

## Asbestos Litigation: The Insurance Coverage Question

### I. INTRODUCTION

Since the beginning of World War II, an estimated eight to eleven million American workers have been exposed to asbestos.<sup>1</sup> Although asbestos exposure in factories is not as severe a problem today,<sup>2</sup> additional construction and demolition workers will be exposed while doing rip-out and repair work.<sup>3</sup> As a result of asbestos exposure, at least 200,000 asbestos-related deaths are expected by the year 2000.<sup>4</sup> Approximately 20,000 personal injury lawsuits are pending against mining companies, manufacturers, and distributors of asbestos;<sup>5</sup> payments to plaintiff workers may eventually total billions of dollars.<sup>6</sup>

One major battle in the asbestos litigation is between the asbestos manufacturers and their casualty insurers. Because of the insidious nature of asbestos-related diseases,<sup>7</sup> it is medically impossi-

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<sup>1</sup>Vagley & Blanton, *Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*, 16 FORUM 636, 647 (1981).

<sup>2</sup>The Occupational Safety and Health Act requires the Secretary of Labor and the Occupational Safety and Health Administration to promulgate standards to protect employees from regular exposure to toxic materials. 29 U.S.C. § 655(b)(5) (1976).

<sup>3</sup>4A GRAY'S ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 205C.11(1) (3d ed. 1980) [hereinafter cited as GRAY'S].

<sup>4</sup>Winter, *Asbestos Legal 'Tidal Wave' Is Closing In*, 68 A.B.A. J. 398 (Apr. 1982) (quoting Dr. Irving Selikoff, Director of the Environmental Sciences Laboratory\* at New York City's Mt. Sinai School of Medicine).

<sup>5</sup>Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1. The defendants most often named in these cases are Johns-Manville, Eagle-Picher, Owens-Corning, Pittsburg-Corning, Celotex, Keene Corp., Armstrong Cork Co., Raybestos-Manhattan, and GAF Corp. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 FORUM 860, 865 (1980). For purposes of this Note, "mining companies, manufacturers and distributors of asbestos" will be, hereinafter, referred to collectively as "manufacturers."

<sup>6</sup>Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1. Asbestos also impairs the value of buildings; market values are depressed because the asbestos used in the construction of buildings makes prophylactic repairs necessary to prevent the occupants' exposure to asbestos. Legal action to recover the decreased market value and the cost of repairs is being contemplated in some instances. The New York City Board of Education plans to spend \$30 million in remedying the asbestos problem in its schools and is reportedly considering legal action. In light of the extensive use of asbestos in the construction industry, the property damage claims could well surpass the personal injury claims in terms of financial impact. Mansfield, *supra* note 5, at 866.

<sup>7</sup>An insidious disease is defined as one that "progresses with few or no symptoms to indicate its gravity." STEDMAN'S MEDICAL DICTIONARY ILLUSTRATED 711 (23d ed. 1976).

ble to determine, with any accuracy, when an asbestos-related disease develops.<sup>8</sup> Generally, symptoms can not be detected until ten years or more after the initial exposure to asbestos.<sup>9</sup> The standard language in the asbestos manufacturers' comprehensive general liability insurance policies covers injuries which "occur" during the policy period.<sup>10</sup> Consequently, the language of these policies presents serious interpretive problems when applied to asbestos-related diseases. Moreover, many asbestos manufacturers had more than one insurance carrier between the time of the plaintiff's initial exposure to asbestos and the manifestation of the symptoms of the disease. These unique aspects of asbestos litigation present the critical question of which insurance company has the duty to defend and bear the ultimate financial burden.

The insurance coverage question in asbestos litigation has been characterized as the most important litigation of the decade because it will determine the course of thousands of pending and future lawsuits.<sup>11</sup> The resolution of this question, however, may not be limited to the asbestos litigation, but may affect future litigation involving other industrial carcinogens. Furthermore, this litigation will have an impact on the future premium structures and underwriting practices of the casualty and liability insurance industry.<sup>12</sup>

This Note will discuss the background of the coverage dispute and explain why the controversy has arisen. This Note will then compare and analyze the various approaches taken by the courts and discuss the resulting difficulties in formulating long-range strategy to deal with the overwhelming number of lawsuits being filed.

## II. BACKGROUND

The underlying tort actions generally involve one of two factual situations. The first is illustrated by the landmark case of *Borel v. Fibreboard Paper Products Corp.*<sup>13</sup> In that case, an insulation

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<sup>8</sup>W. HUEPER, OCCUPATIONAL TUMORS AND ALLIED DISEASES 403 (1942); see also S. ROBBINS, PATHOLOGIC BASIS OF DISEASE 514 (1974).

<sup>9</sup>See notes 15-17 *infra*.

<sup>10</sup>See notes 27-29 *infra*.

<sup>11</sup>Mansfield, *supra* note 5, at 875.

<sup>12</sup>*Id.*

<sup>13</sup>493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In *Borel* the court held that the manufacturers' failure to adequately warn the ultimate users of their products (insulation workers) of the hazards of asbestos made the product unreasonably dangerous. *Id.* at 1093, 1103. As a result, each defendant manufacturer who contributed to Borel's injuries was jointly and severally liable for the judgment. *Id.* at 1096. For other "insulator" cases, see *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975); *Mooney*

worker was exposed to insulation containing asbestos at numerous job sites over several years. The other factual setting involves a plaintiff claiming exposure to asbestos while working for a single employer, for several years, in a factory using raw asbestos fibers supplied by numerous asbestos manufacturers.<sup>14</sup>

To compensate parties who are successful in their tort action, the manufacturers have turned to their insurance companies, precipitating this coverage dispute based on the standard comprehensive general liability insurance policy.

