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Susan Frankewich

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Liability Cure-All for Insidious Disease Claims

Recent decisions handed down in various circuits have created virtual chaos in predicting the liability and damage amounts of insidious disease claims. At least three substantially divergent theories have been adopted to impute liability to the manufacturers of the disease catalysts. Additionally, a new trust fund concept has been used on a limited basis to reconcile differences in court decisions. The trust fund approach is relatively flexible and simple to apply in apportioning damages for insidious disease claims. The author examines and analyzes these three liability theories. In conclusion, the adoption of the trust fund concept is recommended.

I. INTRODUCTION

The insurance industry has a passion for predictability. Insurance companies spend millions of dollars each year on personnel and technical equipment to make financial and statistical predictions.¹ They want to know how long a person will live, which occupations are the most hazardous, and what diseases are the most prevalent.² Knowledge of the insured risks gives them the ability to set premiums so as to assure themselves a comfortable profit margin.³ The trend toward predictability and security for insurers, however, has suffered a dramatic setback with the insurgeny of insidious disease claims.⁴

Insidious diseases are those which develop gradually or in a subtle manner with few or no symptoms to indicate their development.⁵ Due to their unpredictability, insurance company statistics are not capable of computing the occurrence of these diseases or the amount which must be paid out of the claims. This inability to predict has left insurers floundering in a sea of financial insecurity.

A prime example of the kind of insidious disease claims which have caused extreme pain and suffering to the insurance commu-

1. J. ATHEARN, *RISK AND INSURANCE* 45 (2d. ed. 1969).

2. *JOURNAL OF RISK AND INSURANCE* 49 (March 1981).

3. Overall, insurance companies set premiums with an expectation of paying out only 60% of the premiums in settlement of liability claims. *ECONOMIC ALMANAC 1981-82 BUSINESS FACTBOOK* 248 (1982).

4. INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY. U.S. DEP'T OF COMMERCE, *FINAL REPORT OF THE INSURANCE STUDY* (1979).

5. *STEDMAN'S MEDICAL DICTIONARY* 714 (Lawyer's ed. 1982). Insidious is defined as "denoting a disease that progresses with few or no symptoms to indicate its gravity." *Id.*

nity are the asbestos cases, which continue to increase both numerically and monetarily. An estimated 30,000 tort claims against asbestos manufacturers were filed in state courts as of mid-summer of 1982, and the number of new filings is increasing at the rate of 400 per month.⁶ Former Health Education and Welfare Secretary Joseph Califano estimated that between eight and eleven million persons—and potential litigants—have been exposed to disease-related levels of asbestos since World War II,⁷ with 1.6 million remaining exposed to such dangers as of 1982.⁸ A widely accepted study projects that from 1965 to 2000, there will be an average of 20,000 asbestos-related deaths each year in the United States.⁹

The cost of total payments of damages for asbestos exposure from 1977 to 1995 has been placed in the range of \$9.5 to \$26 billion.¹⁰ This tremendous potential liability in the asbestos cases alone has pitted insurance companies against industry in a battle to determine who must pick up the tab. The fighting is vigorous as a loss for either side could spell financial ruin for the respective industry.

The courts have offered little hope of resolving the dispute. Three divergent liability theories have arisen from divided opinions among the circuits. One theory imposes liability on the employer and insurer from the time the claimant is first exposed to the dangerous substance.¹¹ A second theory propounds that liability is not triggered until the time of disease manifestation or medical discovery.¹² A third notion imposes liability on all insurers from the date of initial injury to final manifestation without regard to any time factors.¹³

Currently, with the three approaches to liability simultaneously in effect, there is chaos in predicting whether the insurer will be

6. N.Y. Times, July 13, 1982, § 1 at 1, col. 1. See also Legal Times of Washington, Oct. 12, 1982, at 1, col. 1.

7. BEST INSURANCE MANAGEMENT REPORTS, RELEASE 7 (1980).

8. NATIONAL INSTITUTE FOR OCCUPATIONAL HEALTH AND SAFETY, NATIONAL OCCUPATIONAL HAZARD SURVEY: SURVEY ANALYSIS AND SUPPLEMENT TABLES (Dec. 1982).

9. J. SELIKOFF, INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS REPORT (Sept. 1967).

10. U.S. DEPT OF LABOR REPORT, Compilation of State Compensation Awards in Asbestos Claims (1981).

11. See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), cert. denied, 454 U.S. 1109 (1982); see also *infra* notes 80-86 and accompanying text.

12. See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982); see also *infra* notes 65-70 and accompanying text.

13. See, e.g., Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982); see also *infra* notes 100-116 and accompanying text.

liable for the claims as of the time of: (1) exposure, (2) manifestation, or (3) the entire injury period. In addition to this confusion, during certain periods industry either could not, or chose not to, obtain any insurance against insidious disease claims, therefore leaving the manufacturer partially liable for damages.¹⁴ Since the 1930's, due to the increasing awareness of the high risks involved, most insurance companies issued only single year policies with extraordinarily high deductibles.¹⁵ Since 1978, virtually all insurers have excluded industrial disease coverage from their liability policies.¹⁶ Thus, final resolution as to which liability theory applies is of the utmost importance in determining who will be responsible for the tremendous amounts owing on these insidious disease claims.

In proposing a solution to this dilemma, several factors must be taken into consideration. First, an examination is required of the insurance contract's terms, as well as the insurance company's claim policies. Second, the three liability theories of manifestation, exposure, and the continuous trigger, with an emphasis on their relative advantages and weaknesses will be reviewed. Finally, the reasoning behind a suggested uniform standard of determining liability, and the use of a trust fund approach to resolve the insidious disease claims dispute will be discussed.

14. The first known medical report linking industrial hazardous substances to the later development of disease was issued in Britain. Cooke, *Fibrosis of the Lungs Due to the Inhalation of Industrial Dust*, II BRIT. MED. J., 147 (1924). The first report of medical evidence issued in the United States studied the industries of asbestos, shipbuilding, and insulation. The study was released in 1935, with even greater proof of industrial hazards to health than its earlier British counterpart. Lynch and Smith, *Carcinoma of the Lung*, 24 AM. J. CANCER 56 (1935).

15. Industries engaged in the manufacture or handling of disease-related substances frequently changed insurers in order to take advantage of cheaper rates, and on the average had policies issued by nine different insurance companies during the period of 1940-1978. U.S. DEP'T OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES (June 1980).

16. During the years of World War II, liability insurance was extremely expensive, due to the number of women working in manufacturing plants. Because of this, industry often opted not to insure itself. Also, because of wartime exigencies, manufacturers were more willing to experiment with substances which had not been tested for worker safety. Thus, workers were exposed to disease-related materials by manufacturers who did not have any corresponding insurance. DEP'T OF HEALTH, EDUCATION AND WELFARE REPORT TO CONGRESS ON INDUSTRIAL EXPOSURE TO HAZARDOUS MATERIALS AND LIABILITY OF THE MANUFACTURER (April 1979).

