodily injury," as defined in the CGL policy, encompasses any part of the injurious process from the initial exposure to asbestos until manifestation of disease.¹⁹² Therefore, each insurer providing coverage between the initial exposure and the manifestation of disease is liable to indemnify the insured manufacturer. The *Keene* court formulated its new theory based upon facts that were similar to the facts in *Eagle-Picher* and in *Forty-Eight*.

In the *Keene* case, Keene Corporation (Keene) sought a declaratory judgment of the rights and obligations of the parties under CGL policies that the four defendant insurance companies issued to Keene or its predecessors from 1961 to 1980.¹⁹³ Between the years 1948 and 1972, Keene manufactured thermal insulation products that contained asbestos.¹⁹⁴ Keene wanted a determination of the extent to which each insurance policy covered Keene's potential liability for asbestos-related diseases.¹⁹⁵ Keene's potential liability arose from underlying lawsuits in which insulation workers or their survivors alleged personal injury or wrongful death as a result of exposure to Keene's asbestos products.¹⁹⁶ Keene believed that its CGL policies covered all potential liability.¹⁹⁷ The defendant insurers offered less expansive views on their respective potential liability.¹⁹⁸ Because of the inherent ambiguity in the CGL language¹⁹⁹ and the parties' inability to resolve the ambiguity,²⁰⁰ the court was called upon to interpret the CGL policy.

The language of the CGL policies did not direct the court to adopt one particular view of insurer liability.²⁰¹ The court explained that, in the context of asbestos related disease, the CGL terms "bodily injury," "sickness," and "disease" standing alone lacked the precision necessary to identify a point in the development of a disease at which coverage was triggered.²⁰² The court sought to interpret these insurance contract terms in a manner which was equitable and administratively manageable.²⁰³ In addition, the court noted that its interpretation of the CGL policy should be consistent with insurance principles, insurance law, and the terms of the insurance contracts themselves.²⁰⁴ In its effort to resolve the insurer liability dispute, the court found the

¹⁹² *Id.*

¹⁹³ *Id.* at 1038.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1039.

¹⁹⁸ *Id.* "Aetna, INA, and Liberty Mutual argued that coverage [was] triggered only when bodily injury manifest[ed] itself during a policy period." *Id.* According to this theory, only the insurer providing coverage to Keene when bodily injury manifested itself would be liable. "Hartford took an intermediate position; [it argued] that coverage [was] triggered by the inhalation of asbestos fibers, but that each company's coverage [was] determined by the ratio of exposure years during its policy period to the entire period of inhalation." *Id.*

¹⁹⁹ *Id.* at 1041.

²⁰⁰ *Id.* at 1039.

²⁰¹ *Id.* at 1043.

²⁰² *Id.*

²⁰³ *Id.* at 1041.

²⁰⁴ *Id.*

insurance law cases to be only marginally instructive.²⁰⁵ The *Keene* court's treatment of the insurance law cases, cases from the areas of statutes of limitations, worker's compensation, and health insurance, was similar to the treatment of the cases by the *Forty-Eight* court.²⁰⁶

The *Keene* court found the statute of limitations cases not at all relevant to the insurer liability issue before it.²⁰⁷ The court noted that the date of a disease's manifestation or discovery was deemed generally to be the date of the disease's occurrence for purposes of statutes of limitations.²⁰⁸ The court commented that if the date of a disease's origin were to begin statute of limitations periods, meritorious claims would be barred and plaintiffs would be unduly prejudiced.²⁰⁹ As a matter of public policy, the court suggested, courts had held that the purpose of the statutes, which was to protect defendants against stale claims, did not warrant barring such claims.²¹⁰ The *Keene* court reasoned that neither party to the CGL policy was unduly prejudiced by the requirement that the bodily injury be found to have occurred during the policy period.²¹¹ Therefore, the court concluded, the considerations involved in the statute of limitations cases had no bearing on the considerations relevant in the insurer liability cases.²¹²

The court also regarded the worker's compensation cases as only slightly relevant in construing CGL policies.²¹³ The court stated that those cases, only some of which adopted the manifestation approach, relied largely on the legislative intent behind worker's compensation statutes.²¹⁴ The cases that adopted the manifestation approach, the court observed, were based on the overriding importance of efficient administration in the worker's compensation system.²¹⁵ The court suggested that administrative efficiency also must be a concern in determining insurer liability.²¹⁶ The court commented that administrative efficiency was not important enough, however, to override the rules of contract interpretation which were central to a determination of insurer liability under the CGL policy.²¹⁷

The *Keene* court found the health insurance cases more relevant to the insurer liability question.²¹⁸ In the health insurance cases, the courts were called

²⁰⁵ *Id.* at 1043 n.17.

²⁰⁶ *See supra* text and notes at 77-108.

²⁰⁷ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17 (D.C. Cir. 1981).

