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# COMMENTS

## LIABILITY INSURANCE FOR INSIDIOUS DISEASE: WHO PICKS UP THE TAB?

### INTRODUCTION

The growth of industrial sophistication and the enormous strides in medicine over the last fifty years have yielded countless benefits to ease the burdens of daily living. At the same time, however, exposure to the by-products of these triumphs has planted in the bodies of untold numbers of people the seeds of insidious disease[1] that may not become evident for decades.[2] There is strong evidence that in many instances manufacturers were aware of potential health hazards but failed to obviate the dangers or, when this was not feasible, to warn adequately of their presence.[3]

Accordingly, this breach of the legal duty to act with reasonable care invokes the full panoply of product liability litigation.[4] This system has evolved rather well-defined rules for determining the circumstances under

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1. An insidious disease is one that "progresses with few or no symptoms to indicate its gravity." Stedman's Medical Dictionary 711 (4th unabr. lawyers' ed. 1976). In 1930, Dr. Merewether, a pioneer in the area of occupational diseases, demonstrated the particular aptness of this term as a description of the pathogenesis of asbestosis. "This disease, insidious in its onset, stealthily advances with but faint warnings of its progress; inexorably it cripples the essential tissues of the lungs, yet for a considerable period causes almost no inconvenience to the worker. As time goes on, however, the lungs find more and more difficulty in re-aerating the blood; and breathing is quickened on slight exertion. Still the worker is able to remain at work, but is aware of his undue shortness of breath on extra effort. Usually, however, he ascribes it to causes other than the dust he is inhaling.

"As the disease progresses, if no acute illness has caused a fatal termination, a stage is reached when the lungs can do little more than maintain life; and the shortness of breath is extreme. Even in its terminal stages, the disease, deceitful to the last, may masquerade as chronic bronchitis, pulmonary tuberculosis, bronchopneumonia, or the like." Merewether, *The Occurrence of Pulmonary Fibrosis and Other Pulmonary Affections in Asbestos Workers*, 12 J. Indus. Hygiene 198, 201-02 (1930).

2. Selikoff, *Widening Perspectives of Occupational Lung Disease*, 2 Prev. Med. 412 (1973) [hereinafter cited as *Widening Perspectives*]. "[I]n many instances, disease now being seen is the result of work conditions in the 1920's, 1930's, and 1940's. . . . By the same token, exposures today will be reflected in disease in the year 2,000 . . . ." *Id.* at 430-31.

3. *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 175-78 (1949) (silica dust); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1087-89 (5th Cir. 1973) (asbestos), *cert. denied*, 419 U.S. 869 (1974); Needham v. White Labs., Inc., No. 76-1101, slip op. at 15 (N.D. Ill. Jan. 10, 1980) (dienestrol—synthetic estrogen); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 706-07, 60 Cal. Rptr. 398, 411 (1967) (MER/29—cholesterol reducer); Sadowski v. Long Island R.R., 292 N.Y. 448, 455-56, 55 N.E.2d 497, 500-01 (1944) (silica dust); McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 391-98, 528 P.2d 522, 531-34 (1974) (oral contraceptive).

4. In 1916, Judge Cardozo announced the doctrinal basis of product liability law: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. . . . We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law." MacPherson v. Buick Motor Co., 217 N.Y. 382, 389-90, 111 N.E. 1050, 1053 (1916).

which liability for damages will be imposed.[5] Thus, a manufacturer may be held liable either in negligence or in strict liability for injuries sustained as a result of exposure[6] to a hazardous substance, even though the plaintiff's disease may not become manifest for many years.[7]

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5. For a general discussion of the development of product liability in negligence and warranty, see W. Prosser, Handbook of the Law of Torts §§ 96-104 (4th ed. 1971). With the acceptance of § 402A of the Restatement (Second) of Torts (1965), the rules for grounding a cause of action for defective products in strict liability were firmly established. Section 402A provides that a seller of a product "in a defective condition unreasonably dangerous" will be held strictly liable in tort for any physical injuries caused by that product, notwithstanding the due care that might have been taken in preparing and selling the product and a lack of privity with the user or consumer. *Id.* The nature and evolution of strict liability has been the subject of much critical discussion. *See, e.g.,* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication,* 73 Colum. L. Rev. 1531 (1973); Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products,* 27 S.C.L. Rev. 803 (1976); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 Yale L.J. 1099 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 Minn. L. Rev. 791 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 Tenn. L. Rev. 363 (1965); Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age,* 61 Cornell L. Rev. 495 (1976); Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825 (1973). Strict liability for defective products has been adopted in most jurisdictions, either by judicial decision or by statute. *See* 1 Prod. Liab. Rep. (CCH) ¶¶ 4015, 4016 (state-by-state survey of the doctrine of strict liability in tort).

6. Depending upon the particular substance, the period of exposure may be extraordinarily brief, as in the case of a chemical injected into the body for diagnostic or therapeutic purposes. *See* Thrift v. Tenneco Chems., Inc., 381 F. Supp. 543, 544 (N.D. Tex. 1974) (thorium dioxide—radioactive roentgen contrast medium). The exposure may take place over the period of a few weeks or a few years in the case of different preventive therapies. *See* Needham v. White Labs., Inc., No. 76-1101, slip op. at 1 (N.D. Ill. Jan. 10, 1980) (dienestrol—synthetic estrogen); McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 382-83, 528 P.2d 522, 527 (1974) (oral contraceptive). Conversely, the exposure may continue for ten years or more, such as when industrial workers are exposed to asbestos or silica dust. For cases involving asbestos exposure, see Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 156 (8th Cir. 1975) (18 years of exposure); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973) (33 years of exposure), *cert. denied,* 419 U.S. 869 (1974); Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 883, 159 Cal. Rptr. 113, 114 (1979) (30 years of exposure); Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497, 498 (Ky. 1979) (10 years of exposure); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 72, 394 A.2d 299, 300 (1978) (15 years of exposure). For cases involving exposure to silica dust, see Urie v. Thompson, 337 U.S. 163, 165-66 (1949) (30 years of exposure); Sadowski v. Long Island R.R. Co., 292 N.Y. 448, 451-52, 55 N.E.2d 497, 498 (1944) (16 years of exposure). If the plaintiff can establish in any of these instances that the manufacturer was negligent in failing to warn adequately of the danger or that the substance was defective and unreasonably dangerous and that there exists a causal relationship between his injury and exposure to the hazardous substance, he may succeed in a suit against the manufacturer. *See, e.g.,* Urie v. Thompson, 337 U.S. 163, 175-80 (1949); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1091-92 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974); Davis v. Wyeth Labs., Inc., 399 F.2d 121, 126-27 (9th Cir. 1968).

7. *See* note 6 *supra.* The basis for the plaintiff's suit, whether grounded in negligence or strict liability, will often be that the manufacturer knew, or in the exercise of reasonable diligence should have known, of a real or potential danger and failed to warn adequately or at all. *See, e.g.,* Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 156-57 (8th Cir. 1975); Borel v.