II. THE BASIC CAUSES OF THE LIABILITY DISPUTE

Several basic factors must be examined to appreciate the split of authority. The very nature of the development of insidious diseases sheds light on the aspect of medical unpredictability as to how and when the disease develops. Furthermore, recent changes in insurance liability policies permit different judicial interpretations. Finally, modern legal attitudes and strategies have modified claim settling procedures. These basic underlying causes must be considered as a foundation to understanding the divergence of liability theories.

A. *The Development of Insidious Diseases*

Perhaps the very nature of an insidious disease is the most important cause in the current confusion. By definition, an insidious disease is an injury which results from exposure to hazardous materials, but develops within the body without serious consequences for years until a final period where permanent physical symptoms appear, usually resulting in death. Some common examples of insidious diseases include: black lung in coal miners;¹⁷ asbestos fiber inhalation;¹⁸ Agent Orange poisonings;¹⁹ and DES cases.²⁰

Neither the medical profession nor the various industries agree

17. Black lung is caused by the inhalation of coal dust particles by miners. It results in pneumoconiosis (a scarring and blockage of the lung airways due to the dust buildup). Although the disease causes serious respiratory problems, medical detection through chest x-rays is not usually possible until there is almost complete blockage of the lungs. See 3 EPLER, EVALUATION OF PULMONARY DISABILITY, CLINICAL CHALLENGE IN CARDIO-PULMONARY MEDICINE #2, American College of Chest Physicians (1980), and Morgan, W.K.C., *Respiratory Disability in Coal Miners*, 243 J. AM. MED. ASS'N 2401-04 (1980).

18. Inhalation of asbestos fibers has been cited as the cause of pneumoconiosis (lung scarring and eventual airway blockage), pleural abnormalities (hardening or thickening of the chest cavity which restricts breathing), and pulmonary carcinoma (lung cancer). All diseases are capable of medical detection over a period of years as the symptoms develop, however, rarely are any cases diagnosed within 10 years after exposure to asbestos. See *Asbestos Exposure and Neoplasia*, 188 J. AM. MED. ASS'N 22 (1964), and 1 MICHAELS, ASBESTOS PROPERTIES APPLICATIONS AND HAZARDS (1979).

19. Agent Orange was used as a defoliating herbicide during the Vietnam War, but contains dioxin (a deadly poison) which has resulted in nervous system damage to veterans and birth defects in their children. The dosages were supposedly safe for humans. See Medical World News, Feb. 16, 1981, at 45, and "Agent Orange" *Product Liability Litigation*, 7 AM. J. OF L. & MED. 46 (1981).

20. DES is a synthetic estrogen which was given to women in the 1940's through the 1970's to prevent miscarriages. The ingestion of DES had no apparent side effects for the women. Their daughters, however, are now suffering from cervical cancer and reproductive changes which either prevent pregnancy or result in miscarriages or deformed children. See *Product Quality and Safety Manufacturers Liability—DES*, 7 AM. J. OF L. & MED. 213 (1981), and Eclavea, *Diethylstilbestrol (DES)*, 2 AM. L. REP. 1091 (4th ed. 1980).

on how exposure to the substances can cause an insidious disease. Governmental agencies, relying on their own statistics, also disagree as to what constitutes safe or hazardous exposure limits. The asbestos guidelines promulgated by three of those agencies, OSHA, EPA, and CPSC, recommend conflicting exposure limits, resulting in industry-wide speculation as to the true danger level.²¹

Further clouding over the amount of exposure which may trigger development of the disease demands consideration of other factors such as work time, surroundings, and even the climate where the exposure occurs.²² The exposure time itself is important in calculating the risk of injury,²³ as exposure amount and time indicates the possibility of future disease. The unpredictable nature of the amounts and times of exposure, however, limits the usefulness of these indices to the courts or medical profession in attempting to impose liability for insidious diseases.

Following the initial exposure, assuming that it was of an amount sufficient to cause injury, the disease does not manifest itself for many years. The latency period, where the disease progresses, but shows no real outward symptoms, is subject to great variances. "In many instances, diseases now being seen are the result of conditions in the 1920's, 1930's and 1940's. . . . By the same token, exposures today will be reflected by disease in the year 2000. . . ." ²⁴ The latency period is estimated to range from three to more than fifty years, depending on the type of disease

21. The Occupational Safety & Health Administration (OSHA) has determined that exposure to 5 fibers per cc longer than 5 microns is unsafe. 45 Fed. Reg. 77, 840 (1980), (OSHA). The Environmental Protection Agency (EPA) claims exposure to 2 fibers per cc longer than 5 microns may cause disease-related injury. 45 Fed. Reg. 77, 868 (1980), (EPA). Finally, the Consumer Product Safety Commission (CPSC) has declared that 3 fibers per cc *shorter* than 5 microns will be considered a hazardous exposure. 45 Fed. Reg. 77, 883 (1980), (CPSC).

22. Dust in the workplace, hourly shifts of workers exposed, and humidity or dryness of the climate have all been cited as conditions which may either increase or decrease the amount of exposure necessary to trigger insidious diseases. See SELIKOFF & LEE, *ASBESTOS AND DISEASE* (1978).

23. Depending on the substance, exposure time may be very brief, as in the case of drugs injected into the body. See *Thrift v. Tenneco Chem., Inc.*, 381 F. Supp. 543, 544 (N.D. Tex. 1974) (only a few minutes elapsed between the injection and adverse reaction). On the other hand, exposure in the case of industrial workers may continue for ten years or more. See *Velasquez v. Fibreboard Paper Prod. Corp.*, 97 Cal. App. 3d 881, 883, 159 Cal. Rptr. 113, 114 (1979) (over 30 years passed between the initial exposure and medical discovery of asbestiosis).

24. Selikoff, *Widening Perspectives of Occupational Disease*, 2 PREVENTIVE MED. 412, 430-31 (1973).

and amount of exposure involved. Typically, the disease will manifest itself within 10 to 25 years following exposure.²⁵ Manifestation of symptoms is usually considered the best method of detecting insidious diseases because medical diagnosis of insidious disease is a relatively new concept.