²⁰⁸ *Id.* (citing *United States v. Kubrick*, 444 U.S. 111 (1979)). *See supra* note 77.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* (citing *General Dynamics Corp. v. Benefits Review Bd.*, 565 F.2d 208, 212 (2d Cir. 1977) and *Travelers Ins. Co. v. Cardillo*, 255 F.2d at 145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955)).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

to determine when a disease began in order to decide whether it began during a policy period.²¹⁹ A court must find that the disease began during a policy period for the disease to be covered by insurance.²²⁰ The rule of the health insurance cases, the court observed, is that if a disease manifested itself during a policy period, than that policy covered the disease even if the disease's origin could be traced back to a time prior to the policy period.²²¹ The *Keene* court asserted that, in the health insurance cases, the security which the health insurance policies provided would be undermined if a disease were not covered by the insurer whose policy was in effect when the disease manifested itself.²²² The courts that had decided the health insurance coverage issue had held that a manifestation rule was necessary to protect the reasonable expectations of the insured.²²³ Thus, the *Keene* court reasoned that in product liability insurance policies, as in health and accident insurance policies, the purchase of the contracts would be defeated if the insured were forced to bear the risk of disease that was latent at the time a policy was purchased.²²⁴ After examining these insurance law cases, the *Keene* court addressed the characteristics and purpose of insurance to aid its interpretation of the CGL policy. The court noted that the insurance contracts purchased by Keene represented an exchange of an uncertain loss, the possibility of incurring legal liability, for a certain loss, the premium payment.²²⁵ By issuing the policy, the court observed, the insurer agreed to assume the risk of the insured's liability in exchange for the fixed premium payment.²²⁶ The court asserted that when Keene purchased insurance, it expected to limit the costs it would have to incur to protect itself against specified types of losses.²²⁷ In short, the court reasoned, Keene expected to be indemnified for any legal liability it incurred.²²⁸ In order to give effect to the dominant purpose of the insurance policies, which was indemnity,²²⁹ the court decided that all points in the development of disease must trigger coverage.²³⁰ The court commented that, in either of the other insurer liability

²¹⁹ *Id.*

²²⁰ *E.g.*, *Metropolitan Life Ins. Co. v. Reynolds*, 48 Ariz. at 209, 60 P.2d at 1072 (1936); *Cohen v. North Am. Life & Cas. Co.*, 150 Minn. at 508, 185 N.W. at 939 (1921).

²²¹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1043 n.17 (D.C. Cir. 1981) (citing *Wilkins v. Grays Harbor Community Hospital*, 71 Wash. 2d 178, 427 P.2d 716 (1967); *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942)).

²²² *Id.* at 1043-44 n.17.

²²³ *Id.* at 1045; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1221 (6th Cir. 1980).

²²⁴ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045 (D.C. Cir. 1981) (citation omitted).

²²⁵ *Id.* at 1041.

²²⁶ *Id.*

²²⁷ *Id.* (citing S. HUEBNER, K. BLACK, JR., & R. CLINE, *PROPERTY AND LIABILITY INSURANCE* 5-7 (1976)).

²²⁸ *Id.* at 1044.

²²⁹ *Id.* at 1041 (citing COUCH ON INSURANCE 2d §§ 15:22, 15:41 (2d ed. 1959); 4 WILLISTON ON CONTRACTS § 900 (3d ed. 1959)).

²³⁰ *Id.* at 1047.

theories formulated for interpreting the CGL policy, Keene might be uninsured for its legal liability.²³¹ If Keene were uninsured for a part of its legal liability, the court suggested, then the function of the insurance policies would be undermined.²³² The court then discussed the injurious exposure and the manifestation theories and pointed out the flaws that result if either theory is applied individually.

The court observed that the injurious exposure theory, applied individually, would undercut the security that Keene hoped to obtain when it purchased insurance.²³³ The court noted that if exposure to asbestos were deemed to constitute a discrete "bodily injury" triggering coverage under the CGL policy, the subsequent development of disease would be characterized as a consequence of the injury.²³⁴ Since under this theory insurance coverage is triggered only at the time of exposure, the *Keene* court suggested that future stages of the disease's development would not trigger additional coverage.²³⁵ The court commented that under the injurious exposure theory, a manufacturer that purchased a CGL policy would be insured only against liability for diseases which resulted from exposure during the policy period.²³⁶ Yet, the manufacturer would bear the risk of liability for diseases that manifested themselves during the policy period but occurred as a result of exposure at a time when the manufacturer held no insurance.²³⁷ Because of this possibility, the court asserted that the manufacturer's purchase of insurance would not constitute the purchase of guaranteed indemnification for liability resulting from asbestos-related disease.²³⁸ The court further stated that the insured would be uncertain as to its future liability for injuries which began developing prior to the purchase of insurance.²³⁹ Thus, the court concluded that, in light of the basic purpose of insurance, to provide guaranteed indemnification from liability, injurious exposure could not be the sole trigger of coverage.²⁴⁰

The *Keene* court also reasoned that, in order to give effect to the purpose of insurance, manifestation similarly could not be the sole trigger of coverage.²⁴¹ If manifestation were the sole trigger of coverage, the certainty of indemnification that a manufacturer hoped to obtain when it purchased insurance would be impaired severely.²⁴² Only clinically evident disease triggers coverage under

²³¹ *Id.* at 1044, 1045-47. If Keene had insurance coverage for the entire injurious process except manifestation, and a court applied the manifestation theory, Keene would be uninsured. If Keene had continuous insurance coverage after the time of exposure, and a court applied the injurious exposure theory, Keene would be uninsured.