### A. The Problem

To understand the insurance coverage problem, it is essential to understand the insidious nature of asbestos-related diseases. Inhalation of asbestos fibers can result in various types of diseases; the most common of which are asbestosis,<sup>15</sup> mesothelioma,<sup>16</sup> and bronchogenic carcinoma.<sup>17</sup> These diseases lead to disability and, often times, death.<sup>18</sup> These diseases generally take ten years or more to develop to a point where symptoms appear.<sup>19</sup> A single asbestos fiber can start a fibrogenic process in the lungs which, with a sufficient number of fibers, may develop into asbestosis.<sup>20</sup> Even an extremely brief exposure to asbestos can lead to the development of

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v. Fibreboard Corp., 485 F. Supp. 424 (E.D. Tex. 1980); Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979); Locke v. Johns-Manville Corp., 221 Va. 951, 275 S.E.2d 900 (1981).

<sup>14</sup>Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497 (Ky. 1979); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (secretary at factory developed mesothelioma).

<sup>15</sup>Asbestosis is the most frequently occurring asbestos-related disease. Symptoms of asbestosis are shortness of breath, chest pains, coughing and clubbing of the fingers. Death may eventually be caused by suffocation. Asbestosis generally does not manifest itself until at least ten years after the initial exposure to asbestos. GRAY'S, *supra* note 3, ¶ 205C.30.

<sup>16</sup>Mesothelioma is a rare cancer of the lining of the chest cavity. It may take 30 to 35 years for mesothelioma to manifest itself, but it is ultimately fatal within two years of manifestation. The tumor may develop with only a very light exposure to asbestos. *Id.* ¶ 205C.72.

<sup>17</sup>Bronchogenic carcinoma does not generally become a problem for at least 15 years after the initial exposure. The risk of developing the carcinoma is greatly increased by cigarette smoking. Very light exposure to asbestos is sufficient to trigger the development of bronchogenic carcinoma. The prognosis for an asbestos-induced carcinoma is no different than for other lung cancers. *Id.* ¶ 205C.71.

<sup>18</sup>For a detailed discussion of the effects of asbestos, see Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967) and Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 ANNALS N.Y. ACAD. SCI. 139 (1965).

<sup>19</sup>See notes 15-17 *supra*.

<sup>20</sup>GRAY'S, *supra* note 3, ¶ 205C.21.

mesothelioma.<sup>21</sup> It is medically impossible, however, to pinpoint the time at which any asbestos-related disease actually developed.<sup>22</sup> Therefore, a judicial determination of when the injury occurred is essential in establishing insurance coverage for that injury. A manufacturer will receive no indemnification for a personal injury judgment against it unless the underlying injury is determined to have occurred within the policy period.<sup>23</sup>

The plaintiffs in the underlying tort suits were typically exposed to asbestos or asbestos products supplied by several manufacturers,<sup>24</sup> each of which periodically switched insurance companies during the years in which workers were exposed.<sup>25</sup> Because it is medically impossible to pinpoint the occurrence of an asbestos-related disease, but necessary to establish coverage, a controversy has arisen as to which of a manufacturer's several insurers, if any, has a duty to defend and indemnify the manufacturer for the asbestos-related diseases.

### B. *Interpreting the Insurance Policy*

Aside from the medical difficulties, resolution of the coverage dispute between the insurance carriers and the manufacturers requires interpretation of the applicable insurance policies. The manufacturers in the asbestos insurance cases purchased comprehensive general liability (CGL) insurance policies that are standardized by the insurance industry.<sup>26</sup> Therefore, the terms of each of the manufacturers' various policies were essentially identical. In a CGL insurance policy, the insurer contractually agrees to:

[P]ay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as damages because of A. *bodily injury* or B. *property damage* . . . caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on

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<sup>21</sup>*Id.* ¶ 205C.72.

<sup>22</sup>*Id.*

<sup>23</sup>13 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 46:173 (2d ed. 1964).

<sup>24</sup>*See, e.g.,* Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973).

<sup>25</sup>Wermiel, *Top Court Refuses to Hear Insurers' Cases On Liability for Asbestos-Related Disease*, Wall St. J., Dec. 8, 1981, at 10, col. 1.

<sup>26</sup>*See* notes 46, 60 & 71 *infra*. *See also* Mansfield, *supra* note 5, at 875. A liability policy requires the insurer to make a payment although the insured has not made any payment on the claim for which he is liable. Under an indemnity policy, the insurer must make the insured whole after he has made a payment. 11 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 44:4 (2d ed. 1963). Although technically different, the effect is the same on the insured. Therefore the terms "indemnity" and "liability" will be used interchangeably.

account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false, or fraudulent . . . .<sup>27</sup>

The policy defines bodily injury as a "sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."<sup>28</sup> Occurrence is defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured."<sup>29</sup>

Generally, an insurance policy is to be construed and interpreted in the same manner as any other contract.<sup>30</sup> As with any other contract, indemnity or liability provisions should be construed to give effect to the entire contract.<sup>31</sup> Where the insurer has prepared the contract, any ambiguity should be resolved in favor of the insured;<sup>32</sup> however, if the language is clear, this principle of construction is inapplicable, and the terms must be given their common and ordinary meaning.<sup>33</sup> To do otherwise would extend coverage "beyond the plain and natural meaning of the language chosen by the parties."<sup>34</sup> In interpreting a liability or indemnity insurance contract, the court is to consider both the policy's dominant purpose of indemnification and the expectations of the insured.<sup>35</sup>

### C. Theories of Interpretation

The determination of when the injury occurred depends upon the characterization of the injury. Essentially the question is whether the injury occurred with exposure to asbestos and the beginning of the fibrogenic process, or whether the injury occurred when the symptoms of disease became evident. This forms the basis of the two interpretations of "bodily injury" offered by parties in asbestos insurance litigation.