Because of the long latency period that characterizes insidious diseases, injured plaintiffs may be barred from asserting their claim because the applicable statute of limitations has run by the time they are aware, not only of their illness, but also that some causal link exists between the disease and the exposure to the manufacturer's product.[8] Many courts, however, have applied a discovery rule to cases involving latent injury.[9] Under this rule, a

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Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 381, 528 P.2d 522, 526 (1974). "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . as to its use." Restatement (Second) of Torts § 402A, Comment j (1965). Even if a product is safe for normal handling or consumption, if the seller "has reason to anticipate that danger may result from a particular use . . . he may be required to give adequate warning . . . and a product sold without such warning is in a defective condition." *Id.*, Comment h. The same rule applies to those products that are unavoidably unsafe. A seller will be subject to liability for "products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use" only if he fails to warn properly of the dangers. *Id.* Comment k.

8. In Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 200 N.E. 824 (1936), for example, plaintiff's lung disease, pneumoconiosis, allegedly developed as a result of a negligent accumulation of dust during his employment. *Id.* at 297-98, 200 N.E. at 825-26. No manifestation of the disease appeared for many years, however, and the New York Court of Appeals held that the plaintiff's action was time-barred. "[T]he statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Id.* at 300, 200 N.E. at 827. Therefore, liability arose when the plaintiff was negligently exposed to the dust. *Id.* at 301, 200 N.E. at 827. Recently, the New York Court of Appeals reaffirmed the *Schmidt* rule in substance in Thornton v. Roosevelt Hosp., 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979). "It is well established in this State that when chemical compounds are injected into a person's body, the injury occurs upon the drugs introduction, not when the alleged deleterious effects of its component chemicals become apparent. Here, plaintiff's claim being interposed some 20 years after the decedent's injection—the date of injury—the action is time-barred . . . ." *Id.* at 781, 391 N.E.2d at 1003, 417 N.Y.S.2d at 922 (citation omitted).

9. The Supreme Court, in an early case involving silicosis, announced the policy rationale underlying the application of a discovery rule. In Urie v. Thompson, 337 U.S. 163 (1949), a fireman on a steam locomotive had been exposed to silica dust for 30 years before he began to experience any symptoms of disease. *Id.* at 165-66. Soon after being diagnosed as suffering from silicosis, he brought suit pursuant to the Federal Employers' Liability Act of 1908, 45 U.S.C. §§ 51-60 (1976), which had a three-year statute of limitations. 337 U.S. at 166-67. The Court noted: "If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

. . . .

"We do not think the humane legislative plan intended such consequences to attach to blameless ignorance." *Id.* at 169-70. The Court held that for purposes of the statute of limitations, a plaintiff would not be deemed injured until the disease manifested itself. *Id.* at 170-71. The decision in *Urie* thus removed a major obstacle confronting victims of insidious disease.

cause of action accrues for statute of limitations purposes when the disease is manifest.[10]

This accommodation to victims of insidious disease has been problematic for the insurance industry. Because of the latent nature of the plaintiff's injury, it is often difficult, if not impossible, to determine the precise time during exposure to a hazardous substance that the plaintiff sustained injury. A manufacturer's insurance coverage, however, depends upon this very finding. Typically, the comprehensive general liability (CGL) policy that the manufacturer will apply to the plaintiff's recovery in the underlying product liability suit limits coverage to damages arising out of bodily injury that occurs during the policy period.[11] Over the years of exposure and insidious development of the disease, the manufacturer that is ultimately sued by an injured plaintiff has had numerous insurance policies with a succession of different carriers.[12] The question of when the injury or disease occurred, and therefore, when the plaintiff was actually injured, is essential to the determination of which insurers the manufacturer can look to for a defense to the action and which insurers will be required to indemnify the manufacturer if the plaintiff succeeds.[13]

With the vast number of lawsuits now being filed for damages arising out of exposure to hazardous substances that began many years ago,[14] the controversy over insurer liability has become acute.[15] This Comment examines

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10. *See* notes 62-71 *infra* and accompanying text. For a comprehensive discussion of the application of a discovery rule to latent injury cases, see Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases,* 13 Forum 279 (1977); Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations,* 56 N.C.L. Rev. 663 (1978).

11. A comprehensive general liability insurance policy provides, in pertinent part, that "the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . . ." National Bureau of Casualty Underwriters, Standard Provisions for General-Automobile Liability Policies CGL-2 (Feb. 1, 1966) (emphasis omitted) [hereinafter cited as Standard Policy]. *See also* notes 178-89 *infra* and accompanying text.

12. *See, e.g.,* Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1234-36 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978) (from 1955 to 1972 Insurance Co. of N. America provided coverage under six different policies; from 1972 to 1975 Affiliated FM Insurance Co. provided coverage under three different policies; from 1975 to 1976 Illinois National Insurance Co. covered the risk; during 1976 Travelers Indemnity Co. of Rhode Island provided coverage; and from 1976 to 1978, Liberty Mutual Insurance Co. provided coverage).

13. The impact of the problem of successive insurer liability extends deep into the insurance industry, touching excess insurers and reinsurers that, over the years, either shared risk with the primary product liability carrier or provided the manufacturer with additional layers of coverage. *See* Interagency Task Force on Product Liability, U.S. Dep't of Commerce, 1 Final Report of the Insurance Study 1-16 to 1-18 (1977) [hereinafter cited as Task Force Report].

14. *See* notes 41-42 *infra* and accompanying text.

15. In the recent litigation between carriers and their insureds that has dealt with this question, two basic theories of successive insurer liability have emerged. Under the manifestation theory, only the carrier on the risk at the time the injury or disease became manifest will be

the issue of successive insurer liability in the context of asbestos litigation and analyzes the CGL insurance policy to determine whether a solution can be extrapolated from the terms of that policy. The validity of analogizing the policy rationales and theories of liability employed in other areas of the law to the issue of insurance coverage is also discussed. Finally, a proposal is offered for justly and practically accommodating the rights and obligations of the parties to a CGL policy in cases of insidious disease.

## I. CONTOURS OF THE INSURANCE CONTROVERSY

### A. *The Parties*

An underlying lawsuit against the manufacturer might arise out of a situation similar to the following hypothetical.[16] An asbestos insulation worker was exposed to Manufacturer X's hazardous substance over a period of thirty years, commencing in 1940. The manufacturer failed to provide adequate warnings of the potential health hazards known to be associated with exposure to asbestos. In 1965 the first symptom of ill-health—shortness of breath upon exertion[17]—appeared, but the worker considered it only a trivial annoyance, not a precursor of disease. In mid-1975 the worker began experiencing a dry cough, but he declined to seek medical advice.[18] His health[19] deteriorated rapidly during the winter of 1978-1979, and he was finally diagnosed as terminally ill in late 1979, purportedly as a result of

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liable. Under the exposure theory, all carriers on the risk from the time of initial exposure through manifestation will be jointly and severally liable. These theories have long been applied for various social and judicial policy reasons in the areas of worker compensation law, health and accident insurance cases, and latent injury tort cases.

16. To provide a concrete conceptual framework for the analysis of the difficult problems that arise when there are multiple but successive insurance carriers on a risk involving liability for insidious disease, this discussion will focus on asbestos-related diseases as the basis for the underlying tort liability.

17. Shortness of breath upon exertion, the earliest and most prominent clinical manifestation of asbestosis, rarely becomes evident until at least 10 years after initial exposure to asbestos dust. Typically, it is not until after 20 years of exposure that the symptom is commonly seen. Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 Annals N.Y. Acad. Sci., 139, 147 (1965) [hereinafter cited as *Occurrence of Asbestosis*].