Medical detection of insidious diseases is at best difficult, because they often "cause very little inconvenience and may pass unnoticed until the development of some other symptoms directs attention to the person's general state of health."²⁶ The medical profession is generally untrained in the detection and diagnosis of these types of diseases and frequently relies on the presence of other symptoms to indicate the need for further testing²⁷ with the result that the presence of insidious disease is not conclusively detected until it has advanced to stages of severely deteriorated health.²⁸ Current diagnostic techniques, including chest x-rays or blood tests, may have to be performed so frequently as to result in increased potential danger to the individual. Furthermore, the general health of the person, such as weight, blood pressure, and lung capacity, may produce ambiguities in the test results and eventual diagnosis.²⁹

The medical profession is unable to accurately pinpoint how much exposure was received and how the disease developed. The inability to determine exposure and manifestation times makes it difficult for courts to impose liability for these disease claims. In turn, insurers cannot predict with any certainty their financial burden for premium and claim settlement purposes. The medical profession and technology, however, cannot take the entire blame because the insurance industry's general liability policies have undergone modifications of their own in recent years, making resolution of the issue of liability even more difficult.

B. Insurance Policy Construction and Settlement Practices

Insurance enables a buyer to finance a risk for a set price.

25. U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE CENTER FOR DISEASE CONTROL REPORT (June 1977).

26. Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases, 13 FORUM 279 (1977).

27. A review of medical schools revealed that of the 119 American Medical Association-accredited schools, only 21 schools offer any curriculum in occupational or long-term illnesses, with most courses subject to cancellation for sparse enrollment. SURVEY OF BENEFITS REVIEW BOARD, DEPT OF LABOR MEDICAL REPORT (1979). See also THE AMERICAN LUNG ASSOCIATION, LUNG DISEASES, AN INTRODUCTION (1979).

28. See MANAGEMENT OF ASSUMED RISKS FOR CARCINOGENS, NEW YORK ACADEMY OF SCIENCES REPORT (1981).

29. *Id.*

Through insurance, the risk is transferred from the insured to the insurer for a premium. The insurer, a professional risk-bearer, expects the premium to cover losses and expenses so that the company may show a satisfactory profit for its risk assumption.³⁰ With minor variations, the standard comprehensive general liability insurance policies issued to industries and manufacturers are of a uniform type, and state:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages as the policy applies, caused by an occurrence, and the insurance company will have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury. . . .³¹

Historically, insurance companies have flourished as a result of these highly profitable industrial liability policies.³² This lucrative business, however, crashed in the mid-1970's with the deluge of claims filed by persons suffering from a multitude of insidious diseases. There are presently more than 200 substances which have been identified under the Occupational Health and Safety Act (OSHA) as disease or cancer-causing agents; each one providing a basis for insurance liability.³³

Prior to 1966, general liability policies issued by insurance companies provided coverage only for "accidental" injuries. This language implied that the policy covered only "injuries and damage caused by events that were unintended, unexpected and sudden and therefore identifiable in time and place."³⁴ The courts, however, began to interpret the term "accident" more broadly, refusing to limit coverage to sudden events, and extending it to injuries and property damage that were progressive or gradual.³⁵

30. INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, U.S. DEPT OF COMMERCE, FINAL REPORT OF THE INSURANCE STUDY (1979).

31. Standard comprehensive general liability insurance policy language was drafted under the auspices of various insurance industry associations, including the National Bureau of Casualty Underwriters, the Mutual Insurance Rating Bureau and, since 1972, the Insurance Services Office.

32. Annual total profits of all liability insurers rose dramatically from \$11 million in 1960 to over \$50 million in 1974. INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS (1981).

33. U.S. DEPT OF LABOR, AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASES (June 1981).

34. OBRIST, THE NEW COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY—A COVERAGE ANALYSIS 16 (1966).

35. See, e.g., *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co. of N.Y.*, 281 F.2d 538 (3d Cir. 1960) (where the court held that the gradual peeling of paint over a two-year period was property damage within the meaning of insurance policy); *Geddes & Smith, Inc. v. St. Paul-Mercury Indemn. Co.*, 51 Cal. 2d 558, 334 P.2d 881

In 1966, the general liability insurance policy underwent changes in standardization and text that remain in effect today.³⁶ The major change in wording in the liability policy was the substitution of the use of "occurrence" for "accident" in bodily injury coverage. "Occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury. . . ."³⁷ The intent behind the policy revision was:

Although it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over an extended period of time before they become evident. For example, slow ingestion of foreign substances or inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage—the injury must take place during the policy period.³⁸

Thus, the significance of the policy language change was a recognition by the insurance industry of the problem of insidious diseases and their gradual development. It also signaled the apparent consensus by insurers that injury would have to occur before liability would be triggered. Once the injury was discovered, however, the insurer would be liable for all claims occurring within the policy period.³⁹ The new wording of the general liability policy, which appeared to clear the doubts concerning insidious disease claims, only served to further obscure the issue.

The practice of insurance companies in settling and paying insidious disease claims added to the wording problems. As previously mentioned, the business of liability insurance developed from a type of coverage and pricing game where most insurers only issued annual policies.⁴⁰ Many of the industries now being sued for insidious injury damages employed a succession of in-

(1959) (where the court awarded damages for both property damage and injury due to defectively built doors warping and jamming over a three year period).

36. The work of revision was instituted in 1959 by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau to provide uniform coverage policies. *See supra* note 34. However, Judge Keith noted in *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1226 n.29 (6th Cir. 1980) *cert. denied*, 455 U.S. 1109 (1982), that "the cause of the plague (of cases resulting from unsatisfactory resolutions); however, is an insurance industry which adopted a standard policy which is inadequate to deal with the problems of asbestosis." *Id.*

37. The Comprehensive General Liability Insurance Policy definitions were promulgated by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau and adopted by all liability insurance companies of the United States.

38. Elliott, *The New Policy Provisions for General Liability Insurance*, 18 THE ANNALS 3, 197 (Fall 1965) (Elliott is the Secretary of the National Bureau of Casualty Underwriters). *See also* LONG, LAW OF LIABILITY INSURANCE § 11.05A (1973).

39. *See* Roscow and Liederman, *An Overview to the Interpretive Problems of "Occurrence" in Comprehensive Liability Insurance*, 16 FORUM 1148 (1981).

40. *See supra* notes 15-16 and accompanying text.

surers, which confuses the determination of both liability and apportionment for each insurer.⁴¹ Also, prior to the insurance companies' knowledge of the extent and number of claims to be filed, they were often cooperative with the manufacturer or other insurance companies by settling for a pro-rata share of the damages. This practice was often used to avoid litigation and expedite the payment of claims to injured parties. However, with the current financial stakes and the tremendous number of claims filed, insurance companies have refused to split costs—and thus must litigate the issue of liability for the amount due to the injured individual.⁴² Additionally, the court system itself is changing its attitude toward insidious disease claims and the imposition of liability.

C. *Changes in Legal Attitudes*

In building the great pyramid of confusion in attempting to resolve insidious disease litigation, it has been noted that there are several conflicts between medical evidence and insurance practices. Recent modifications of legal attitudes toward insidious disease claims, such as the discovery statute of limitations and the imposition of joint and several liability, add to the current disorganization.