1. *Manifestation Theory*.—The manifestation theory relies on the common and everyday meanings of the terms "disease" and "injury."<sup>36</sup> Under this theory, bodily injury is interpreted as not occur-

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<sup>27</sup>THE DEFENSE RESEARCH INSTITUTE, INC., ANNOTATED COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY 67 (No. 1, 1979).

<sup>28</sup>*Id.* at 66.

<sup>29</sup>*Id.* at 6.

<sup>30</sup>1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:1 (2d ed. 1959).

<sup>31</sup>11 *id.* § 44:5 (2d ed. 1963).

<sup>32</sup>*Id.* § 44:6.

<sup>33</sup>1 *id.* § 15:82 (2d ed. 1959). *See also* 11 *id.* § 44:7 (2d ed. 1963).

<sup>34</sup>11 *id.* § 44:7 (2d ed. 1963).

<sup>35</sup>1 *id.* § 15:22 (2d ed. 1959).

<sup>36</sup>*Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 115 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982). This theory is ad-

ring until the asbestos-related disease manifests itself.<sup>37</sup> Specifically, bodily injury occurs when the plaintiff first knew or should have known that he had an asbestos-related disease, or on the date of diagnosis, whichever is first.<sup>38</sup> Accordingly, only the carrier on the risk at the date of manifestation would have to defend and indemnify the manufacturer.<sup>39</sup>

The advocates of this theory point out that not all exposure to asbestos results in disease. For instance, some individuals with long exposure periods never develop an asbestos-related disease.<sup>40</sup> Because exposure does not always result in injury, they argue that it would be unreasonable to say that "bodily injury" occurs before manifestation of disease.<sup>41</sup> Furthermore, supporters of the manifestation theory point to medical evidence which indicates that it is impossible to determine with any certainty a correlation between a disease and a specific incidence of exposure.<sup>42</sup> It is also impossible to determine the extent of damage at a particular point in time, nor is it possible to determine the time at which the bodily function is impaired.<sup>43</sup>

The manifestation theory was adopted by the court in *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*<sup>44</sup> The plaintiff, Eagle-Picher, was a manufacturer that used asbestos in some of its products between 1931 and 1971. The defendants were insurance companies which provided Eagle-Picher with primary CGL insurance, first layer excess insurance, and second layer excess insurance<sup>45</sup> during the years 1968 through 1979.<sup>46</sup> Prior to 1968, Eagle-

vocated by most insurers and Eagle-Picher Industries. Eagle-Picher is the only manufacturer who argues for this theory. Mansfield, *supra* note 5, at 876.

<sup>37</sup>Vagley & Blanton, *supra* note 1, at 652.

<sup>38</sup>Mansfield, *supra* note 5, at 876.

<sup>39</sup>Vagley & Blanton, *supra* note 1, at 652.

<sup>40</sup>See *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 115 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

<sup>41</sup>*Id.*

<sup>42</sup>*Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 451 F. Supp. 1230, 1238 (E.D. Mich. 1978), *aff'd*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 102 S. Ct. 686 (1981).

<sup>43</sup>*Id.*

<sup>44</sup>523 F. Supp. 110 (D. Mass. 1981), *aff'd in part*, 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

<sup>45</sup>Excess insurance is coverage against loss that is not covered by other insurance. The excess insurer is liable only for damages which exceed the coverage provided by the primary policy. 16 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 62:48 (2d ed. 1966).

<sup>46</sup>Liberty Mutual Insurance Company provided primary coverage from 1968 through 1978. First layer excess insurance was provided by American Motorists Insurance Company from 1973 through 1975. The London Market provided first layer excess insurance after 1975 and provided second layer excess insurance after 1973. 523 F. Supp. at 111, 113, & 119.

Picher was uninsured. In 1977 Eagle-Picher's primary insurer sent notice to Eagle-Picher that the primary policy limits for 1974 and 1975 might be exhausted. Eagle-Picher then forwarded this notice to its excess insurers, one of whom disagreed with the primary insurer's handling of claims under the manifestation theory. Eagle-Picher filed an action seeking a declaratory judgment concerning the rights and obligations of the parties to the insurance contracts.<sup>47</sup>

The court held that coverage under the policies is triggered at the time the accumulation of asbestos fibers in the lungs produces a diagnostic asbestos-related disease.<sup>48</sup> The court defined "manifestation" as the date of actual diagnosis or as the date of death if no prior diagnosis was made.<sup>49</sup> The court's decision was based on the medical evidence and the parties' expectations.<sup>50</sup> The court pointed to medical evidence which indicated that exposure to asbestos does not produce instantaneous, subcellular changes and that development of disease is not inevitable.<sup>51</sup> The court said that to "characterize as injury the minimal changes which occur in some people some time after exposure is not a supportable use of the word 'injury' in the context of a liability insurance policy."<sup>52</sup> The court also stressed the expectations of the parties. Eagle-Picher did not use asbestos after 1971 but continued to purchase insurance. The court said that because there was minimal possibility of future exposure, but that claims for past exposure would continue, Eagle-Picher obviously thought it was purchasing coverage for past exposure.<sup>53</sup>

2. *Exposure or Prorata Theory*—The advocates of the exposure theory argue that the first exposure to asbestos results in a physiological change in the lungs which should be treated as a bodily injury.<sup>54</sup> Exposure advocates rely heavily on medical evidence concerning the progressive nature of asbestos-related diseases.<sup>55</sup> However,

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<sup>47</sup>523 F. Supp. at 111-12. Eagle-Picher has been named as a defendant in over 5,000 products liability suits for asbestos-related injuries. *Id.* at 111.