18. In 1930, Dr. Merewether described the nature and prevalence of the cough symptom in asbestos workers, noting that it "causes very little inconvenience and may pass unnoticed until the development of some other symptom directs attention to the general state of health." Merewether, *supra* note 1, at 211. In a recent case before the California Court of Appeal, the plaintiff had worked with asbestos insulation materials for 30 years before becoming disabled by asbestosis in 1974. During a periodic physical examination in 1971, doctors were able to make an unequivocal diagnosis of moderately severe asbestosis. Although plaintiff was at that time experiencing a cough and shortness of breath, he told the examining physicians that he was "feeling good." It was not until two years later that he experienced any discomfort in his chest or unusual fatigue, whereupon he sought medical treatment. Velasquez v Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 883-84, 159 Cal. Rptr. 113, 114-15 (1979).

19. For a detailed description of the early clinical symptomatology in 14 case studies of asbestos workers, see Merewether, *supra* note 1, at 216-21. *See also* J. Crofton & A. Douglas, Respiratory Diseases 487 (1969); U.S. Dep't of Health, Education, and Welfare, No. 78-1681, Asbestos: An Information Resource 34-35 (1978) [hereinafter cited as Asbestos Monograph]

injurious exposure to the manufacturer's product. After the worker's death, plaintiff brings a strict liability action in 1980 against the manufacturer on the basis of failure to warn.

Manufacturer X has been successively insured over the years under different policies by different carriers, each of which provided one form or another of comprehensive general liability coverage. Although the policies differ in some details, they all generally agree to pay on behalf of the insured any damages for which it becomes liable as a result of bodily injury occurring during the policy period.[20] Since 1940 the following insurers have been on the risk: Carrier A, 1940 to 1950; Carrier B, 1951 to 1965; Carrier C, 1966 to 1976; Carrier D, 1977 to 1978; and Carrier E, 1979 to 1980.

A controversy arises over which insurer will assume the defense and which will indemnify the manufacturer if plaintiff succeeds.[21] Each may disclaim liability: Carrier A claims that "no bodily injury occurred during my policy period,"[22] while Carrier B contends that "breathlessness is not a bodily injury."[23] Carrier C argues that "decedent had no actual injury during my policy period, and did not even know he was sick."[24] Carrier D disclaims because "decedent was not diagnosed as having any disease during my policy period,"[25] and finally, Carrier E states that "I cannot be liable because I was

20. *See* note 11 *supra* and accompanying text.

21. The facts suggested in the hypothetical are a composite model drawn from the few insidious disease cases that have already come before the courts in contests over insurer liability. *See* Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978); Porter v. American Optical Corp., No. 75-2202 (E.D. La. Nov. 23, 1977), *appeal docketed,* No. 78-1953 (5th Cir. May 5, 1978); American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc., 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

22. "With respect to asbestosis, which medically is fibrotic lung impairment and nothing more, first symptomatology is almost by definition the commencement of disease. After all, in the absence of some evidence of impairment . . . it is difficult to state or to conclude that a claimant's lungs are functionally diminished or that the claimant is diseased." Brief of Appellant Insurance Co. of N. America at 14, Insurance Co. of N. America v Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978).

23. "[A]n appropriate business sense of the agreement would wish to identify the insurable event as the occurrence of some *compensable* injury, for it is against that eventuality and not microscopic tissue changes, let alone microscopic tissue changes without functional impairment, that insurance is surely purchased." Brief of Amici Curiae, Federal Ins. Co. & Fireman's Fund Ins. Co. at 16, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978) (emphasis in original).

24. "[T]he definitions . . . of bodily injury and occurrence require that the incident happen 'during the policy period'. The principal purpose of this requirement is to put the burden of loss upon the insurer at the time of *actual injury*. . . . [I]t would be illogical to require an insurance carrier to provide coverage for a time when a person may not know that the injury or disease exists . . . ." Brief for Defendant/Appellant Affiliated FM Ins. Co. at 13, 15, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978) (emphasis in original).

25. "[T]he key in defining 'occurrence' is in determining, without engaging in speculation or conjecture, at what point in time there is a medically diagnosable injury. When that point in time is known, coverage is determined by the applicable policy period." Brief for Defendant/Appellant Illinois Nat'l Ins. Co. at 6-7, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978).

not on the risk during any part of decedent's exposure."[26]

The litany of disclaimers announced by the carriers has been tested under the laws of Louisiana, Michigan, and New York with inconsistent results. In Louisiana, for example, the burden of defending and indemnifying would most likely fall only on Carrier C, although there is a possibility that all would escape liability. In *Porter v. American Optical Corp.*,[27] the manufacturer of a respirator and filter apparatus designed for use by asbestos workers had been found liable in an underlying lawsuit for damages sustained by the plaintiff, whose asbestosis was linked to the defective equipment.[28] The issue before the court was which of the manufacturer's insurers during the period from plaintiff's initial exposure to asbestos until his ultimate death from the disease would be liable for the judgment.[29] Although the court recognized the slowly progressive nature of the disease, it determined that there could be no bodily injury within the meaning of the terms of the insurance policy prior to manifestation of the disease.[30] Thus, the insurer who had been on the risk for most of the twenty years of the plaintiff's exposure had no liability because no symptoms of illness appeared during this period. The insurer on the risk at the time of diagnosis was also free from liability because the plaintiff had already become disabled and was no longer being exposed to asbestos during its policy period.[31] The only insurer held liable was the one on the risk during the three years in which the plaintiff was undergoing both exposure to asbestos and treatment for respiratory problems related to his illness.[32] As applied to the hypothetical, the *Porter* reasoning suggests that unless the court accepts the initial symptom of shortness of breath as a sufficient manifestation of disease, there might be no insurer liable for the judgment because other than Carrier C, no insurer was on the risk at the time of both exposure and manifest illness.

In Michigan, however, insurer liability in the hypothetical could be determined with greater surety. Applying the court's analysis in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[33] only Carriers A, B, and C would be liable. In *Forty-Eight Insulations*, the court analyzed the medical evidence relating to asbestos diseases and reasoned that bodily injury or damage begins with initial exposure and continues to occur throughout exposure.[34] "Consequently, each insurer on the risk when a currently diseased

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26. "[I]nsurance coverage for asbestos-related claims must be based on 'injurious exposure' to asbestos and not on 'manifestation' of the injury . . . ." Brief of Amicus Curiae Hartford Accident & Indem. Co. at 2, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978).

27. No. 75-2202 (E.D. La. Nov. 23, 1977), *appeal docketed*, No. 78-1953 (5th Cir. May 5, 1978).

28. *Id.* at 1.

29. *Id.* at 2.

30. *Id.* at 3-5.

31. *Id.* at 6.

32. *Id.* at 4-5.

33. 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed*, Nos. 78-1322 to 1326 (6th Cir. July 21, 1978).