²³² *Id.* at 1047.

²³³ *Id.* at 1044.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1046.

²⁴² *Id.*

the manifestation theory.²⁴³ The court pointed out that the development process of an insidious disease involves a long latency period before the disease becomes clinically evident.²⁴⁴ The court observed that insurers know which manufacturers have exposed potential claimants to hazardous conditions, and the insurers know when the resulting diseases are likely to become manifest.²⁴⁵ With this knowledge, an insurer might refuse to renew the manufacturer's insurance coverage, and this non-renewal would leave the manufacturer effectively uninsured.²⁴⁶ The court commented that this termination of coverage prior to the manifestation of many cases of disease would deprive the insured of the protection it purchased when it obtained the insurance policies.²⁴⁷ If manifestation were the only trigger of insurance coverage, a manufacturer of a product known to cause insidious disease probably would be unable to secure coverage in the future, because few insurers would underwrite the risk where the pool of potential claimants was great.²⁴⁸ This difficulty certainly would arise if the insurer providing coverage at the time of manifestation was liable to pay the full amount of the claims.²⁴⁹ The *Keene* court noted that the manifestation theory's interpretation of the CGL policy, taken separately, fails to provide the insured with any certainty of recovery.²⁵⁰

The court remarked that the allocation of rights and obligations established by the insurance policies would be undermined if either the exposure to asbestos or the manifestation of asbestos-related disease were the sole trigger of coverage.²⁵¹ The court interpreted "bodily injury" in the CGL policy to mean any part of the single injurious process by which asbestos-related diseases

²⁴³ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 116 (D. Mass. 1981).

²⁴⁴ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045 (D.C. Cir. 1981).

²⁴⁵ *Id.*

"[D]uring [the period between the point at which the injurious process begins and the point at which injury manifests itself], the existence of latent injury among people who have worked with asbestos [becomes] predictable with a substantial degree of certainty. The injury and attendant liability [become] predictable precisely because it was discovered that past occurrences [are] likely to . . . set in motion injurious processes for which [the insured] could be held liable."

Id. at 1046.

²⁴⁶ *Id.* at 1045-46.

²⁴⁷ *Id.* at 1046.

²⁴⁸ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting). See note 7 *supra* for the number of suits pending against various manufacturers of asbestos-containing products. It is important to recognize that the plaintiffs in these actions are victims whose diseases have become manifest. See e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 (D.C. Cir. 1981) ("The plaintiffs in the underlying suits allege that they contracted asbestosis, mesothelioma, and/or lung cancer as a result of [asbestos] inhalation.") Because there are countless other victims whose diseases have not yet become manifest, the suits pending represent only a small percentage of the total potential claimants.

²⁴⁹ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting).

²⁵⁰ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1046 (D.C. Cir. 1981).

²⁵¹ *Id.* at 1047.

developed.²⁵² The court concluded, therefore, that inhalation exposure, exposure in residence, or manifestation could trigger coverage under the policies.²⁵³

After determining the events that triggered insurance coverage, the court proceeded to consider the extent to which an insurer was liable to its policyholder once coverage under the insurer's policy was triggered. The court concluded that, if an insurer's policy was triggered, then that insurer was liable to indemnify the insured in full, subject to the policy limits and the "other insurance" provisions.²⁵⁴ The court observed that the policies at issue provided that the insurance company would pay on behalf of Keene "all sums" that Keene became liable to pay as damages resulting from bodily injury during the policy period.²⁵⁵ The court had defined "bodily injury" to encompass any part of the injurious process beginning with initial exposure and ending with manifestation.²⁵⁶ The court explained that the reason it adopted this definition was to enforce the insurers' promises to indemnify Keene.²⁵⁷ The court believed that the policies issued to Keene relieved Keene of all potential liability for latent injury.²⁵⁸ The court stated that Keene did not expect, nor should it have expected, that its security was undercut by the existence of prior periods in which it was uninsured.²⁵⁹ Asbestos-related diseases, the court noted, develop over an extended period.²⁶⁰ As a result, the court continued, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period.²⁶¹ The balance of the development may have occurred during another policy period or during a period in which Keene was uninsured.²⁶² If an insurer were obligated to pay only a pro rata share of Keene's liability, the court commented, then Keene's reasonable expectations of indemnification would be violated.²⁶³ Keene's security would be contingent on the existence and validity of all the other applicable policies.²⁶⁴ The court observed that under a scheme where Keene could obtain

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 1050. The court explained the "other insurance" provisions:

"When more than one policy applies to a loss, the 'other insurance' provisions of each policy provide a scheme by which the insurers' liability is to be apportioned." *Id.* A policy might read: "When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, [this insurance company] shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision. . . ." *Id.* The policy was one from the Insurance Co. of North America. *Id.*

²⁵⁵ *Id.* at 1047.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1040 n.9. See *Asbestosis and Neoplasia* *supra* note 1 at 487-88 and *The Occurrence of Asbestosis Among Insulation Workers*, *supra* note 1 at 146-47 (both articles describe the development of asbestos-related disease).