Due to the lengthy latency period which characterizes insidious diseases,⁴³ injured plaintiffs have been barred from asserting a claim because the applicable statute of limitations had run by the time they became aware of their illness and the causal link to the manufacturer's product.⁴⁴ "The statutory period of limitations [in some courts] begins to run from the time when liability for wrong

41. Successive insurers cover both the primary insurers of an industry, along with excessive insurers or reinsurers that provide the company with additional layers of coverage. INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY, U.S. DEP'T OF COMMERCE, 1 FINAL REPORT OF THE INSURANCE STUDY 1-16 to 1-18 (1977).

42. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 455 U.S. 1109 (1982), where the Insurance Company of North America refused to accept full liability for damages as it was only one of five insurers covering the Forty-Eight Insulation manufacturers. The court ultimately pro-rated liability among the five.

43. See *supra* notes 24-25 and accompanying text.

44. See, e.g., *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), where the plaintiff's lung disease was found to be a result of an accumulative inhalation of dust during his employment. The disease did not appear for many years and the New York Court of Appeals held the action was time-barred.

has arisen even though the injured party may be ignorant of the existence of the wrong or injury."⁴⁵

To overcome the undue harshness and burden on the claimant due to the statute of limitations bar, the United States Supreme Court, in *Urie v. Thompson*,⁴⁶ announced the application of a discovery rule. The *Urie* Court disregarded the three year statute of limitations to permit a claim for disintegration of the lungs caused by occupational silica dust exposure which did not manifest itself for thirty years.⁴⁷ The Court noted that enforcement of the statute of limitations would have been a delusive remedy, as it would charge Urie with the unknown and inherently unknowable awareness of his disease.⁴⁸ The Court held that for purposes of the statute of limitations, a plaintiff would not be decreed injured until the disease manifested itself in some medically recognizable form.⁴⁹

Several tremors have also been detected in the judicial ground-work over the imposition of liability.⁵⁰ The insurance industry felt the first shocks of a virtual legal earthquake in *Borel v. Fibreboard Paper Products Corp.*⁵¹ The court decided in *Borel* that conditions contributing to diseases are basically indivisible, and the amount of injury at any one time is likewise indeterminable.⁵² Since the bodily injury could not be precisely determined, the court in *Borel* held all manufacturers and distributors of the product jointly and severally liable for the entire amount of damages.⁵³ This early asbestos case sent out repercussions to insurers that they could be liable for phenomenally high damages as a result of their manufacturer's liability policy.

These judicial decisions, coupled with problems in proving exposure and manifestation,⁵⁴ along with previous insurance practices,⁵⁵ did not financially benefit the insurance industry. As a result, the insurers themselves were forced to employ new strate-

45. *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979) (citing *Schmidt v. Merchants Dispatch Transp. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936)).

46. 337 U.S. 163 (1949).

47. *Id.* at 166-67.

48. *Id.* at 169-70.

49. *Id.* at 170-71.

50. See, e.g., Comment, *Insurance Law—Products Liability Insurance—Time of Exposure Triggers Coverage for Asbestos-Related Diseases*, 26 WAYNE L. REV. 1127 (1980) (sets forth various court interpretations in non-enforcement of the statute of limitations in manifestation cases).

51. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

52. *Id.* at 1083-85, 1094.

53. *Id.* at 1094. See also *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975).

54. See *supra* notes 23-29 and accompanying text.

55. See *supra* notes 34-42 and accompanying text.

gies to avoid liability. These tactics were successful in some courts, but not in others, and explain in part the judicial divergence of liability theories. The theories include exposure, manifestation, and in-residence approaches to imposing liability. Each theory is distinct from the other, but together they could spell disaster for the insurance industry, as well as causing great financial unpredictability to liability insurers attempting to settle insidious disease claims.

III. THE CONFLICTING THEORIES OF LIABILITY

The development of the three liability theories was a result of the different avoidance practices of insurance companies in various circuits. All the courts agree that once coverage is triggered by an occurrence of bodily injury due to disease, the insurer cannot refuse coverage.⁵⁶ The word "occurrence," however, is the key and all three liability theories are a direct result of the various interpretations given that word.⁵⁷ The exposure theory triggers liability upon the initial exposure to the dangerous substance.⁵⁸ The manifestation theory states that there is no liability until the disease becomes manifest or at least capable of medical detection.⁵⁹ Finally, the most recently developed in-residence theory imputes liability on all the insurers from the time of initial exposure to final manifestation.⁶⁰

All three theories have been accepted by various circuits, although some circuits are still undecided on which liability standard to adopt. Thus far, the Supreme Court has not granted certiorari to resolve this question. The result is that insurers are confused and thwarted in their attempts to prepare a defense be-

56. THE NEW STANDARD COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY, ABA SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW PROCEEDINGS 250 (1966).

57. See generally Roscow and Liederman, *supra* note 39, at 1151-52.

58. See *supra* note 50.

59. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 23-25 (1st Cir. 1982). The *Eagle-Picher* court distinguished the case of *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (1st Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), decided by the same circuit only a year earlier, on the grounds that the *Keene* court construed the insurance policies in order to fulfill the reasonable expectations of the parties, which resulted in full liability. However, the parties involved in the *Eagle-Picher* litigation were not interpreted to have similar expectations; thus, the more limited liability was applied. 682 F.2d at 23.

60. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (1st Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

cause they do not know what theory might be applied. Insurers, in those circuits that are undecided, are waiting to make claim payments, and intentionally subjecting themselves to further law suits for bad faith. Each legal theory has its own advantages and weaknesses which must be examined to determine if any one appears to be the best resolution of the liability confusion. Asbestos cases are particularly illustrative, because they are the most recent and well-defined in terms of the current liability controversy. The decisions discussed herein, however, may be applied to all types of insidious disease claims.⁶¹

A. The Disease Manifestation Theory

The manifestation approach is heavily favored by insurance companies. Its theorists contend that liability does not arise until the condition became or should have become known to the plaintiff, or the date on which the plaintiff's condition was medically diagnosed, whichever occurs first.⁶² The manifestation theory is a court-adopted theory for allocating insurer liability. In its application, a court construes the term "bodily injury" in the comprehensive general liability policy to include only the bodily injury caused by an occurrence that manifests itself during the policy period.⁶³ Consequently, under the manifestation approach, only the insurance carrier providing coverage at the time the plaintiff's injury or disease became manifest is liable to indemnify the manufacturer.⁶⁴

The leading decision adopting the manifestation theory is *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*⁶⁵ In *Eagle-Picher*, the manufacturer successfully argued that Liberty Mutual and other insurer defendants should indemnify Eagle-Picher for asbestos claims filed between 1968 and 1979. The defendants countered that they should not be liable for such claims as the manufacturer, who carried no insurance for disease claims arising prior to 1968, was attempting to shift its liability to them.⁶⁶ The court imposed liability on the defendants, relying on medical evidence which demonstrated that exposure to asbestos fibers and physical injury did not occur simultaneously.⁶⁷ Thus, the

61. See *supra* notes 17-20 and accompanying text.

62. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216-17 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

63. *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 23-25 (1st Cir. 1982).