34. *Id.* at 1237.

plaintiff was allegedly exposed is obligated to acknowledge coverage and to provide a defense and possibly indemnification."[35]

The radically different approach of a New York court would probably fix liability on Carrier E alone, although Carrier D might also have to share coverage. *American Motorists Insurance Co. v. E.R. Squibb & Sons, Inc.*,[36] did not involve asbestos-related diseases, but the decision is nevertheless instructive on the question of insurer liability for insidious diseases. The mothers of three female plaintiffs ingested Diethylstilbestrol (DES) during their pregnancies in 1952, 1953, and 1961, respectively. The daughters developed cervical cancer in 1970, 1971, and 1975.[37] Examining disability and health insurance cases for guidance, the court noted that in New York, "disease or bodily injury does not include a latent condition which fails to manifest itself, but arises only when revealed."[38] Thus only the insurer on the risk when the plaintiffs' cancers became manifest would be liable, even though the exposure to DES had not occurred while this insurer was on the risk.[39]

Different courts have thus responded inconsistently to the controversy over insurer liability in insidious disease cases. The resultant confusion, with manufacturers uncertain of their coverage and insurers uncertain of their obligations to defend and indemnify, is exacerbated by the magnitude of current and future litigation.[40] Manufacturers and their insurers have reported that thousands of suits have been brought on claims arising out of exposure to asbestos.[41] One manufacturer alone is reported to be named in

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35. *Id.* at 1239.

36. 95 Misc. 2d 222, 406 N.Y.S.2d 658 (Sup. Ct. 1978).

37. *Id.* at 223, 406 N.Y.S.2d at 659.

38. *Id.* at 225, 406 N.Y.S.2d at 660. *See also* note 8 *supra.*

39. "It is the *result* which is keyed to the policy period, and not the accident or exposure." 95 Misc. 2d at 224, 406 N.Y.S.2d at 660 (emphasis in original).

40. One medical researcher has noted that "[t]he first case involving asbestos and human disease was recorded in 1907; the first case in the United States was reported in 1930. Protective standards were not adopted, however, until 1972. The extent of occupational and nonoccupational exposure is unknown, but the use of asbestos in the manufacture of cement pipes, sheets, shingles, floor tiles, millboard, roofing felts, pipe covering, insulation paper, flooring felts, friction and packing material, paints, roof coatings, caulks, sealants, safety clothing, curtains, brake linings, clutch facings, spray insulation, asphalt paving, welding rod coatings, and filter mediums in the pharmaceutical and beverage industries results in widespread exposure of the entire population. Such exposures have resulted in lung and pleural carcinoma and mesothelioma." Haley, *Asbestosis: A Reassessment of the Overall Problem,* 64 J. Pharm. Sci. 1435, 1441 (1975) (footnotes omitted).

41. In six pending declaratory judgment actions that involve the question of successive insurer liability for claims alleging asbestos-related diseases, more than 30 different insurance companies have been joined in the proceedings. *See* GAF Corp. v. Insurance Co. of N. America, No. 78-0461 (D.D.C. Dec. 3, 1979) (action dismissed), *appeal docketed,* No. 79-2560 (D.C. Cir. Dec. 27, 1979); Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., No. 78-2739-Z (D. Mass., filed Oct. 17, 1978); Keene Corp. v. Insurance Co. of N. America, No. 78-1011 (D.D.C., filed July 6, 1978); Zurich Ins. Co. v. Raybestos-Manhattan, Inc., No. 78-8760 (Cir. Ct. Ill., filed Apr. 28, 1978); Insurance Co. of N. America v. Nicolet Indus., Inc., No. 77-971955 (Ct. C.P. Ohio, filed July 6, 1977); Crown Cork & Seal Co. v. Aetna Cas. & Sur. Co., No. 1292 (Ct. C.P. Pa. Sept. 1978). The experience of some of the insurers and manufacturers named in the above

more than 2,900 pending lawsuits.[42] Furthermore, there is evidence that future suits will far exceed the number of those currently filed. The output of asbestos during the last fifty years has increased a thousandfold,[43] and the more than 3,000 uses of asbestos currently known[44] involve the employment of millions of workers.[45] One noted team of medical researchers warned in 1967 that "[t]he [tumors] associated with current utilization and exposure to asbestos will not be evident until the 1990's."[46] Moreover, future litigation may well involve plaintiffs who, though not industrial workers, were nevertheless exposed to asbestos as a consequence of their employment.[47]

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actions provides a telling index to the magnitude of the problem. By February 1977, Forty-Eight Insulations, an asbestos insulation manufacturer, had been named in 251 lawsuits that arose out of injury or death as a result of lung diseases allegedly caused by exposure to the company's products. By mid-December 1978, the number of lawsuits had grown to 806. Brief for Defendant/Appellee-Cross Appellant Forty-Eight Insulations, Inc., at 5 & n.1., Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). By the end of July 1979, nearly 1,370 suits had been filed against Forty-Eight Insulations. Reply Brief for Defendant/Appellee-Cross Appellant Forty-Eight Insulations, Inc., at 1 n.1, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). In 1979, a former manufacturer of asbestos products, Combustion Engineering, reported that in the prior five years "hundreds" of suits had been filed against it. Brief of Amicus Curiae on Behalf of Combustion Engineering, Inc., at 3 n.2, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). This is particularly alarming because the company sold products containing asbestos only from mid-1963 to 1972. *Id.* at 3. The company also indicated that since 1976, it has been unable to purchase insurance to cover future claims based on exposure to its asbestos products. *Id.* at 3 n.3. The Keene Corporation, a successor to various companies whose insulation products contained asbestos, has been named in more than 1,500 personal injury suits. Brief of Amicus Curiae on Behalf of Keene Corp. at 2, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). In 1979, Keene reported that it no longer had primary liability insurance to cover asbestos cases and that it could not obtain such insurance. *Id* at 3. The only coverage it has been able to secure from its insurer is claims management services. *Id.* at 4. Liberty Mutual Insurance Company reports that it was defending 3,200 suits in October, 1978, and that the number grew to approximately 6,500 cases by June 1979. Reply Brief of Appellant Liberty Mut. Ins. Co. at 2 & n.2, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978).

42. Telephone Interview with Leonard Andrews, Publisher, Asbestos Litigation Reporter (Feb. 23, 1980) ("According to our records there are between 2,900 and 3,000 lawsuits now pending against [Johns-Manville]").

43. Reeves, *The Carcinogenic Effect of Inhaled Asbestos Fibers*, 6 Annals Clin. & Lab. Sci. 459, 461 (1976).

44. Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 Am. J. Med. 487, 492 (1976) [hereinafter cited as *Asbestosis and Neoplasia*]. For a general discussion of the various industrial uses of asbestos, see Asbestos Monograph, *supra* note 19, at 41-49.

45. Haley, *supra* note 40, at 1435 ("primary exposure in the insulation industry results in secondary exposure to between 3 and 5 million workers in the construction and shipyard industries" (footnote omitted)); Asbestos Monograph, *supra* note 19, at 41-42.

46. *Asbestosis and Neoplasia, supra* note 44, at 494. Similarly, the latency period associated with asbestosis is also quite long, with clinical symptoms rarely becoming evident in less than one or two decades. *Id.* at 488.

47. In the recent case of Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978), the plaintiff was employed from 1940 to 1955 as a secretary by a company that fabricated and installed asbestos products. *Id.* at 72, 394 A.2d at 300. Mrs. Harig left her job in 1955 and

The confusion over insurer liability is augmented not simply by the number of lawsuits that arise, but by the number of insurers that are likely to be involved in any one of these suits.[48] Accordingly, the following facts, based on cases that have already been litigated,[49] may be added to the hypothetical posed above to suggest the broad scope of the insurer controversy. The decedent's employment as an asbestos installer actually exposed him not just to the products of Manufacturer X, but also to those of ten additional manufacturers, all of which the plaintiff joins as defendants. Like Manufacturer X, each of these companies has been successively insured over the years by at least five different carriers, none of which is certain about its obligation to defend or indemnify the manufacturer.