²⁶¹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

²⁶² *Id.*

²⁶³ *Id.* at 1047-48. See *supra* note 125.

²⁶⁴ *Id.* at 1048.

only pro rata indemnification from an insurer, each policy would fail to serve its function of relieving Keene's entire risk of liability.²⁶⁵ For these reasons the court concluded that, under the terms of the policies, an insurer whose coverage was triggered was liable to Keene up to its policy's limits, subject to the "other insurance" clauses.

In holding each insurer fully liable to Keene, the court explained that it did not mean that a single insurer would be burdened with full liability for any injury.²⁶⁶ The court noted that the "other insurance" provisions of each insurance policy provided a scheme by which the insurers' liability was to be apportioned.²⁶⁷ The "other insurance" provisions guarantee that a single insurer will not be saddled with full liability for an injury when more than one policy applies to a loss.²⁶⁸ The court observed that these provisions of the policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease.²⁶⁹ The court commented that insurers whose policies were triggered could collect also from one another under the doctrine of contribution.²⁷⁰

Under the court's opinion in *Keene*, the CGL policies' coverage was triggered by any part of the injurious process from initial exposure to asbestos through manifestation of disease.²⁷¹ Keene was able to collect the full amount of indemnity that it was due from any insurer whose coverage was triggered.²⁷² The insurers were then responsible for allocating liability among themselves according to the "other insurance" provisions of their policies²⁷³ and according to the doctrine of contribution.²⁷⁴

Judge Wald's partial concurrence in *Keene* agreed with the majority's definition of coverage-triggering "bodily injury"²⁷⁵ but disagreed with the majority's allocation of insurer liability.²⁷⁶ The majority had exempted asbestos manufacturers from all financial responsibility arising from a suit if the manufacturer had purchased insurance which covered any part of the injurious process.²⁷⁷ Judge Wald believed that a manufacturer should bear a portion of the loss if it was voluntarily uninsured for a part of the injurious process.²⁷⁸ Judge Wald commented that an asbestos manufacturer that had decided not to

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 1050.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 1050 n.35.

²⁷¹ *Id.* at 1047.

²⁷² *Id.* at 1050.

²⁷³ *Id.*

²⁷⁴ *Id.* at 1050 n.35.

²⁷⁵ *Id.* at 1058 (Wald, J., concurring).

²⁷⁶ *Id.* (Wald, J., concurring).

²⁷⁷ *Id.* (Wald, J., concurring).

²⁷⁸ *Id.* (Wald, J., concurring).

insure itself during part of the injurious process should not reasonably expect to be exempt from liability for injuries that were occurring during the uninsured period.²⁷⁹ The concurrence urged that manufacturers who voluntarily assume risk during a period when the diseases are developing must share the responsibility for the judgment.²⁸⁰ By not obtaining insurance during the entire injurious process, the manufacturer assumed the risk of liability for asbestos-related disease.²⁸¹ Judge Wald concluded that the manufacturer should be treated as an insurer providing coverage for that part of the injurious process during which it was voluntarily uninsured.²⁸² Judge Wald noted that allowing a manufacturer who purchases insurance only intermittently during the injurious process to escape liability altogether would provide a disincentive to purchasing full insurance protection.²⁸³ If such a manufacturer escapes liability, the concurrence observed, then the manufacturer that purchases insurance sporadically would be as fully insured as those manufacturers that purchase insurance continually.²⁸⁴ Thus, for the manufacturer to be entitled to full indemnification, the concurrence asserted, the manufacturer must have purchased insurance coverage continuously throughout the injurious process.²⁸⁵

In essence, Judge Wald agreed with the majority that all stages of the injurious process should trigger coverage.²⁸⁶ If the manufacturer held insurance during any part of the injurious process, then that insurance would be triggered. The *Keene* court noted that its definition of coverage-triggering "bodily injury" guarantees the certainty of coverage that manufacturers seek when they purchase insurance.²⁸⁷ Judge Wald disagreed with the majority regarding its liability allocation scheme.²⁸⁸ The majority believed that an insured was free from all liability if it held coverage during any part of the injurious process.²⁸⁹ Judge Wald asserted that a manufacturer should not be exempted from all liability if it was voluntarily uninsured for any part of the injurious process²⁹⁰ and if it had no reasonable expectation of full coverage.²⁹¹ If the manufacturer was voluntarily uninsured for part of the injurious process, and if it had no reasonable expectation of full coverage, then the manufacturer, Judge Wald argued, should bear a portion of the liability for the part of the injurious process during which it was uninsured.²⁹²

²⁷⁹ *Id.* (Wald, J., concurring).

²⁸⁰ *Id.* (Wald, J., concurring).

²⁸¹ *Id.* (Wald, J., concurring).

²⁸² *Id.* (Wald, J., concurring).

²⁸³ *Id.* (Wald, J., concurring).