64. *Id.*

65. *Id.* at 15-16.

66. *Id.* at 16-17.

67. *Id.* at 18. See also *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

court held that in order to uphold the policy language, liability would be imposed upon the manufacturer and insurer only when some clinical evidence or manifestation occurred.⁶⁸ Further, the court in *Eagle-Picher* favored the manifestation approach as a mechanism to provide coverage for the manufacturer who was uninsured during the exposure period of most employees who filed claims.⁶⁹

The manifestation theory adopted in *Eagle-Picher* has generally been applauded by a significant portion of the insurance industry. This position is favored because, unlike Liberty Mutual and its co-defendants, most insurers provided coverage for the manufacturer in the earlier years when the exposure to hazardous substances actually took place. And, as previously mentioned, most insurers refused to issue these liability policies after 1978⁷⁰ when the asbestos scare began to receive publicity.

The manifestation approach is a judicially sound theory which parallels other insurance liability decisions. First, it is compatible with workers' compensation cases, holding that the last insurer of the last employer bears the full loss, even for progressive conditions that take many years to manifest themselves.⁷¹ Second, health and accident cases are in agreement that bodily injury does not originate, for purposes of liability, until it reveals itself.⁷² Finally, the manifestation approach recognizes that some type of manifestation or discovery of the disease is necessary to set in motion the statute of limitations.⁷³

Although the manifestation approach is appealing to most insurers and is judicially compatible with other insurance liability cases, it contains serious pitfalls. First, manifestation theorists themselves are sharply divided as to what manifestation means. For example, some construe manifestation to mean the time of diagnosis; others believe it to imply the time when a claimant knew

68. 682 F.2d at 18.

69. *Id.* at 17. See also *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

70. See *supra* notes 15-16 and accompanying text.

71. *General Dynamics Corp. v. Benefits Review Bds.*, 565 F.2d 208 (2d Cir. 1977); *Traveler's Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

72. *Reiser v. Metropolitan Life Ins. Co.*, 262 A.D. 171, 28 N.Y.S.2d 283 (1941), *aff'd*, 289 N.Y. 561 (1942).

73. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982); see also *Urie v. Thompson*, 337 U.S. 163 (1949).

or should have known of the presence of the injury or disease; and another group suggests it to mean the date on which the policyholder manufacturer became aware of the possible future claim.⁷⁴

Another problem relates to the type of medical evidence necessary to establish manifestation, where it is unclear if discovery of the disease means a positive x-ray result or merely a cough or shortness of breath by the claimant.⁷⁵ In *Eagle-Picher*, the court used the manifestation theory to impose liability on the insurer, rather than the manufacturer who was uninsured during exposure periods.⁷⁶ This approach afforded relief to Eagle-Picher, but could seriously harm the insurance industry if adopted by other courts. The manifestation theory offers a more precise and arbitrary method for insurers to predict liability. Its flaws, however, could backfire and result in greater liability than insurers may have anticipated.

B. The Injurious Exposure Theory

The exposure theory of liability is the approach favored by manufacturers. Exposure proponents contend that liability is triggered from the date the person was initially exposed to the dangerous substance.⁷⁷ The courts who adopt the injurious exposure theory deem bodily injury to have legally occurred upon the first exposure to the hazard.⁷⁸ Therefore, the insurance company whose policy was in effect at the time the plaintiff was exposed is responsible as an indemnitor, even if it no longer covers the insured manufacturer when the suit is brought.⁷⁹

The landmark decision imposing liability on the insurance company based on the injurious exposure theory was *Insurance Company of North America v. Forty-Eight Insulations, Inc.*⁸⁰ The case involved a declaratory judgment action filed by the insurance

74. See *Insurance Coverage for Asbestos Tort Litigation*, J. OF PROD. LIAB. 69, 72 (1982).

75. This question was not resolved in *Eagle-Picher*; the court implied that manifestation could involve a number of symptoms or medical testing results. 682 F.2d at 24-25.

76. *Id.* at 17. It was noted that if uncertainties existed in the policy, the court would consider the extrinsic evidence in a manner most unfavorable to the insurer and impose liability coverage.

77. See generally Reeves, *The Carcinogenic Effect of Inhaled Asbestos Fibers*, 6 ANNAL. CLIN. & LAB. SCI. 459 (1976).

78. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), cert. denied, 454 U.S. 1109 (1981).

79. *Id.*

80. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), cert. denied, 454 U.S. 1109 (1981).

company to determine its liability to an asbestos manufacturer.⁸¹ The manufacturer, Forty-Eight, had held products liability policies from five different insurance companies. Thus, the issue before the court was which of the insurers was obligated to provide indemnification for potential liability.⁸²

The Sixth Circuit Court of Appeals found bodily injury to have legally occurred shortly after the initial inhalation of asbestos fibers.⁸³ Consequently, the insurer providing coverage when the plaintiff was allegedly exposed to the hazardous condition would be responsible as the indemnitor.⁸⁴ The court also held that the insured manufacturer itself was liable for a pro-rata share of damages for any uninsured or self-insured years.⁸⁵ In arriving at its decision, the court distinguished the workers' compensation cases, and relied instead on medical evidence and public policy favoring coverage.⁸⁶

There are several advantages to the injurious exposure theory. The major advantage expounded in *Insurance Company of North America* focused on the fact that this theory reflects the medical evidence that injury occurs either simultaneously or soon after the initial inhalation.⁸⁷ When the fibers enter the respiratory tract they are deposited and lodge in the airways and lung tissue where they build up and cause blockage of the pulmonary functions.⁸⁸ Although the initial occurrence may not cause any pain to the plaintiff or even be capable of medical detection, the court held this was the "bodily injury" necessary to trigger liability.⁸⁹

A further benefit resulting from the injurious exposure theory is the avoidance of the tolling of the statute of limitations. The statute has been reinterpreted to permit the claim even though

81. *Id.* at 1214.

82. *Id.* at 1216.

83. *Id.* at 1223. *See also* APPELMAN, *INSURANCE LAW AND PRACTICES* § 355 (1965).

84. 633 F.2d at 1223-24.

85. *Id.* at 1224-25.

86. *Id.* at 1218-20. *See also* Tijsseling v. General Accident Fire and Life Assurance Corp., Ltd., 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976) (where the court held that damages could be measured and pro-rated to provide at least partial recovery to the claimant).

87. Selikoff, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487, 492 (1976).

88. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, NO. 78-1681, ASBESTOS: AN INFORMATION RESOURCE 34-35 (1978).