### B. *The Insurance Policy*

Although many of the insurance policies involved in the controversy over insurer liability for insidious disease were written over a span of many years

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had no subsequent exposure to asbestos. The first symptom of disease, a cough, did not develop until 20 years later. Within a year of the emergence of this initial symptom, she was diagnosed as suffering from malignant mesothelioma. *Id.*, 394 A.2d at 301. Although Mrs. Harig did not work directly with these products, she did handle files that were exposed to asbestos dust and was required on occasion to enter areas of the warehouse where workers were fabricating asbestos products. In 1976, Mrs. Harig was diagnosed as suffering from malignant mesothelioma, allegedly as a result of her exposure to asbestos. *Id.*, 394 A.2d at 300. The *Harig* case raises the specter of a vast new population of future litigants in asbestos cases. It should not be assumed that simply because some plaintiffs have successfully maintained causes of action in strict liability for asbestos-related disease that the question of liability is settled as to other victims of injurious exposure. Each plaintiff must still establish the causative link between his own disease and exposure; prove to the trier of fact that the product was defective and unreasonably dangerous, usually because of a failure to warn or warn adequately; causally relate the injury to the failure to warn; and defeat the affirmative defenses of state of the art and assumption of risk. The plaintiff must still convince the trier of fact that someone is liable in tort for his injuries. *See* Reyes v. Wyeth Labs., 498 F.2d 1264, 1280 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974). That this is not a foregone conclusion is illustrated by the recent case of Daniels v. Combustion Eng'r, Inc., 583 S.W.2d 768 (Tenn. Ct. App. 1978). A professional installer of insulation materials contracted a mild case of asbestosis and proceeded against the manufacturer. The plaintiff based his cause of action on the Restatement (Second) of Torts § 402A (1965). The manufacturer successfully resisted the claim, relying in part on the affirmative defenses of state of the art and assumption of risk. 583 S.W.2d at 772-73.

48. In Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., No. 78-2739-Z (D. Mass., filed Oct. 17, 1978), for example, the following insurers were joined in the action: American Motorists Ins. Co.; Walbrook Ins. Co.; "Winterthur" Swiss Ins. Co.; Southern Am. Ins. Co., Mutual Reinsurance Co., Ltd.; St. Kathernine Ins. Co., Ltd.; London & Edinburgh Gen. Ins. Co. Ltd.; Bermuda Fire & Marine Ins. Co., Ltd.; Dominion Ins. Co., Ltd.; Yasuda Fire & Marine Ins. Co. (U.K.) Ltd.; Bellefonte Ins. Co.; Turegum Ins. Co., Ltd.; Mentor Ins. Co. (U.K.) Ltd.; Assicurazioni Generali London; Stronghold Ins. Co., Ltd.; Excess Ins. Co.; London & Edinburgh Ins. Co.; National Cas. Ins. Co. of America, Ltd.; Accident & Cas. Ins. Co.; Argonaut Northwest Ins. Co.; Slater, Walker Ins. Co., Ltd.

49. In Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), the leading case on asbestos liability, the plaintiff worked for 33 years with asbestos and brought suit against 11 different manufacturers. *Id.* at 1081, 1086. In Daniels v. Combustion Eng'r, Inc., 583 S.W.2d 768 (Tenn. Ct. App. 1978), the plaintiff had a 12-year exposure and sought to join 16 manufacturers of asbestos materials in his action. *Id.* at 769.

and are not identical in every detail, they are all of the same general type.[50] The CGL policy now provides that the insurer "will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence."[51] "Occurrence" is defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily

50. The major revision and standardization of these general liability policies in 1966, converted the basis of liability from "accident" to "occurrence." Prior to 1966, general liability policies provided coverage only for "accidental" injuries. The coverage for bodily injury liability was typically worded as follows: " 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the hazards hereinafter defined.' " 1 R. Long, Law of Liability Insurance § 11.01, at 11-4 (1979). The policy was intended "to cover only injuries and damage caused by events that were: unintended; unexpected; and sudden and therefore identifiable in time and place." Obrist, The New Comprehensive General Liability Insurance Policy—A Coverage Analysis 16 (Defense Research Inst. Monograph 1966). Courts, however, tended to interpret the term "accident" more broadly, refusing to limit coverage to sudden and violent events. They often extended it to injuries and property damage that was processive or gradual. *See, e.g.*, Koehring Co. v. American Auto. Ins. Co., 353 F.2d 993 (7th Cir. 1965); Bundy Tubing Co. v. Royal Indem. Co., 298 F.2d 151 (6th Cir. 1962); Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co., 281 F.2d 538 (3d Cir. 1960); Geddes & Smith, Inc. v. St. Paul-Mercury Indem. Co., 51 Cal. 2d 558, 334 P.2d 881 (1959); Shelby Mut. Ins. Co. v. Ferber Sheet Metal Works, Inc., 156 So. 2d 748 (Fla. Dist. Ct. App. 1963); Hauenstein v. St. Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954); Ducker v. Central Sur. & Ins. Corp., 234 S.C. 228, 107 S.E.2d 342 (1959). In 1959, the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau undertook the task of standardizing the general liability insurance policy. The work, completed in 1966, resulted in the promulgation of the Comprehensive General Liability (CGL) Insurance policy, which continues today as the prototype for this form of insurance. *See* note 11 *supra*. Although some revisions have been made since 1966, they are not relevant to the instant inquiry. *See generally* Reichenberger, *The General Liability Insurance Policies—Analysis of 1973 Revisions*, in General Liability Insurance—1973 Revisions 5 (F. Bardenwerper & D. Hirsch eds. Defense Research Inst. Monograph 1974). To be sure, the conversion from "accident" to "occurrence" involved a major substantive change. Obrist, *supra*, at 6. Nevertheless, the provisions relevant to the problem of insidious disease and successive coverage are substantially the same with respect to pre- and post-1966 policies. The gravamen of this controversy is not whether these diseases qualify as an "accident" or an "occurrence," but rather under which policy period the resultant bodily injury occurred. "Bodily injury" is defined in the CGL policy as "bodily injury, sickness or disease sustained by any person." Standard Policy, *supra* note 11, at GA-3. The insurers currently litigating the question of coverage liability in asbestos cases generally agree that the 1966 revision has no effect on determining the limits of the policies involved. *See, e.g.*, Brief for Defendant/Appellant Affiliated FM Ins. Co. at 30, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978); Brief for Defendant/Appellant Illinois Nat'l Ins. Co. at 4, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978); Brief of Appellant Insurance Co. of N. America at 11, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978); Reply Brief of Appellant Liberty Mut. Ins. Co. at 8-10, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978); Brief of Appellee Travelers Indem. of R.I. at 12-13, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). For purposes of analysis, this discussion will focus on the language of the CGL policy.

51. Standard Policy, *supra* note 11, at CGL-2 (emphasis omitted).

injury or property damage neither expected nor intended from the standpoint of the insured."[52] Thus the policy, by its express terms, makes the rights and obligations of the parties turn on determining *when* the plaintiff was injured—the threshold finding that may be impossible to ascertain with any precision in cases of insidious disease.