²⁸⁴ *Id.* (Wald, J., concurring).

²⁸⁵ *Id.* (Wald, J., concurring).

²⁸⁶ *Id.* (Wald, J., concurring).

²⁸⁷ *Id.* at 1047.

²⁸⁸ *Id.* at 1058 (Wald, J., concurring).

²⁸⁹ *Id.* at 1047.

²⁹⁰ *Id.* at 1058 (Wald, J., concurring).

²⁹¹ *Id.* (Wald, J., concurring).

²⁹² *Id.* (Wald, J., concurring).

III. CONTINUOUS TRIGGERING OF COVERAGES AND PRO RATA ALLOCATION OF LIABILITY

Of the three theories for allocating insurers' liability under the CGL policy in insidious disease cases, the most equitable is that articulated by Judge Wald in *Keene*. Under Judge Wald's approach, the entire injurious process triggers coverage, but with certain limitations on the extent of each insurer's liability. "Bodily injury," which triggers coverage under the CGL policy, is defined to include exposure to the hazard, exposure in residence, and manifestation of the resultant disease.²⁹³ The ultimate liability for an insidious disease judgment is allocated among the various insurers who are found liable.²⁹⁴ This insurer liability theory both honors the legitimate expectations of the insured manufacturer that it will be entitled to recover from an insurer and acknowledges that insurers are engaged in a profit-seeking activity. In addition, the theory avoids pitfalls encountered when either the injurious exposure theory or the manifestation theory is adopted separately. Judge Wald's approach can be applied consistently, while maintaining due regard for the reasonable expectations of the parties.

As the *Keene* court noted, one flaw of both the manifestation²⁹⁵ and injurious exposure²⁹⁶ theories is that they do not provide the certainty of coverage which is a basic goal of liability insurance.²⁹⁷ Under the injurious exposure theory, "bodily injury" is deemed to occur only at the time of exposure.²⁹⁸ Thus, coverage is triggered only at the time of exposure.²⁹⁹ If a manufacturer purchased a CGL policy immediately after many persons were exposed to the manufacturer's hazardous product, the manufacturer would remain completely uninsured for the liability that would result from these exposures. The manufacturer's legitimate expectation that the insurance policy would cover at least a portion of the manufacturer's liability would be defeated. Similarly, a court's adoption of the manifestation theory may leave the manufacturer uninsured, thus nullifying the certainty of coverage which the manufacturer hoped to obtain by purchasing insurance. Under the manifestation theory, coverage-triggering "bodily injury" includes only clinically evident disease.³⁰⁰ Therefore, the manufacturer that holds insurance throughout the injurious process, but whose insurance coverage is terminated before manifestation, is totally without coverage for the ensuing claims. As the *Keene* court observed, the long

²⁹³ *Id.* at 1047.

²⁹⁴ *Id.* at 1050.

²⁹⁵ See *supra* text and notes at notes 241-49.

²⁹⁶ See *supra* text and notes at notes 233-40.

²⁹⁷ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1041 (D.C. Cir. 1981).

²⁹⁸ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1223 (6th Cir. 1980).

²⁹⁹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1044 (D.C. Cir. 1981).

³⁰⁰ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 116 (D. Mass. 1981).

latency period before an insidious disease's manifestation permits insurers to avoid liability by failing to renew the manufacturer's policy.³⁰¹ Insurers know which manufacturers have exposed potential claimants to hazardous conditions,³⁰² and they know when the resulting diseases are likely to become manifest.³⁰³ By refusing to renew insurance coverage at a time before the manifestation of diseases, the insurer can effectively shift liability from itself back to the manufacturer. This process of shifting the loss to the manufacturer defeats the manufacturer's legitimate expectation of coverage.³⁰⁴ The inability of both the injurious exposure theory and the manifestation theory to provide certainty of coverage is one reason why these theories are inadequate.

The *Keene* continuous trigger theory avoids one flaw of the other two theories by providing certainty of coverage to the manufacturer.³⁰⁵ Coverage is uncertain under the other two theories because coverage is triggered only at specified points in the injurious process.³⁰⁶ Under the continuous trigger theory, by contrast, coverage is triggered throughout the injurious process.³⁰⁷ Thus, the manufacturer can be certain that the policies it purchases during any part of the injurious process will provide a measure of coverage. Similarly, insurance companies cannot avoid liability under the continuous trigger theory by refusing to renew a manufacturer's policy.³⁰⁸ The insurer's policy already would be triggered, under the continuous trigger theory, since the policy had been effective during a portion of the injurious process. In addition, the court could hold the previous insurer that denied the manufacturer's continued coverage liable for the full amount of the damages.³⁰⁹

Another flaw of the injurious exposure and manifestation theories is that

³⁰¹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1045 (D.C. Cir. 1981).

³⁰² *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting).

³⁰³ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1046 (D.C. Cir. 1981).