<sup>48</sup>*Id.* at 115.

<sup>49</sup>*Id.* at 118. The judgment did not require that the damages be prorated because of its reliance on the manifestation theory. *Id.* On appeal the First Circuit Court of Appeals held that disease results when it becomes clinically evident. 51 U.S.L.W. 2025 (1st Cir. June 30, 1982).

<sup>50</sup>523 F. Supp. at 115, 118.

<sup>51</sup>*Id.* at 115.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 118. Because one cannot generally purchase insurance for past occurrences or casualty, the court surely meant Eagle-Picher expected that a manifestation theory would be applied to cases of disease that were latent at the time the policies were purchased.

<sup>54</sup>Mansfield, *supra* note 5, at 876.

<sup>55</sup>Vagley & Blanton, *supra* note 1, at 652.

the exposure advocates disagree on the issue of the insurer's liability. This disagreement has divided the exposure theorists into two basic groups based upon differing characterizations of the diseases.

One group of exposure theorists argues that each substantial exposure to asbestos dust triggers coverage.<sup>56</sup> Under this approach, each insurer on the risk during the period of exposure is jointly and severally liable to defend and indemnify. Thus, if a worker was exposed during the years 1942 through 1946, the insurance company or companies covering this period would be liable even if the symptoms of the disease did not appear until 1975.<sup>57</sup> This formulation of the exposure theory is essentially that which the Sixth Circuit adopted in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*<sup>58</sup>

Forty-Eight Insulations manufactured products containing asbestos from 1923 until 1970.<sup>59</sup> By the summer of 1979, Forty-Eight Insulations had become the target of over 1,300 products liability suits. During the years it manufactured asbestos products, Forty-Eight Insulations had purchased numerous CGL insurance policies from five insurance companies.<sup>60</sup> One of Forty-Eight Insulations' insurers brought a diversity action seeking a declaratory judgment of the carriers' obligations under the policies.<sup>61</sup> The Court of Appeals for the Sixth Circuit affirmed the trial court judgment and adopted a version of the exposure theory whereby the initial exposure to asbestos dust triggered coverage.<sup>62</sup> All insurers on the risk from the plaintiff's initial exposure until his last exposure were held liable.<sup>63</sup>

In reviewing the case, the appellate court relied on basic rules of contract interpretation.<sup>64</sup> The court said that the words "bodily in-

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<sup>56</sup>Mansfield, *supra* note 5, at 876.

<sup>57</sup>*Id.*

<sup>58</sup>633 F.2d 1212 (6th Cir. 1980).

<sup>59</sup>*Id.* at 1214. Forty-Eight Insulations and other manufacturers began cutting back on the use of asbestos in the 1960's because of the large numbers of workers who had contracted asbestosis. *Id.* at 1215.

<sup>60</sup>Those companies were: Insurance Company of North America (Oct. 31, 1955 to Oct. 31, 1972), Affiliated FM Insurance Company (Oct. 31, 1972 to Jan. 10, 1975), Illinois National Insurance Company (Jan. 10, 1975 to Jan. 12, 1976), Travelers Indemnity Company of Rhode Island (Jan. 12, 1976 to Nov. 8, 1976), and Liberty Mutual Insurance Company (after Nov. 8, 1976).

<sup>61</sup>633 F.2d at 1216.

<sup>62</sup>*Id.* at 1223.

<sup>63</sup>*Id.* at 1224-25.

<sup>64</sup>*Id.* at 1218-23. The manifestation proponents relied heavily on analogy to cases dealing with statutes of limitations, workmen's compensation and health insurance. In insidious disease and latent injury cases where the statute of limitations is dispositive, the courts have generally applied a discovery of injury rule. The manifestation proponents argued that such cases supported the use of a manifestation rule in their insurance coverage case. The court rejected this argument, saying that the cases were only minimally relevant. The court said that the discovery of injury rule for statute of

jury" and "occurrence" are ambiguous when dealing with an insidious disease such as asbestosis.<sup>65</sup> Because of that ambiguity, the court was free to apply rules of construction and "resolve doubts in favor of maximizing coverage."<sup>66</sup>

The other group of exposure theorists argues that because asbestos fibers, once having reached the lungs, remain lodged and cause progressive, insidious, and continuous harm, each carrier on the risk from the initial exposure until manifestation is obligated to defend and indemnify the manufacturer.<sup>67</sup> In other words, if the worker was exposed to asbestos from 1942 to 1946, all insurers from 1942 through 1976, when the lawsuit was filed, would be liable to defend and indemnify, even though the plaintiff's last exposure was in 1946.<sup>68</sup> This group argues that liability should be determined by a

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limitations purposes is based on policy considerations reflecting a desire to avoid the barring of meritorious claims of plaintiffs unaware of an injury of disease when it first develops. Because the use of the word "injury" in the statute of limitations cases performs a different function than in the context of a CGL insurance policy, the court rejected the argument. *Id.* at 1220.

The court also found the workmen's compensation cases relied on by the manifestation advocates largely irrelevant. Those cases had held the last insurer of the last employer liable for workmen's compensation where a worker was disabled by a progressive, insidious disease. The court said that the "last employer" rule in those workmen's compensation cases was based on the "overriding importance of efficient administration in this area." *Id.* at 1221 (quoting *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955)). The need for efficiency was insufficient to override the rules of contract interpretation already cited by the court.

The court found the health insurance cases cited by the manifestation advocates the most relevant because the problem in those cases was to determine when a disease begins in order to decide whether it began during a policy period. In the health insurance cases cited, the courts determined that there is coverage of the disease even if the disease can be traced to a time prior to the policy period. The manifestation proponents argued that these cases supported a manifestation rule in their case at bar. The court held that the expectations of the insured required a manifestation rule in the health insurance cases, and that those same expectations of coverage required an exposure rule in the case before it. 633 F.2d at 1221-22.