### C. *The Alternative Theories*

Two theories have been formulated to determine when bodily injury occurs during the policy period. Advocates of the exposure theory urge that medical research and evidence pertaining to asbestos-related diseases establish that histological or tissue damage begins shortly after inhalation.[53] Although it is true that the injury to the body is not manifest for some time, it has, nevertheless, occurred. Moreover, because these minute injuries are cumulative and progress over the entire period of exposure, "all insurers on the risk from the time of alleged initial exposure through manifestation [should be] jointly and severally obligated to defend and to indemnify."[54]

The alternative theory is that of manifestation, advocated by most, but notably not all, insurers.[55] Although manifestation theorists concede that there is tissue damage long before any symptoms of disease become evident, they claim that "a person cannot be considered injured or diseased until symptoms are noticeable or a diagnosis is made."[56] Moreover, because the medical evidence does not conclusively establish that every exposure to asbestos will necessarily result in damage to the lungs, injury or disease cannot be deemed to occur until functional impairment becomes noticeable.[57] Thus, only the insurer on the risk when the disease becomes manifest should be required to provide coverage.[58]

The manifestation theory offers an expeditious, though essentially arbitrary, resolution to the question of insurer liability in insidious disease cases. It effectively denies that there was any bodily injury prior to the manifestation of symptoms, yet medical studies conclusively establish that asbestos-related diseases have already reached an advanced stage of development by the time

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52. *Id.* at GA-4 (emphasis omitted). As one commentator explained: "Occurrence is described not only as an accident, but also exposure to conditions which may continue for days, weeks, months or even years. There is no 'occurrence' until an injury results from a happening. Injury or damage must occur during the policy period to be covered . . . ." Obrist, *supra* note 50, at 16 (emphasis omitted).

53. Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1238 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978).

54. *Id.*

55. Travelers Indem. of R.I. joined Forty-Eight Insulations in urging the exposure theory of liability upon the court. *Id.* at 1233.

56. *Id.* at 1238. This analysis imports the reasoning underlying the Supreme Court's decision in Urie v. Thompson, 337 U.S. 163 (1949). *See* note 9 *supra* and accompanying text.

57. Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1238 (E.D. Mich 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978).

58. The manifestation theorists contend that the date of manifestation is "the date on which the condition became known or should have become known to plaintiff or the date on which plaintiff's condition was medically diagnosed, whichever comes first." *Id.*

initial symptoms appear.[59] The exposure theory, however, with considerably more deference to the facts, assumes that a bodily injury occurs immediately upon first inhalation of asbestos particles,[60] even though the medical support for this assumption is inconclusive.[61] Whether either theory can be justified in the context of an insurance coverage dispute requires an investigation of public policy questions that have arisen in analogous latent injury litigation as well as an analysis of the provisions in the CGL policy.

## II. Discretionary Application of Manifestation and Exposure Theories

The express terms of the CGL policy do not mandate either a manifestation or an exposure theory in construing "bodily injury during the policy period." In many areas of the law, however, these theories have long served as convenient analytic constructs. When courts have resorted to these discretionary schemes of interpretation, they have usually done so on grounds of social, judicial, or statutory policy.

### A. *The Discovery Rule and Underlying Tort Liability for Insidious Diseases*

In latent injury cases, when there is a considerable hiatus between exposure to a drug or condition and the manifestation of injury caused by that exposure, many courts have adopted a discovery rule to determine when the plaintiff's cause of action will be deemed to have accrued.[62] Under this rule, a

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59. "An asbestos worker with significant pulmonary damage, as shown by an impaired diffusing capacity, may have no symptoms and no x-ray abnormality." J. Crofton & A. Douglas, *supra* note 19, at 487. *See also* Haley, *supra* note 40, at 1441; Merewether, *supra* note 1, at 201-02; Asbestos Monograph, *supra* note 19, at 35; *Widening Perspectives*, *supra* note 2, at 426-27.

60. *See* notes 53-54 *supra* and accompanying text.

61. "The disposition of asbestos fibers entering the respiratory tract is not fully understood. Certainly some fibers are ultimately deposited in the airways and lung tissue. Some could also be expectorated or conveyed to the gastrointestinal tract by airway clearance mechanisms and possibly some to the pleural and peritoneal cavities via lymphatic drainage." Asbestos Monograph, *supra* note 19, at 21. *See also* J. Crofton & A. Douglas, *supra* note 19, at 483-84; *Asbestosis and Neoplasia*, *supra* note 44, at 488.

62. *See* United States v. Kubrick, 100 S. Ct. 352, 360-61 (1979); Urie v. Thompson, 337 U.S. 163, 170-71 (1949); Goodman v. Mead Johnson & Co., 534 F.2d 566, 570, 574-75 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 160-61 (8th Cir. 1975); Roman v. A.H. Robins Co., 518 F.2d 970, 972 (5th Cir. 1975), Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1102 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919, 924 (8th Cir. 1970); R.J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776, 780 (5th Cir. 1963); Brush Beryllium Co. v. Meckley, 284 F.2d 797, 800 (6th Cir. 1960); Sylvania Elec. Prods., Inc. v. Barker, 228 F.2d 842, 847-48 (1st Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Thrift v. Tenneco Chems. Inc., 381 F. Supp. 543, 546 (N.D. Tex. 1974); Withers v. Sterling Drug, Inc., 319 F. Supp. 878, 881 (S.D. Ind. 1970); Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 889, 159 Cal. Rptr. 113, 118 (1979); Steiner v. Ciba-Geigy Corp., 364 So. 2d 47, 48-49 (Fla. Dist. Ct. App. 1978); Chrischilles v. Griswold, 260 Iowa 453, 463, 150 N.W.2d 94, 100 (1967); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 71, 394 A.2d 299, 300 (1978); Raymond v. Eli Lilly & Co., 117 N.H. 164, 175-76, 371 A.2d 170, 177 (1977); Frohs v. Greene, 253 Or. 1, 2-4, 452 P.2d 564, 565 (1969); Gilbert v. Jones, 523 S.W.2d 211, 213 (Tenn. Ct. App. 1974).

plaintiff " 'can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.' "[63] In effect, the statute of limitations is tolled until the plaintiff discovers, or in the exercise of reasonable care should have discovered, the injury or impairment.[64]

Statutes of limitation and their construction are essentially creatures of social and judicial policy.[65] In fairness to a defendant, they relieve him of the burden of defending stale claims, wherein "evidence has been lost, memories have faded, and witnesses have disappeared."[66] At the same time, they encourage plaintiffs to be prompt and diligent in instituting claims.[67] In the case of latent injury, however, the gross inequity of barring a plaintiff who is blamelessly unaware of any injury and who cannot be said to have been slumbering on his rights has prompted many courts to adopt the discovery rule.[68] Disease or impairment that existed prior to manifestation is simply ignored and constructively held not to have existed for statute of limitation purposes.[69] Application of the discovery rule in the case of insidious disease or latent injury is grounded in the notion that the harsh injustice to an injured plaintiff that would arise from rigorous adherence to the statute of limitations outweighs the defendant's need for repose.[70] Thus the fiction that an injury or disease is not an injury or disease until it manifests itself, is not a finding of fact, but a balance of competing equities.[71] In sharp contrast, there are no similarly compelling issues of social or statutory policy underlying the construction of a CGL policy. Neither party to that insurance contract is unduly prejudiced by the requirement that the bodily injury be found to have occurred during the policy period.

### B. *Health and Accident Insurance Approach*

Courts have also found that undue prejudice in cases of latent injury may exist in the area of health and accident insurance policies. A manifestation rule is often applied in these cases when it is necessary to protect the obvious and reasonable expectations of the insured.[72] Underlying the approach is also

63. Urie v. Thompson, 337 U.S. 163, 170 (1949) (quoting Associated Indem. Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932)).