89. 633 F.2d at 1218.

the actual discovery or manifestation does not occur until years later. This change upholds the public policy favoring broad availability to claimants who were unaware that they were injured prior to the normal two year statute of limitations.⁹⁰ This is similar to the law of accident insurance, where the process-of-nature rule determines liability coverage.⁹¹ The process-of-nature rule provides coverage in circumstances where the resulting injury does not become apparent until a later date because of the natural development of the condition. The *Insurance Company of North America* court relied heavily on public policy favoring the process-of-nature theory, and construed the statute of limitations so as to impose liability on the insurers as of the exposure date.⁹² The decision saved many manufacturers who would have been unable to pay all of the claims if a manifestation approach were utilized;⁹³ however, the exposure theory itself has many flaws.

The foremost problem with the exposure theory is defining the word "exposure." Similar to the manifestation puzzle, different interpretations have been given to the theoretical idea in its application. Some interpret the word to mean that point in time when the causative substance enters the body—or when inhalation of asbestos fibers occurred.⁹⁴ Others insist that exposure includes not only the initial inhalation, but encompasses the entire period of continuing injury prior to the cessation of inhalation.⁹⁵ The court in *Insurance Company of North America* did not delineate between these two approaches.⁹⁶

The theory raises many questions as to insurer liability. Is the insurer who provided coverage as of the employee's first day of work liable, or is it every insurer whose policy was in effect while that particular employee was subject to the hazard? Also, in most of the cases the initial exposure occurred fifteen to thirty years prior to the filing of the action, when employment records may

90. *Id.* at 1219-20.

91. *Willden v. Washington Nat'l Ins. Co.*, 18 Cal. 3d 631, 557 P.2d 501, 135 Cal. Rptr. 69 (1976).

92. 633 F.2d at 1219-21.

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

94. Brief of Amicus Curiae, Hartford Accident and Indem. Co. at 2, 633 F.2d 1212 (6th Cir. 1980).

95. Brief of Amicus Curiae, Fed. Ins. Co. and Fireman's Fund Ins. Co. at 16, *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981).

96. The confusion between simple exposure and exposure throughout the entire period of inhalation was discussed in the trial court, 451 F. Supp. 1230 (E.D. Mich. 1978), but the two policies were not distinguished. The Sixth Circuit Court of Appeals affirmed this aspect without discussion and merely considered the allocation of damages. 633 F.2d at 1218-20.

have been too sketchy to set the exact date when exposure first occurred.⁹⁷ Liability could not be imposed on an insurer unless it was specifically shown that their policy was in effect on the injury date.

A second drawback in the rationale of the exposure theory involves, as does the manifestation approach, the uncertainty and inaccuracy of medical evidence. The exact effect of substances entering the respiratory tract is not fully understood.⁹⁸ Moreover, medical evidence does not conclusively establish that every exposure to hazardous conditions will necessarily result in damage or disease to the person.⁹⁹ Therefore, the imposition of liability under the exposure theory may lead to fraudulent claims because presumably a manifestation of a subsequent injury would not have to be proven in order to recover.

The manifestation and exposure theories clearly favor either insurers or manufacturers. Neither, however, appears to be an equitable solution for the commercial solvency of both the insurance and manufacturing industries. A third approach to liability combines aspects of the manifestation and exposure theories to form a new judicial mechanism imposing liability for insidious diseases.

C. In Residence or the Continuous Trigger Theory

The third alternative liability theory is the most recent one developed by the courts. The continuous trigger theory is a hybrid of the manifestation and exposure theories. It further attempts to refine the characteristics of both, as it takes into consideration the fact that inhalation exposure, in residence development, and manifestation of the resultant insidious disease *all* trigger liability coverage.¹⁰⁰ The continuous trigger idea adopts the view that the bodily injury required in the policy encompasses any part of the injurious process from the initial first breath of exposure through outward manifestation of the physical disease.¹⁰¹ Therefore, every insurer who provided coverage during any period of the

97. See *supra* notes 22-23 and accompanying text.

98. See *supra* note 88.

99. 633 F.2d at 1219.

100. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

101. *Id.*

disease development will be liable to indemnify the insured manufacturer.

The recent case of *Keene Corp. v. Insurance Co. of North America*¹⁰² developed the continuous trigger theory as a compromise between the earlier injurious exposure and manifestation approaches. Keene Corporation was an asbestos and thermal insulation manufacturer who sought declaratory judgment of the rights and obligations of its four insurers between 1961 and 1980.¹⁰³ Keene, who contended that the policies of each insurer should cover all potential liability,¹⁰⁴ requested a judicial determination of the extent of liability of each policy for asbestos-related suits arising between 1948 and 1972.¹⁰⁵ Each of the insurers prayed for application of either the manifestation or exposure theories.¹⁰⁶

The court sought to resolve the matter and impose liability in an equitable manner.¹⁰⁷ The court held that liability was triggered by initial exposure, and liability continues while the disease was in residence until manifestation.¹⁰⁸ Once the insurance policy was triggered by the injury, the insurer became obligated to pay all sums for which the policyholder was liable,¹⁰⁹ but was also permitted to seek contribution from each other insurer.¹¹⁰ The court absolved Keene itself from any liability, by not requiring it to pay any portion of the damages, even during periods when it was uninsured or unable to provide coverage.¹¹¹

The *Keene* decision was a result of great emphasis being placed on other types of insurance policies. The court rejected the statute of limitation cases¹¹² because they left claimants without a remedy for many meritorious claims.¹¹³ Workers' compensation

102. 667 F.2d 1034.

103. *Id.* at 1038.

104. *Id.* at 1038-39.

105. *Id.*

106. Aetna, INA, and Liberty Mutual argued that coverage should be triggered using a manifestation approach so only the insurer providing coverage at the time of discovery would be liable. Hartford took a different position contending that even though coverage was triggered by inhalation, each company's coverage should be limited by the ratio of its coverage years to the total years of inhalation. 667 F.2d at 1039.

107. *Id.* at 1041. See generally COUCH ON INSURANCE 2d, §§ 15:22, 15:41 (2d ed. Anderson 1959).

108. 667 F.2d at 1047.

109. *Id.*

110. *Id.* at 1050. The court stressed the importance of pro-rata distribution of liability between insurers to give full effect to the "other insurance" clauses of the respective policies.

111. *Id.* at 1047.

112. See *supra* note 73 and accompanying text.

113. 667 F.2d at 1043 n.17 (citing *United States v. Kubrick*, 444 U.S. 111 (1979)).

cases¹¹⁴ were deemed irrelevant, because they relied on the manifestation theory of liability approach which the court pointed out should not override the general rule of law that insurance contracts should be construed so as to provide maximum coverage.¹¹⁵ Instead, the court looked to insurance law cases in holding that the initial injury triggers policy coverage and makes the insurer liable for all resulting harm.¹¹⁶

The *Keene* decision offers advantages over the other liability theories. First, it provides a mechanism to equitably prorate the liability of the numerous insurers who might have written insurance policies during the exposure periods.¹¹⁷ This arrangement is beneficial to both the insurance industry and manufacturers whose products cause insidious diseases. No one insurance company is saddled with the entire burden of liability, as under the other theories, but the arrangement does not provide indemnification to the manufacturer in accordance with the public policy encouraging coverage.