³⁰⁴ *Id.* If the manufacturer's coverage is terminated prior to the manifestation of diseases, the manufacturer most likely would not be able to secure adequate insurance protection in the future. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting). Under the manifestation theory, the insurer providing coverage at the time of the manifestation of diseases must pay the full amount of the claims. *Id.*; *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981). Therefore, few carriers would underwrite the risk where the pool of potential claimants is great. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting). Once again, the manufacturer's legitimate expectation of coverage is defeated because the manufacturer must bear the entire risk of liability.

³⁰⁵ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³⁰⁶ Insurance coverage attaches only at the time of exposure under the injurious exposure theory. *Id.* at 1044. If the manifestation theory is applied, the insurer providing coverage at the time of the insidious disease's manifestation is liable for the entire amount of the claim. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1230 (6th Cir. 1980) (Merritt, J., dissenting); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981).

³⁰⁷ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³⁰⁸ See *supra* text and notes at notes 300-03 (discussion of the loss shifting problem).

³⁰⁹ See *infra* text and notes at notes 342-45.

adoption of either theory, by a court, will lead to either inconsistent or inequitable results in later cases. Such results are likely in cases where the timing of the manufacturer's insurance coverage differs from the timing involved in the court's original decision. Both the *Forty-Eight* court, which adopted the injurious exposure theory, and the *Eagle-Picher* court, which adopted the manifestation theory, construed the CGL policies to promote coverage.³¹⁰ Unfortunately, a court's adherence to a general policy goal of promoting coverage will lead to inconsistent results in subsequent cases. In addition, if the court decides not to pursue the public policy goal of promoting coverage in a later case, inequitable results would follow. The *Eagle-Picher* decision serves as an illustration of the dilemma facing the courts. The manufacturer in *Eagle-Picher* was uninsured prior to 1968,³¹¹ even though *Eagle-Picher* had manufactured asbestos-containing products since 1931.³¹² The court determined insurer liability based on the manifestation theory.³¹³ The *Eagle-Picher* court relied upon insurance law principles of construction³¹⁴ which explicitly serve public policy goals, the medical evidence relating to the development of asbestos-related disease,³¹⁵ and the expectations of the contracting parties³¹⁶ in reaching its decision. If a similar situation is presented to the court in the future with the single difference that the manufacturer was insured until 1968 and uninsured thereafter, the court will be confronted with a difficult choice. If the court follows precedent and adheres to the manifestation theory, the manufacturer would be uninsured for the manifestations of disease that occurred after 1968, and the potential litigants' claims would remain unsatisfied. This result would be inequitable because the insurance coverage that the manufacturer held for thirty-seven years of the injurious process would be rendered nugatory. In contrast, if the court were to construe the insurance policies to promote coverage, the court would have to apply the injurious exposure theory. The decision to adopt the injurious exposure theory, however, would be inconsistent with the court's prior adoption of the manifestation theory.

Without more guidance from the courts, it is impossible to ascertain whether the courts will adhere to their original insurer liability decisions, or whether they will adopt inconsistent theories in an attempt to promote coverage. Both the *Eagle-Picher* court and the *Forty-Eight* court relied heavily on the public policy objective of maximizing the insured's coverage in adopting a

³¹⁰ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1219, 1221 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981).

³¹¹ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

³¹² *Id.*

³¹³ *Id.* at 118.

³¹⁴ *Id.* at 114-15, 118.

³¹⁵ *Id.* at 115.

³¹⁶ *Id.* at 118.

particular theory of insurer liability.³¹⁷ Both courts also relied, however, upon medical evidence and the literal construction of the policy language, independent of the courts' desire to maximize coverage.³¹⁸ A court's reliance upon these other factors would necessitate adhering to the previously adopted insurer liability theory in future cases. The court's adherence to the previously adopted insurer liability theory could lead to an inequitable result, however, because the manufacturer could be deprived of the insurance coverage for which the manufacturer had paid. Although it is impossible to determine whether a court will adhere strictly to its original insurer liability theory when it is confronted with a different pattern of insurance coverage, both the injurious exposure and the manifestation theories are flawed because they inevitably lead to either inconsistent or inequitable results in later cases.

The continuous trigger theory of *Keene*, however, permits a court to interpret the CGL policy to promote coverage without leading to inconsistent results in subsequent cases. Because the entire injurious process from exposure through manifestation triggers coverage,³¹⁹ the court need not change its interpretation of when coverage triggering "bodily injury" occurs in an effort to promote coverage. The court can apply the continuous trigger theory regardless of the manufacturer's historical pattern of insurance coverage. The facts of *Eagle-Picher* are illustrative of how the continuous trigger theory avoids the inconsistent decisions/inequitable result dilemma. For the purpose of this analysis, it is assumed that the injurious process for the claimants' diseases extended until after 1968. *Eagle-Picher* began purchasing insurance coverage in 1968.³²⁰ Under the continuous trigger theory of *Keene*, insurance coverage is triggered at all times during the injurious process.³²¹ Since *Eagle-Picher* held insurance coverage during at least a part of the injurious process, this insurance coverage would be triggered, and the manufacturer would be insured for the underlying asbestos-related disease claims. If the manufacturer's pattern of insurance purchase is changed, however, so that *Eagle-Picher* is insured from 1931 until 1968 and uninsured thereafter, the result remains the same. The manufacturer would be insured under the *Keene* court's continuous trigger theory, because the manufacturer held insurance during the injurious process. In summary, a court's effort to promote insurance coverage, while applying either an injurious exposure or manifestation theory, leads inevitably to incon-

³¹⁷ *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1219, 1221 (6th Cir. 1980); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 117-18 (D. Mass. 1981).