64. *See* cases cited note 62 *supra*.

65. As Justice Jackson once noted for a unanimous court: "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. . . . They represent a public policy about the privilege to litigate." Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citation and footnote omitted).

66. Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944).

67. Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 791, 144 S.E.2d 156, 161 (1965).

68. *See* cases cited note 62 *supra*.

69. *See* note 9 *supra*.

70. *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev 1177, 1207 (1950).

71. *See, e.g.*, Lopez v. Swyer, 62 N.J. 267, 273-74, 300 A.2d 563, 566-67 (1973); Gaddis v. Smith, 417 S.W.2d 577, 581 (Tex. 1967).

72. *See, e.g.*, Royal Family Ins. Co. v. Grimes, 42 Ala. App. 481, 483, 168 So. 2d 262, 264 (1964); Dowdall v. Commercial Travelers Mut. Acc. Ass'n of America, 344 Mass. 71, 73-74, 181 N.E.2d 594, 596 (1962); Silverstein v. Metropolitan Life Ins. Co., 254 N.Y. 81, 84, 171 N.E. 914, 914-15 (1930).

the general societal interest of guaranteeing to people who purchase health insurance the security and reliability of the protection they seek.[73] Society would not be served well if people bought health insurance and then were faced with uncertainty of coverage. In *Cohen v. North American Life & Casualty Co.*,[74] therefore, the Supreme Court of Minnesota refused to deny coverage under a health insurance policy even though the claimant's medical disability was at least in part attributable to a diseased condition that was present but unknown when the policy was purchased.[75] The court examined the intentions of the parties and emphasized the reasons ordinary people seek health insurance:

> The insurer intended to give and the insured expected to get indemnity if illness or sickness [occurred] . . . . They were not concerned with the latent or the remote cause of it. The cause of the disease insured against is not mentioned in the policy as a condition of liability. . . . A construction making the time of the medical cause of the outbreak of the disease determinative of liability, irrespective of actual illness, sickness or disease, as commonly understood, would make health insurance subject to uncertainty, unattractive to those wanting reasonable health insurance protection, and less marketable.[76]

At the heart of the court's decision was the fundamental unfairness of placing a construction on the policy that permits a hidden condition that suddenly and surprisingly surfaced to defeat the very coverage sought. "As we construe it the [insurer] is liable, though the medical cause of the disease existed prior to the policy, if the disease or sickness does not manifest itself until afterwards. So the ordinary man wanting health protection would understand it."[77]

Unlike the health and accident policy before the court in *Cohen*, however, the cause of the risk insured against in a CGL policy is indeed expressed in the agreement as a condition of coverage. The risk insured against is not illness or disease, but liability resulting from the manufacture of a particular product. The definition of "occurrence" to include exposure over time to injurious conditions[78] reflects the parties' mutual awareness of the latency factor that will have to be assessed in determining coverage. It cannot be said that the manufacturer of a product that poses an insidious hazard to the health of others is truly unaware that the damages for which he may be found liable arose out of bodily injury that remained latent for some time.[79]

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73. *See, e.g.*, Cohen v. North Am. Life & Cas. Co., 150 Minn. 507, 185 N.W. 939 (1921).

74. 150 Minn. 507, 185 N.W. 939 (1921).

75. The claimant's preexisting condition involved postoperative adhesions, which had developed six years prior to the policy in question. He suffered no ill-effects from the adhesions and, in fact, enjoyed normal, good health. The claimant had no way of knowing of the existence of this condition, which was discovered only during the surgical procedure for which he sought coverage. *Id.* at 508, 185 N.W. at 939.

76. *Id.*

77. *Id.*

78. *See* note 152 *infra* and accompanying text.

79. Generally, a manufacturer "will be held to the skill of an expert in that business and to an expert's knowledge of the arts, materials, and processes. Thus he must keep reasonably abreast of scientific knowledge and discoveries touching his product and of techniques and devices used by practical men in his trade." 2 F. Harper & F. James, The Law of Torts § 28.4, at 1541 (1956) (footnotes omitted). *See also* Keeton, *Product Liability—Problems Pertaining to Proof of Negli-*

### C. *Worker Compensation Law*

The manifestation rule has also been frequently applied in the area of worker compensation law. To suggest, however, that Judge Learned Hand's pronouncement that "a disease is no disease until it manifests itself"[80] has universal applicability, is to extend the scope of the decision in *Grain Handling Co. v. Sweeney*[81] beyond its intended reach. The Second Circuit explicitly confined the inquiry to whether a preexisting disease should affect a worker's ability to recover for occupational disability under a compensation statute.[82] The court recognized the need to carry out the intended purpose of the statute,[83] which was to compensate for disability arising out of workplace conditions.[84] Therefore, to determine whether a disabled worker could recover under the statute, Judge Hand concluded that "[t]he statute is not concerned with pathology, but with industry disability."[85] In contrast, there is

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*gence,* 19 Sw. L.J. 26, 30-33 (1965) (on the manufacturer's status as an expert). The evidence is overwhelming that the dangers of asbestos have long been known and described. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1093 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974). In 1968, Dr. Irving Selikoff appeared before the Select Subcommittee on Labor and testified in support of the proposed Occupational Safety and Health Act. H.R. 14816, 90th Cong., 2d Sess. (1968), *reprinted in Occupational Safety and Health: Hearings on H.R. 14816 Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor,* 90th Cong., 2d Sess. 1 (1968) [hereinafter cited as *OSHA Hearings*]. "In 1924, which is a little over 40 years ago, Dr. Cooke in England described a case of a woman dying of severe lung scarring who had spent 20 years in a textile factory, weaving asbestos, and in the next decade many similar cases were reported, so that by the mid-1930's the hazard of asbestos as a pneumoconiotic dust was pretty universally [accepted].

"Textile factories in this country, most of them in the southern part of our country, were also studied and our Public Health Service fully documented the very significant risks involved in asbestos textile factories and a classic report by Dreesen and his colleagues which was published by the GPO in 1938. Precautionary measures were urged in this report and elimination of hazardous exposures were strongly recommended.

"As I sit here now, I am unhappy to say that unfortunately implementation of these recommendations has been haphazard and inadequate and that conditions and dangers so well recognized . . . 40 years ago are still with us. It is an unhappy reflection on all of us—government, public health authorities, and my own medical profession—that at this time in the United States in the 1960's 7 percent of all deaths among insulation workers in this country are due to a completely preventable cause, [pulmonary] asbestosis." *OSHA Hearings, supra,* at 356 (statement of Dr. Irving Selikoff). It should also be noted that the relationship between asbestosis and lung cancer has been suspected since the early 1930's. Asbestos Monograph, *supra* note 19, at 24.

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

81. 102 F.2d 464 (2d Cir.), *cert. denied,* 308 U.S. 570 (1939).

82. The statute involved in the case was the Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 1, 44 Stat. 1424 (1927) (current version at 33 U.S.C. § 901 (1976)).

83. 102 F.2d at 466.

84. *Id.* "[T]he underlying theory of workmen's compensation [is to make] industrial disabilities, so far as they are truly attributable to the industry, a part of the cost of production, and [to throw] compensation for them upon the consumer. This is not because the consumer is at fault for creating the demand whose supply produces the disabilities, but because a loss shared among many is less a loss than if borne by one; the sum of the parts is less than the whole." *Id.* at 465.