Second, the evidentiary problems of the manifestation and injurious exposure theories are eliminated.¹¹⁸ Using the continuous trigger, the time between the initial exposure and the resulting manifestation is the liability period.¹¹⁹ There is no need for sophisticated or confusing medical testimony to prove when the disease may have arisen. The guessing game of attempting to place or shift dates to avoid liability is eliminated. The continuous trigger approach sets the coverage dates based upon simple records of employment and medical establishment of the disease and resulting death.

Although the advantages and simplicity of the *Keene* decision will probably encourage its future use, there are numerous traps in the application of the holding. First, the case may be too simplistic. Imposing liability from the date of initial exposure during employment¹²⁰ appears easier than attempting to use medical evi-

114. See *supra* note 71 and accompanying text.

115. 667 F.2d at 1043 n.17 (citing *General Dynamics Corp. v. Benefits Review Bds.*, 565 F.2d 208, 212 (2d Cir. 1977)); 667 F.2d at 1043 (citing *Traveler's Ins. Co. v. Cardillo*, 255 F.2d at 145 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955)).

116. 667 F.2d at 1043 n.17 (citing *Wilkins v. Grays Harbor Community Hosp.*, 71 Wash. 2d 178, 427 P.2d 716 (1967)).

117. 667 F.2d at 1050.

118. See, e.g., *supra* notes 75-76 and 94-97 and accompanying text.

119. See *supra* note 101 and accompanying text.

120. *Id.* at 1047.

dence to establish some type of injury, however, employment records made twenty to forty years ago may be inaccurate. Furthermore, the current federal workers' statutes mandating recordkeeping requirements had not yet been enacted. Thus, establishing the initial injury date may be virtually impossible.¹²¹

A second fault with the continuous trigger approach revolves around calculating pro-rata liability among insurers. The average asbestos manufacturer carried nine different liability policies between the years 1940 and 1978.¹²² Added to this situation are the thousands of claims which have been filed,¹²³ and the tremendous amounts at stake.¹²⁴ No court has really attempted to solve this vexatious and complex issue.

Third, the *Keene* decision may favor manufacturers. The court stressed the need to prorate liability among all *insurers*, but, at the same time, totally exempted *manufacturers* from all liability.¹²⁵ Manufacturers were excluded even for years when they chose to self-insure and did not provide coverage.¹²⁶ This position imposes greater burdens on the insurers, who are then forced to "cover" for the manufacturer and pay extra for periods previously not provided for under any policy.

This apparent inequity was the basis for Judge Wald's partial dissent in *Keene*, where he argued that if the manufacturer was voluntarily uninsured during part of the injurious process, it should also participate in liability for the disease.¹²⁷ The above disadvantages suggest that the *Keene* decision of continuous coverage, although perhaps the most effective theory for insidious disease claims, is still far from perfect.

A comparison of the injurious exposure, continuous trigger and manifestation theories indicates the source of confusion in the insurance and manufacturing industries. No one is exactly sure of which liability theory to rely on for future predictions. There is simply no uniform standard of liability for predictability, financial stability, and security.

121. For example, many of the federal laws mandating accurate employment records such as Occupational, Health & Safety Acts were not in force until the late 1960's. Thus, employers either did not or could not keep precise data concerning starting dates, firing, retirement, and employment periods. DEP'T OF HEALTH, EDUCATION AND WELFARE REPORT (June 1981).

122. See *supra* note 15.

123. See *supra* notes 6-9 and accompanying text.

124. See *supra* note 10 and accompanying text.

125. 667 F.2d at 1047.

126. *Id.*

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

IV. CONSEQUENCES OF DIVERGENT LIABILITY THEORIES

Judicial imposition of the manifestation, injurious exposure and continuous trigger theories has resulted in severe and unexpected consequences to both the insurance and manufacturing industries. Thus far, judicial imposition of liability has been without regard for the future solvency of the participants.

A prime example of the panic within the asbestos community is the Johns-Manville case. As a manufacturer of asbestos and asbestos-related products, Johns-Manville had been named, as of January of 1981, in over 16,000 asbestos lawsuits.¹²⁸ Coopers & Lybrand, the accounting firm for Johns-Manville Corporation, qualified the company's 1980 and 1981 financial reports because of doubts about the impact of asbestos litigation.¹²⁹ By August of 1982, over 2,500 new claims had been filed, and the company had tentatively settled millions of dollars of previous claims. Legal costs in defense of other claims were mounting, as the company held back payment of its judgments, hoping for new liability rulings by the various circuits to aid their situation. Finally, in the fall of 1982, Johns-Manville filed a petition for protection under Chapter 11 of the Bankruptcy Code.¹³⁰ Both the insurance and manufacturing industries have taken great interest in the action of Johns-Manville. Listed among its liabilities were not only the amount of judgments and settlements rendered against the company, but also an estimated sum representing what amounts could become due in subsequent bad faith litigation.

The good faith aspect of claims settlement is of major concern to insurers involved with insidious disease actions. Not only are the actions being concluded with large sums being awarded, but the original claimants are filing bad faith actions when companies drag their feet in payment.¹³¹ The alternate theories of liability have a great impact on this phenomena as the courts are split on which theory to adopt, and companies attempt to use this confusion to their advantage. In fact, the gravest concern in the bad

128. New York Times, August 27, 1982, § A at 1, col. 6. See also Comment, *The Manville Corporation Bankruptcy: An Abuse of Judicial Process?*, 11 PEPPERDINE L. REV. 151 (1983).

129. Legal Times, March 30, 1982 at 1.

130. Wall Street Journal, Oct. 7, 1982, at 1, col.2.

131. An adjudication of bad faith in claims settlement makes the insurer liable for treble damages. In fact, one state court has already granted an asbestos claimant the augmented damage award because his insurer did not settle in good faith. See *Hammond v. North Am. Asbestos*, 105 Ill. App. 3d 1033, 435 N.E.2d 226 (1982).

faith litigation is the fact that it may subject the company to treble punitive damages on top of the judgment already owing. For example, a trial court in Indiana¹³² recently awarded punitive damages to the plaintiff for lack of good faith by the manufacturer in settlement and payment of an asbestos claim. Meanwhile, the Supreme Court continues to refuse to grant certiorari for an insidious disease action.