³¹⁸ See text and notes at notes 110-19, 147-67 *supra* for the discussion of the factors considered by the courts.

³¹⁹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³²⁰ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

³²¹ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

sistent results. If a court adopts the *Keene* court's continuous trigger theory, however, it can interpret the policies to promote coverage, while maintaining consistency in its decisions.

After the court determines which insurance policies are triggered under the continuous triggering theory, the court must then allocate liability among the insurers whose coverage is triggered. Liability must be allocated to ensure that a single insurer will not be unfairly burdened with full liability.³²² Once an insurer's policy is found applicable, the insured manufacturer is permitted to collect from that insurer the full amount of indemnity that is due under the policy.³²³ After indemnifying the insured manufacturer up to the policy's limits,³²⁴ the targeted insurer may recover from the other insurers any amount the targeted insurer paid in excess of its allocated liability.³²⁵ One method of allocating ultimate liability under the continuous trigger theory is pro rata apportionment,³²⁶ based on the amount of time the insurer provided coverage during the injurious process as a proportion of the entire injurious process period.³²⁷ For example, if the entire injurious process extends for 30 years and three insurers provided coverage to the manufacturer during this time, each for a ten-year period, then each insurer would be ultimately liable for one-third of the total judgment.

When the manufacturer has not been insured continuously during the injurious process, the liability allocation issue is more complex. Although insurance coverage is triggered at any point in the injurious process under the continuous trigger theory,³²⁸ a manufacturer might not be relieved of all liability even if the coverage provisions of one of the policies it holds are triggered.³²⁹ Judge Wald, in her *Keene* concurrence, correctly asserted that the manufacturer should bear a portion of the loss if the manufacturer was voluntarily uninsured for a part of the injurious process.³³⁰ This assertion, in the majority of cases, would be in accord with the notion that the reasonable expectations of the insured should be honored.³³¹ In allocating liability, the courts should honor the objectively reasonable expectations of the insured.³³² This objective standard would produce an essential degree of certainty and predictability about the par-

³²² *Id.* at 1050.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ This recovery could be executed under either the "other insurance" provisions of the CGL policy, *id.*, or the doctrine of contribution. *Id.* at 1050 n.35.

³²⁶ *Id.* at 1058 (Wald, J., concurring).

³²⁷ This insurer liability scheme is similar to the one adopted by the *Forty-Eight* court except, in that case, the years of exposure provided the basis for allocation. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d at 1224 (6th Cir. 1980). See *supra* note 125.

³²⁸ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³²⁹ *Id.* at 1058 (Wald, J., concurring).

³³⁰ *Id.* (Wald, J., concurring).

³³¹ *Id.* (Wald, J., concurring).

³³² R. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

ties' legal rights.³³³ If the manufacturer decided not to purchase insurance continually throughout the process of injury, the manufacturer could not reasonably expect to be fully indemnified,³³⁴ unless there is some indication that the insurer should be held responsible for all legal liability. The circumstances of a particular case will determine the reasonableness of the insured's belief that it is insured for all legal liability.

The facts of the *Eagle-Picher* case will help to illustrate this proposition. Eagle-Picher manufactured asbestos-containing products between 1931 and 1971.³³⁵ Prior to 1968, Eagle-Picher was uninsured for the underlying asbestosis and related claims.³³⁶ During the years after 1971, the manufacturer ceased to produce asbestos-containing materials but it continued to purchase, in increasing amounts, insurance coverage for damages caused by asbestos exposure.³³⁷ The manufacturer would be insured under the continuous trigger theory, since the manufacturer held insurance during the injurious process.³³⁸ The court would still have to allocate liability between the manufacturer and the insurer whose coverage was triggered, because the manufacturer was voluntarily uninsured for 37 years of the injurious process.³³⁹

In allocating the liability between the manufacturer and the insurer, the court should look to the reasonable expectations of the parties.³⁴⁰ A court applying the continuous trigger theory to the facts of *Eagle-Picher* could find that the parties' reasonable expectations were that the insurer was underwriting coverage for the entire injurious process period. In determining the reasonable expectations of the manufacturer regarding the extent of insurance coverage, the courts should examine the manufacturer's historical pattern of insurance purchases and the premiums paid for the insurance. In *Eagle-Picher*, the manufacturer was uninsured for a portion of the injurious process but later decided to purchase insurance coverage.³⁴¹ If the insured paid higher premiums than would otherwise be charged, the higher premiums might be an indication that the insurer agreed to underwrite coverage for the previously uncovered portion of the injurious process, or at least that the insured could reasonably expect full coverage. If the court concludes that it is reasonable for

³³³ *Id.* at 968.

³³⁴ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1058 (D.C. Cir. 1981) (Wald, J., concurring).