<sup>65</sup>633 F.2d at 1222.

<sup>66</sup>*Id.* In a dissenting opinion, Judge Merritt argued for the "discoverability rule." Under that rule asbestosis would occur ten years from the date of first exposure. Subsequent exposures would be additional compensable injuries. Liability would be prorated among any carriers on the risk ten years after the initial exposure, or during the exposures after the ten years. *Id.* at 1230-31.

The next case to deal with the exposure-manifestation dispute was *Porter v. American Optical Corporation*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 102 S. Ct. 686 (1981). *Porter* involved a products liability action against the manufacturer of a defective respirator for damages resulting from Porter's asbestosis contracted while supposedly protected by the respirator. The court dealt with the insurance coverage issue by simply following *Forty-Eight Insulations* and applying the exposure theory. 641 F.2d at 1145.

<sup>67</sup>*Mansfield*, *supra* note 5, at 876-77.

<sup>68</sup>*Id.* at 877.

prorata formula based on the number of years of coverage in relation to the duration of the exposure period.<sup>69</sup>

The most recent, and most controversial, case in the coverage dispute litigation is *Keene Corp. v. Insurance Co. of North America*.<sup>70</sup> From 1948 through 1972, Keene manufactured thermal insulation products containing asbestos. Keene had purchased CGL insurance policies from four different insurance companies from 1961 through 1980.<sup>71</sup> Keene filed a declaratory judgment action seeking a determination of the extent to which each policy covered its liability for asbestos-related injuries. The district court followed *Forty-Eight Insulations* and adopted the exposure theory.<sup>72</sup>

The Court of Appeals for the District of Columbia reversed the district court and remanded the case for determination of damages.<sup>73</sup> The appellate court refused to choose either a manifestation or an exposure theory and held that the actual exposure to asbestos, exposure in residence (subsequent development of disease), and manifestation all triggered coverage under the policies.<sup>74</sup> Under this approach, the court found that each insurer on the risk between the claimant's initial exposure and the manifestation of his disease was liable to Keene for indemnification and defense costs.<sup>75</sup> The court said this was necessary because any other result would undermine the security Keene thought it had obtained by purchasing the policies.<sup>76</sup>

The *Keene* court, like the Sixth Circuit in *Forty-Eight Insulations*, found that the policy language was ambiguous when applied to asbestos-related diseases.<sup>77</sup> This left the court free to interpret the policies, allowing it to use the reasonable expectations of Keene as a guide.<sup>78</sup> The court first discussed the manifestation theory. The court said that Keene, in purchasing the policies, expected to be

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<sup>69</sup>*Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042 n.15 (D.C. Cir. 1981).

<sup>70</sup>667 F.2d 1034 (D.C. Cir. 1981).

<sup>71</sup>Those companies were: Insurance Company of North America (Dec. 31, 1961 to Aug. 23, 1968), Liberty Mutual Insurance Company (Aug. 23, 1967 to Aug. 23, 1968 and Oct. 1, 1974 to Oct. 1, 1980), Aetna Casualty and Surety Company (Aug. 23, 1968 to Aug. 23, 1971), and Hartford Accident and Indemnity Company (Aug. 23, 1971 to Oct. 1, 1974). *Id.* at 1038.

<sup>72</sup>513 F. Supp. 47, 50-51 (D.D.C.), *rev'd and remanded*, 667 F.2d 1034 (D.C. Cir. 1981).

<sup>73</sup>*Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1039 (D.C. Cir. 1981).

<sup>74</sup>*Id.* at 1042-47. "Bodily injury" was interpreted by the court "to mean any part of the single injurious process that asbestos-related diseases entail." *Id.* at 1047.

<sup>75</sup>*Id.* at 1041.

<sup>76</sup>*Id.* at 1045-46.

<sup>77</sup>*Id.* at 1041.

<sup>78</sup>*Id.*

covered for all future liability.<sup>79</sup> Because Keene's reasonable expectations were the guide, the court held that manifestation would have to trigger coverage.<sup>80</sup> The court, however, stated that if manifestation were the sole trigger of coverage, the insurance companies would bear only a fraction of Keene's total liability.<sup>81</sup> This result would also undermine Keene's expectations of protection.<sup>82</sup> To fully secure Keene's rights under the policies, the court found it necessary to hold that coverage was triggered by exposure and exposure in residence as well as manifestation.<sup>83</sup>

The exposure theorists are also split on the issue of the manufacturer's participation in defense and judgment liability for periods during which the manufacturer was not covered by insurance.<sup>84</sup> The insurance companies argue that the manufacturer should participate in paying defense and indemnity costs for uninsured periods on the same prorata basis as any insurer.<sup>85</sup> Predictably, the manufacturers argue that the obligations of the insurers, especially with respect to the duty to defend, preclude any participation by the manufacturer in paying any of the defense or indemnity costs.<sup>86</sup>

When a court determines that some sort of exposure triggers coverage under the insurance policies, as in *Keene* and *Forty-Eight Insulations*, it must then determine the extent of that coverage, and how to allocate liability if more than one policy is triggered.

#### D. *Extent and Allocation of Coverage*

Under the *Keene* approach, any part of the development of the disease will trigger coverage; therefore, only a part of a claimant's disease may have developed during the period of time covered by a particular policy.<sup>87</sup> To a lesser extent, this is also true under the exposure approach adopted in *Forty-Eight Insulations*.<sup>88</sup> Because of this, insurers advocating the exposure theory have argued for pro-

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<sup>79</sup>*Id.* at 1044.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.* at 1045-46. This conclusion was based on the expectation that many cases will be filed in the future for diseases that have not yet manifested, but will manifest in the future. *Id.* at 1045. Apparently underlying that thought is an expectation that Keene would be unable to purchase insurance to cover diseases that manifest in the future for past exposures.