At this point, it is not unlikely that other manufacturers will follow Johns-Manville into the bankruptcy court. If Johns-Manville is permitted to reorganize and possibly reduce or be absolved of its payment or settlement amounts, this will set a major precedent for the industry. Manufacturers may be encouraged to follow suit to avoid the financial burdens of litigation. This would serve to frustrate injured plaintiffs in their search for relief and would place an even heavier burden on non-filing insurers who will become ultimately liable for the claims.

The alternate theories of liability have made it almost impossible for insurance companies to estimate their reserves and the necessary premium charges to ensure adequate liquidity to pay the claims as they become due.¹³³ Also, with the judiciary's use of alternate theories, it has become difficult to establish a precise contribution formula. The continuous trigger theory does not mandate contribution from the manufacturer,¹³⁴ whereas the manifestation and injurious exposure theories impose contribution liability on the manufacturer for uninsured periods. Thus, for almost every new decision by the circuit courts, a new mathematical calculation of contribution from co-defendants is required. This lack of a uniform standard imposes severe time restraints on an insurance company in calculating, contributing and paying claims to avoid bad faith litigation.

With the Supreme Court thus far refusing to accept petitions on the liability issue, another method must be propounded to settle the insidious disease claims in a timely fashion. A proposed trust fund theory of payment is being closely analyzed and even adopted as a means to equitably solve the plethora of actions against insurers and manufacturers.

132. *Insurance Co. of N. Am.*, 633 F.2d 1212; *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Proter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Keene Corp. v. Insurance Co. of N. Am.*, 682 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

133. *Insurance—Negligence and Compensation Law Proceedings*, 68 A.B.A.J. 137 (1982).

134. *See supra* note 79 and accompanying text.

V. THE PROPOSED TRUST FUND SOLUTION

With the vast number of cases filed and the staggering sums being awarded, this trend simply cannot continue. Of the over 30,000 asbestos related claims already concluded, the average award has been \$22,000 per claimant.¹³⁵ Clearly these liability amounts are climbing faster than any insurance reserves or assets can match and there simply is not enough to provide total coverage for every claim. In order to avoid more actions like that of Johns-Manville, a new and alternative system of proportioning liability and establishing a trust fund for payments should be invoked by both insurers and manufacturers.

The trust fund concept was first introduced in asbestos claims in a 1978 Texas Supreme Court decision¹³⁶ which established a \$20 million trust fund for 445 asbestos workers. The awards were based on exposure time and relative severity of the disease. Another recent settlement established a \$9.4 million fund for 680 workers exposed to asbestos prior to 1973.¹³⁷ Establishment of trust funds may be the best answer to the staggering liability threatening the involved industries.¹³⁸

A trust fund concept is capable of accomodating any theory of liability. Although circuit courts may vary on the appropriate liability approach, a trust fund system would not only establish a constant and predictable mechanism for both insurers and manufacturers, but would be capable of consistent application. By adopting one formula for contribution purposes, using a sliding scale for relevant time periods, a uniform and timely standard could be utilized within each circuit.¹³⁹ A circuit following the injurious exposure theory, for example, would merely calculate the number of manufacturers and insurers involved during exposure periods and the applicable number of years as an insurer or uninsured manufacturer. The total expected dollar amount of claims would then be apportioned among the insurers and manufactur-

135. TASK FORCE REPORT ON ASBESTOS COMPENSATION, U.S. DEPT. OF LABOR (May 1981). That figure is the result of more than 30,000 claims which have been settled.

136. *Glover v. Johns-Mansville*, 662 F.2d 225 (4th Cir. 1981).

137. *Wall Street Journal*, Aug. 17, 1982, at 1, col. 2.

138. See *Asbestos Litigation: Common Sense or Common Disaster?* 54 N.Y. ST. B. J. 24 (1982).

139. *Id.* at 27.

ers who would contribute to the fund for the benefit of the claimants.

An additional benefit of the trust fund concept is the certainty afforded to both insurers and manufacturers in this otherwise unpredictable area. By pledging contributions to the fund, insurers would be able to more accurately predict their reserve requirements and liquidity positions. Manufacturers would have more security and stability in their financial status and reporting of liability matters. Both industries would spend far less for both legal defense costs and time expended in complex and repetitious litigation.¹⁴⁰

In order to utilize the trust fund approach, however, standards of exposure and manifestation would have to be established. The courts or some type of representative panel would have to mandate a uniform method to ascertain exposure and manifestation to trigger trust fund payments. This would entail sifting through all of the medical evidence and tests to determine exactly what would constitute exposure or manifestation. Once this finding was made, however, it could be used as the basis of administering a trust under any of the three liability theories.¹⁴¹

The use of a trust fund has been successfully employed in some asbestos claims,¹⁴² and can be equally applicable to other types of insidious disease claims. A trust fund brings certainty to manufacturers and insurers, while providing plaintiffs with a fair and timely disposition of claims.

VI. CONCLUSION

The insurance and manufacturing industries are threatened by the increasing number of insidious disease claims being filed, as well as the amounts at stake. Manufacturers and insurers have, not surprisingly, disagreed over how to impose liability. The courts have responded by developing three different theories of liability imposition. The First Circuit has used a manifestation theory imposing liability on the insurer from the date the disease was discovered. The Sixth Circuit follows the injurious exposure theory placing the duty to indemnify on the insurer from the time of initial exposure. The D.C. Circuit has recently put forth the in residence or continuous trigger approach where all insurers are

140. The average asbestos claim costs each defendant over \$43,000 in legal fees and takes approximately thirty-one months to conclude. ASBESTOS LITIGATION REP., Update, Sept. 1982.

141. The first suggestion of using arbitrary standards for determining exposure and/or manifestation was made by a dissenting judge in the *INA* case. 633 F.2d at 1231 (Merritt, J., dissenting).

142. See *supra* notes 138-39 and accompanying text.

proportionately liable from the time of initial exposure until final manifestation. Nonetheless, the Supreme Court has refused all opportunities to resolve the three conflicting theories.

The consequences due to the lack of a uniform liability standard have been harsh. One major manufacturer has already filed for protection from creditors and financial reorganization.¹⁴³ Insurance companies are suffering from the inability to predict premiums in order to pay out claims and still maintain financial security. Furthermore, insurers are being subjected to bad faith actions for failure to make prompt payment and have been threatened with the possibility of treble punitive damages.

The trust fund system is the best answer to the dilemma. Once basic evidentiary standards are decided, the trust fund can be broadly applied to any theory of liability. Employment of a trust fund would organize and equitably terminate insidious disease litigation in a timely fashion for both claimant and insurer. A systematically applied trust fund would restore the predictability necessary to ensure both reasonably stable insurance premiums and adequate compensation to claimants.

SUSAN FRANKWICH

143. Comment, *The Manville Corporation Bankruptcy: An Abuse of Judicial Process?*, 11 PEPPERDINE L. REV. 151 (1983).