³³⁵ *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 111 (D. Mass. 1981).

³³⁶ *Id.*

³³⁷ *Id.* at 118.

³³⁸ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1047 (D.C. Cir. 1981).

³³⁹ *Id.* at 1058 (Wald, J., concurring). In *Eagle-Picher*, the court found, based on the pattern of insurance purchase, that the manifestation theory must closely approximate the expectations of the contracting parties. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 523 F. Supp. at 118 (D. Mass. 1981). Therefore, the court found that the manufacturer was fully insured. *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

the manufacturer to expect full insurance coverage even though the manufacturer was voluntarily uninsured for part of the injurious process, then the court should not allocate any of the ultimate liability to the manufacturer.

A manufacturer could also expect full coverage if the manufacturer has ceased producing the injurious product and is unable to acquire continued insurance. For example, Keene Corporation manufactured thermal insulation products that contained asbestos from 1948 until 1972.³⁴² As a practical matter, Keene was uninsured after 1976, because its insurer began using large deductibles and administrative fees for handling asbestos-damage claims.³⁴³ Assuming that the manufacturer was continuously insured until 1976, the manufacturer's inability to obtain insurance coverage after that date, Judge Wald reasoned, should not defeat the expectations of full insurance coverage.³⁴⁴ Under these circumstances, the manufacturer has not voluntarily assumed risk during the period when the diseases progressed. Therefore, it seems equitable to apportion all liability among those who insured the manufacturer, because only they have voluntarily assumed the risk of liability during the injurious process.³⁴⁵

Unless there are indications that the insured could reasonably expect to be free from all legal liability, the continuous trigger theory requires that a manufacturer maintain continuous coverage to be assured of full indemnification.³⁴⁶ A manufacturer may be voluntarily uninsured for some or all of the injurious process, either because it is self-insured or because it is not aware of the specific risks involved with the use of its product. Self-insurance is a risk retention plan.³⁴⁷ A self-insured manufacturer, instead of purchasing insurance, charges a higher price for its products and deposits the additional proceeds from the higher price into a fund.³⁴⁸ Any legal liability incurred by the manufacturer, which otherwise would have been covered by insurance, is paid out of this fund.³⁴⁹ In essence, the manufacturer insures itself. The manufacturer voluntarily assumes the risk of liability during the period in which it is self-insured.³⁵⁰ Therefore, it should be liable as an insurer would be for this self-insured period.³⁵¹ A manufacturer also may be uninsured if it is unaware of a specific risk connected with the use of its product. The manufacturer's lack of knowledge about every risk involved in his product does not insulate that manufacturer from the need to have continuous coverage. Insurance, which is founded on the concept of risk, is a rational device to protect against such ig-

³⁴² *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1038 (D.C. Cir. 1981).

³⁴³ *Id.* at 1045 n.21.

³⁴⁴ *Id.* at 1058 (Wald, J., concurring).

³⁴⁵ *Id.* (Wald, J., concurring).

³⁴⁶ *Id.* (Wald, J., concurring).

³⁴⁷ *KEETON*, *supra* note 49, at § 1.2(b)(6).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d at 1058 (D.C. Cir. 1981). (Wald, J., concurring).

³⁵¹ *Id.*

norance.³⁵² Thus, the manufacturer should obtain liability insurance even if it does not know about a specific risk, such as the risk of developing asbestosis from exposure to asbestos, because the manufacturer should know that some type of liability might arise from using any of its products. If the manufacturer does not obtain insurance because it is unaware of a specific risk, then the manufacturer could not reasonably expect to be fully insured. In every instance when the manufacturer is uninsured for a portion of the injurious process, the court should be guided, in allocating liability, by the insured's objectively reasonable expectations.

CONCLUSION

Courts have developed two main theories for determining insurer liability in the insidious disease area: manifestation and injurious exposure. While these two theories have been the most widely applied in the area of asbestos-related diseases, a third theory was recently adopted by the District of Columbia Circuit in *Keene Corporation v. Insurance Company of North America*. This theory, the "continuous trigger" theory, combines features of both the manifestation and injurious exposure approaches. The continuous trigger theory of *Keene*, however, avoids many of the problems encountered in the separate application of the other two theories, and provides certainty of coverage to the manufacturer. The continuous trigger theory should eliminate the need for insurance companies to argue conflicting theories in different cases depending upon their economic interests in a particular case. In addition the more comprehensive definition of when coverage is triggered should preserve judicial integrity by allowing the courts to apply the theory consistently, regardless of the factual pattern in the case. Liability should be allocated among all those insurers that provided coverage to the manufacturer during the injurious process. This allocation should be pro rata, based on the portion of the injurious process during which an insurer provided coverage. When the manufacturer is uninsured, it must bear a portion of the liability, unless the manufacturer reasonably could expect to be free from all liability. This insurance coverage trigger and liability allocation scheme comports with the reasonable expectations of the insured and should be applied in all future insidious disease cases.

STEPHEN V. GIMIGLIANO

³⁵² KEETON, *supra* note 49 at § 1.2(b)(2).