<sup>82</sup>*Id.* at 1046.

<sup>83</sup>*Id.* at 1046-47.

<sup>84</sup>Mansfield, *supra* note 5, at 877.

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>667 F.2d at 1047.

<sup>88</sup>633 F.2d at 1226.

rata liability.<sup>89</sup> With prorata liability, the extent of an insurer's liability would be determined by the duration of the claimant's exposure to the manufacturer's products during that insurer's policy period, in relation to the total duration of the claimant's exposure to the manufacturer's products.<sup>90</sup>

The Sixth Circuit in *Forty-Eight Insulations* accepted this argument and did prorate liability among all of the insurers who were on the risk during the plaintiff's actual exposure.<sup>91</sup> In addition, the manufacturer was treated as self-insured for uninsured periods, and thus responsible for its prorata share of the exposure.<sup>92</sup> However, the court explicitly rejected a scheme to prorate liability over a period of time including exposure and exposure in residence because the policy definition of "occurrence" referred to "*continuous or repeated exposure to conditions*."<sup>93</sup> By applying a prorata formula to determine the extent of liability, the court also allocated liability among all carriers on the risk during exposure.<sup>94</sup>

The court in *Keene* rejected the prorata argument.<sup>95</sup> The court ruled that once coverage is triggered, each insurer is liable for the judgment to the full extent of its policy limits.<sup>96</sup> This conclusion was partially based on the fact that there was no provision in the policies for a reduction of the insurer's liability if the injury occurred only in part during a particular policy period.<sup>97</sup> Furthermore, the court found that the prorata scheme would undermine the security *Keene* expected from an insurance policy; full protection for *Keene* would be contingent upon the existence and validity of all previous and subsequent policies.<sup>98</sup>

Under the *Keene* approach, it is likely that more than one insurer's policy will be triggered. Therefore, it becomes necessary to allocate liability among the insurers whose policies are triggered.<sup>99</sup> The court did not allocate liability; rather, the court held that *Keene* could choose to collect the full policy limit from any insurer whose policy was triggered. The selected insurer would then be able to avail itself of the "other insurance" provisions contained in the contracts.<sup>100</sup>

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<sup>89</sup>667 F.2d at 1047.

<sup>90</sup>*Id.*

<sup>91</sup>633 F.2d at 1224.

<sup>92</sup>*Id.*

<sup>93</sup>*Id.* at 1226.

<sup>94</sup>*Id.*

<sup>95</sup>667 F.2d at 1047-50.

<sup>96</sup>*Id.* at 1050.

<sup>97</sup>*Id.* at 1048.

<sup>98</sup>*Id.* at 1047-48.

<sup>99</sup>*Id.* at 1050.

<sup>100</sup>*Id.* These provisions usually contain a formula for allocating liability where more

The other instance in which extent of coverage becomes an issue is the possibility of stacking policy limits. Forty-Eight Insulations had twelve different insurance policies from 1955 through 1977. If the limits of each of the twelve policies are added together, the combined aggregate is \$5.6 million per injured person.<sup>101</sup> If each exposure to asbestos is deemed a discrete and separate injury, as some have argued, then each case of asbestosis would not be a single injury, but many injuries. If each injury were then compensated, "stacking" coverage limits would result and give an aggregate limit many times the \$5.6 million for a single case of disease.<sup>102</sup> Both the district court and the appellate court in *Forty-Eight Insulations* agreed that such stacking of limits would give Forty-Eight Insulations more insurance than it paid for.<sup>103</sup> Each insurer's liability was limited to the maximum "per occurrence" limit provided for in its policy.<sup>104</sup> The *Keene* court, also concerned with stacking, held that only one policy's limits can apply to a single injury, although it also held that Keene may select that policy.<sup>105</sup>

#### E. *The Duty to Defend*

Under an exposure theory which triggers the coverage of more than one policy, it is necessary to determine which insurer or insurers has the duty to defend the insured in the underlying tort action. Under the manifestation theory the carrier on the risk at the time of manifestation is liable for damages and has the duty to defend.

The standard CGL insurance policy contains a duty to defend clause.<sup>106</sup> This provision means that the insurer, as partial consideration for the premium, is obligated to arrange for and pay the expenses incurred in the defense of any action alleging liability which is covered by the policy to indemnify.<sup>107</sup> These defense costs are in addition to the stated limit of the insurer's liability contained in the policy.<sup>108</sup> The duty to defend, much broader than the duty to indemnify, extends to actions that are "groundless, false, or fraudulent."<sup>109</sup>

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than one policy covers a single occurrence. *Id.* n.35. In the absence of such a provision the loss is usually prorated. 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 62:2 (2d ed. 1966).

<sup>101</sup>633 F.2d at 1226 n.28.

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>667 F.2d at 1049-50.

<sup>106</sup>See note 27 *supra* and accompanying text.

<sup>107</sup>Kircher & Quinn, *Insurer's Duty to Defend—An Overview*, in INSURER'S DUTY TO DEFEND 7 (Defense Research Institute, Inc. 1978).

<sup>108</sup>15 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 56:15 (2d ed. 1966).

<sup>109</sup> Kircher & Quinn, *supra* note 107, at 8.

In light of the high costs of defending thousands of products liability suits, it is obvious why the determination of who has the duty to defend is an important one.

In *Forty-Eight Insulations* the costs of defense were apportioned over the entire period during which the alleged injuries occurred.<sup>110</sup> In doing this, the court relied on the same rationale which it used to apportion indemnification costs. Thus, the duty to defend and the duty to indemnify were coextensive.<sup>111</sup> *Forty-Eight Insulations* was held liable for its prorata share of defense costs that were readily apportionable among covered and noncovered counts in the complaint.<sup>112</sup>

The *Keene* court, in determining the duty to defend, also followed the rationale it used to determine the duty to indemnify.<sup>113</sup> Thus, each insurer whose policy coverage was triggered was also fully responsible to provide a defense.<sup>114</sup> As with indemnification costs, *Keene* may select which insurer will defend each case.<sup>115</sup> However, the court stated that the insurer selected to defend does not have to be the one whose policy limits determine the extent of indemnification.<sup>116</sup> This duty of an insurer to defend is also subject to "other insurance" provisions.<sup>117</sup>

### III. COMPARISON AND ANALYSIS OF THEORIES

The effect of the manifestation theory is to place losses in more recent policy years because it is in those years that the bulk of the asbestos-related diseases, currently being litigated, manifested themselves. Carriers currently on the risk will be liable under the manifestation theory for diseases now being diagnosed, and therefore, those carriers must dramatically increase premiums for CGL insurance.<sup>118</sup> Some fear that the adoption of a manifestation rule will result in no insurance coverage in the future because insurers will refuse to cover manufacturers with large pools of potential victims of industrial disease.<sup>119</sup> One advantage, however, is that

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<sup>110</sup>633 F.2d at 1224.

<sup>111</sup>*Id.* at 1225.

<sup>112</sup>*Id.*

<sup>113</sup>667 F.2d at 1050.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 1051.

<sup>116</sup>*Id.* n.38.

<sup>117</sup>*Id.* at 1050 n.37.

<sup>118</sup>Mansfield, *supra* note 5, at 867.

<sup>119</sup>*Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1230 (6th Cir. 1980) (Merritt, J., dissenting), *cert. denied*, 102 S. Ct. 686 (1981).

the manifestation rule is easy to apply and makes for an expeditious resolution of the problem.<sup>120</sup>

In contrast, the exposure theory spreads losses back over numerous years of insurance coverage, thereby avoiding the dramatic increases in premiums to the manufacturers.<sup>121</sup> Because the exposure theory, as adopted by the Sixth Circuit in *Forty-Eight Insulations*, spreads liability and costs proportionally among all insurers on the risk at the time the plaintiff was exposed, applicable primary limits will not be as rapidly exhausted as under the manifestation theory.<sup>122</sup> The triple trigger theory of *Keene* has aspects of both exposure and manifestation theory, but if followed by other courts, this theory would have an impact more like that of the manifestation theory. The reason for this is that the manufacturer will most likely assign claims to recent insurers whose policies have higher limits. Like the manifestation theory, this will place losses in more recent policy years.

It is sometimes difficult to predict which theory of insurance coverage will be advocated by a particular party in this coverage litigation. The facts of the underlying tort action concerning dates of exposure and manifestation will influence which theory a manufacturer or insurer will advocate. But other factors complicate the analysis, and make long-range plans impractical and difficult to make.

The primary coverage limits of CGL insurance policies have historically been low. For example, in the 1950's, *Forty-Eight Insulations* was covered by a \$100,000 per occurrence primary limit.<sup>123</sup> At that time, this amount was probably sufficient, but when today's large judgments are prorated under an exposure theory back over such a low coverage policy, the \$100,000 limit does not give the policyholder a great deal of protection. After 1976, *Forty-Eight Insulations* had purchased \$1 million in primary coverage. Under the same exposure theory, this high coverage is useless because little or no exposure occurred in the late 1970's. However, because of annual aggregate limits in the policies, *Forty-Eight Insulations* generally would fare better under an exposure theory than under manifestation because it can prorate the cost of one injury over several policies. Each insurer is liable to the limits of its policy, even if those limits are low; therefore, *Forty-Eight Insulations* would receive more coverage. Under the manifestation theory, only the limits of

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<sup>120</sup>Vagley & Blanton, *supra* note 1, at 652.

<sup>121</sup>Mansfield, *supra* note 5, at 877.

<sup>122</sup>*Id.*

<sup>123</sup>633 F.2d at 1227.

the one policy in force at the time of diagnosis would apply to the injury.

Under the exposure theory, liability is usually spread pro rata among several insurers, but the manufacturer may be uninsured for periods of time. Under an exposure theory these gaps in coverage may leave a manufacturer liable for large portions of a judgment. For example, *Forty-Eight Insulations* holds the manufacturer liable for a prorata share of costs based on those uninsured periods. Under the manifestation theory these gaps in coverage would be no problem so long as the diseases manifest themselves during a covered period. Gaps in coverage would also present no problem under the approach used by *Keene* because a manufacturer may assign the entire claim to a single insurer, and the manufacturer would not be liable for any portion of the judgment. Of course under no theory will the manufacturer be protected if the exposure, development of disease, and manifestation occur outside a policy period. This, however, is unlikely to have occurred in the cases now being filed and litigated.<sup>124</sup>

#### IV. AN ALTERNATIVE

Asbestos manufacturers now have three conflicting court rulings

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<sup>124</sup>Lawsuits filed by manufacturers against third parties seeking indemnification or contribution have further complicated the asbestos litigation. *See, e.g., White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981). In the *White* case, Johns-Manville filed suit against the Newport News Shipbuilding and Drydock Company seeking indemnification for liability established in an earlier suit. In that earlier suit, Johns-Manville had been found liable to Newport News employees who installed insulation in Navy ships. In *White*, Johns-Manville argued that Newport News was a sophisticated industrial purchaser who had impliedly warranted that it would use due care in handling the asbestos, and that Johns-Manville was the third party beneficiary of a warranty between Newport News and its employees to provide a safe workplace. *Id.* at 246. Johns-Manville also argued that Newport News was primarily and actively negligent, and that Johns-Manville had been secondarily and passively negligent. *Id.* at 246, 249. Johns-Manville was unsuccessful because the court found that no such alleged warranties existed in the law and that the primary/secondary negligence concept was inapplicable to the facts of the case. *Id.* at 248-50. Although this suit failed, more of these suits can certainly be expected as manufacturers search for ways to spread their losses.

A major target of the third party claims has been the United States because of the extensive use of asbestos in the construction of Navy ships. *Glover v. Johns-Manville*, 662 F.2d 225 (4th Cir. 1981). The government allegedly required asbestos to be used long after the dangers of asbestos were known. *See Mansfield, supra* note 5, at 871-72. Some claims have also been filed against local and international unions. These claims allege that the unions knew of the hazards of asbestos, but that members were not informed, and the union officials used their knowledge of the hazards to win their members some of the highest wages in the construction industry. *See Mansfield, supra* note 5, at 871-72.

to explain how their insurers should pay products liability losses for latent disease caused by asbestos. *Forty-Eight Insulations* holds that all insurers that provide coverage when a claimant is exposed to asbestos must defend and indemnify. *Eagle-Picher* assigns defense and indemnity costs to the insurer on the risk when the claimant's disease manifested itself. Under *Keene*, inhalation exposure, exposure in residence, and manifestation all trigger coverage. Each case maximized coverage for the insured manufacturer due to the factual background peculiar to each of these lawsuits. However, these cases result in inconsistent determinations of when bodily injury occurred. Such inconsistency in court rulings makes it impossible for either manufacturers or insurers to know how to proceed in the pending and future asbestos litigation.

If proposed liability theories are followed<sup>125</sup> and plaintiff asbestos workers win judgments, the cost of asbestos disease will be placed on the asbestos industry. The asbestos industry, in turn, has shifted that potential risk to the insurance industry through the purchase of CGL insurance policies. The Court of Appeals for the District of Columbia went the farthest in shifting the burden of the asbestos litigation onto the shoulders of the insurance industry. Under *Keene*, when a latent disease claim is presented, the manufacturer can assign that claim to an exposure or manifestation year when high limits were in force. As a result, the insurance industry fears that a manufacturer might purchase huge limits every third or fourth year and self-insure during intervening periods.<sup>126</sup>

By allowing the manufacturer to pick and choose which policy limits will apply to which claim of injury, the *Keene* court clearly went beyond any reasonable expectations either the insurer or the manufacturer could have had.

A better solution would be to adopt a *Keene*-type of liability where coverage is triggered by exposure, exposure in residence, and manifestation. Then, the liability of each insurer would be prorated by the following formula: the number of years of coverage during the period from the plaintiff's first exposure to the manufacturer's product until the manifestation of the disease, divided by the total number of years of this same period. Each insurer would be liable for its prorata share of the judgment to the extent of its policy limits. The manufacturer would be liable for any portion not covered by insurance, whether that results from uninsured periods of time or low policy limits.

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<sup>125</sup>See generally Note, *The Causation Problem in Asbestos Litigation: Is There an Alternative Theory of Liability?*, 15 IND. L. REV. 679 (1982).

<sup>126</sup>Rundle, *Keene Jackpot: \$300 Million in Coverage*, Business Insurance, Oct. 26, 1981, at 47, col. 5.

This proposed solution can be justified by society's recognition of the institution of insurance as a method of spreading risk of loss.<sup>127</sup> By holding all insurers on the risk during any stage of the development of the disease liable for a prorata share of the injury, the cost is spread across more of the insurance industry. However, the manufacturer must be responsible for uninsured periods because insurance coverage cannot be extended beyond the terms of the contract to cover periods of time for which no insurance was purchased. Although this proposed solution may not give each individual manufacturer as much coverage as under another rule, it would maximize coverage and give manufacturers, insurers, and the courts the consistency needed to deal with a nationwide problem.

## V. CONCLUSION

The manifestation-exposure dispute has also arisen with respect to insurance coverage for other latent diseases. The most notable to date has risen in cases involving cancer allegedly caused by the drug diethylstilbestrol (DES).<sup>128</sup> There is also some evidence that hundreds of chemicals used in the workplace today may be carcinogenic.<sup>129</sup> Because most cancers develop slowly, the exposure-manifestation issue will undoubtedly surface with respect to other potential carcinogens. The law currently being developed in asbestos litigation will be the logical place to look for guidance in these future cases. The need for consistency and predictability in the determination of manufacturers' and insurers' respective liability in all latent disease cases makes the coverage issue in asbestos litigation extremely important and deserving of great scrutiny.

MARY K. REEDER

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<sup>127</sup>1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1:3 (2d ed. 1959).

<sup>128</sup>See, e.g., *American Motorists Ins. Co. v. E.R. Squibb & Sons*, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (1978).

<sup>129</sup>Tomatis, Agthe, Bartsch, Huff, Monksano, Saracci, Walker & Wilbourn, *Evaluation of the Carcinogenicity of Chemicals: A Review of the Monograph Program of the International Agency for Research on Cancer (1971 to 1977)*, 38 *CANCER RESEARCH* 877, 882-83 (1978). Some examples of carcinogens present in the work place are asbestos, coke oven emissions, vinyl chloride, chloromethyl methyl ether (CMME) and bischloromethyl ether (BCME). Henderson, *Product Liability Disease Litigation: Blueprint for Occupational Safety and Health*, *TRIAL*, Apr. 1980, at 25, 26.