85. *Id.* at 466.

no statutory scheme of compensation underlying the contractual relationship between insured and insurer under a CGL policy. The injured worker's right to compensation arises out of the tort liability of the manufacturer, not out of the terms of the insurance policy. Moreover, an important distinction between worker compensation and general liability coverage is that the former is based on a finding of disability, not mere bodily injury, sickness, or disease.[86] The only common ground between the two risk compensation schemes is the need to shift the loss incurred. The justification for shifting loss pursuant to express legislative intent and considerations of social policy, however, should not be imported into a private contract that rests on a pure business arrangement.

Of perhaps greater relevance to this inquiry is the area of worker compensation law dealing with employer and insurer liability, in which a variation of the exposure theory is usually applied. In cases of successive injuries causally related to ultimate disability as well as in instances of occupational disease, the general rule[87] is that announced by the Second Circuit in *Travelers Insurance Co. v. Cardollo*:[88]

> [T]he employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.[89]

Although the court recognized the "possibility of inequity or seeming injustice"[90] in casting the entire burden on one employer, it was constrained by its interpretation of the legislative intent underlying the compensation statute.[91] The Second Circuit inferred that Congress declined to include an apportionment provision in the statute because it feared that difficulties and delays in administering the federal act would result.[92]

The *Cardillo* court was also faced with determining which of the insurers covering the employer of "last injurious exposure" would be liable for discharging the compensation award.[93] This issue is analogous to the problem of a manufacturer's successive insurers under the CGL policies. Like the "last employer" in the worker compensation situation, the manufacturer must look to one or more of its insurers to satisfy the injured party's award. The *Cardillo* court approached the problem as one of "legislative interpretation,"[94] not unfettered judicial choice. The court concluded that the Congressional concern over efficient administration of the Act should control the question of carrier liability in the same manner that it determines employer liability. Thus,

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86. 1 A. Larson, The Law of Workmen's Compensation § 2.40, at 10-11 (1978); A. Millus & W. Gentile, Workers' Compensation Law and Insurance 132 (1976).

87. *See* 4 A. Larson, *supra* note 86, § 95.21.

88. 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955).

89. *Id.* at 145.

90. *Id.* at 144.

91. The claims for compensation were awarded under provisions of the Longshoremen's and Harbor Workers Compensation Act of 1927. *Id.* at 139; *see* note 82 *supra.*

92. *Id.* at 145. The "last employer" rule has been codified by statute in many jurisdictions. 4 A. Larson, *supra* note 86, § 95.24 at 17-93 & n.5.

93. 225 F.2d at 145.

94. *Id.*

"the carrier who last insured the 'liable' employer during claimant's tenure of employment" will be held solely responsible.[95]

Perhaps such an arbitrary scheme can be justified in worker compensation cases. The *Cardillo* court reasoned that such a conclusion was mandated by the need to implement efficiently a humane scheme of social planning. In the absence of legislative intent and statutory authority, however, the application of the "last injurious exposure" rule would seem to be insupportable. Consequently, this variation of the exposure theory of liability should not serve as a guide to solve the successive insurer liability conflict that arises under the CGL policy.

Apparently, the discretionary application of exposure and manifestation theories has enabled courts to implement policy rationales in many areas of the law when latent injuries or conditions present difficult judicial problems. The appeal of extending the discretionary approach of these theories to the issue of insurer liability in insidious disease cases is that it would relieve the court of the burden of wrestling with complex medical evidence. Without an underlying statutory or social policy rationale, however, the imposition of a constructive scheme of interpretation seems inappropriate. A court would have no support in analogous areas of the law for taking such liberties with what is essentially a contract dispute. Absent support on the grounds of public policy, an exposure or manifestation theory should be found in the insurance contract and in the medical facts of insidious disease, or not at all.

## III. THE CGL POLICY—AN ANALYSIS

### A. *General Principles of Construction*

Insurance policies are almost universally held to be subject to the same rules of interpretation as other business contracts.[96] As long as an insurance policy does not violate any applicable statutory regulation or contravene

95. *Id.* In cases of occupational disease, which typically develop over a period of many years, the rigorous application of the last injurious exposure rule to successive carriers on the risk has led to unduly harsh results in many instances. *See, e.g.*, Alloy Surfaces Co. v. Cicamore, 221 A.2d 480 (Del. 1966) (carrier was on risk only a few weeks); Gregory v. Peabody Coal Co., 355 S.W.2d 156 (Ky. 1962) (carrier was on risk only 25 days); Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 112 S.E.2d 711 (1960) (carrier was on risk only four and one half months). Possibly the most egregious result involved a claimant's award for anthracosilicosis; the entire award was paid by the last insurer, who had been on the risk barely seven hours. Ertz v. Glen Nan, Inc., 29 Pa. Commw. Ct. 409, 371 A.2d 533 (1977). To mitigate the harshness of this rule, some jurisdictions have enacted statutes permitting apportionment, though initial liability to the employee remains with the employer of last injurious exposure. *See* 4 A. Larson, *supra* note 86, § 95.32, at 17-109 & n.33.

96. Hartford Fire Ins. Co. v. Shapiro, 270 Ala. 149, 117 So. 2d 348 (1960); Whaley v. American Nat'l Ins. Co., 30 Ill. App. 3d 32, 331 N.E.2d 571 (1975); Lang v. General Ins. Co. of America, 268 Minn. 36, 127 N.W.2d 541 (1964); Pettid v. Edwards, 195 Neb. 713, 240 N.W.2d 344 (1976); Raymond v. Great Am. Indem. Co., 86 N.H. 93, 163 A. 713 (1932); F.S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co., 252 N.Y. 75, 168 N.E. 834 (1929); Kelley v. Indemnity Ins. Co. of N. America, 252 A.D. 58, 297 N.Y.S. 228 (3d Dep't 1937); Bailey v. Life Ins. Co., 222 N.C. 716, 24 S.E.2d 614 (1943); McCain v. Hartford Live Stock Ins. Co., 190 N.C. 549, 130 S.E. 186 (1925); Carraco Oil Co. v. Mid-Continent Cas. Co., 484 P.2d 519 (Okla. 1971); Farmers Mut. Ins. Co. v. United Pac. Ins. Co., 206 Or. 298, 292 P.2d 492 (1956); Farmers Ins.

public policy, it will be assumed to embody the entire and final understanding of the parties.[97] Thus, in construing a policy a court may not extend, diminish, or in any other way alter the rights and obligations of the parties set forth in the written document.[98]

Each word and phrase in the CGL policy is not, however, to be construed in a contextual vacuum. On the contrary, courts generally agree that insurance policies, like other contracts, should be construed in their entirety.[99] Rather than segregate individual words or provisions and assign isolated meanings to them, courts endeavor to look at "the entire context and subject matter of the contract"[100] as well as the objectives of the parties when they made the agreement.[101]

Within this framework of general principles, the courts have pursued two

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Co. v. Miller, 87 Wash. 2d 70, 549 P.2d 9 (1976) (en banc); Ehlers v. Colonial Penn Ins. Co., 81 Wis. 2d 64, 259 N.W.2d 718 (1977). Because of the inequality of bargaining power and consequent failure of the parties to negotiate at arms length, a few courts have concluded that somewhat different standards of interpretation will be applied in construing insurance policies as opposed to other contracts. *See* Stordahl v. Government Employees Ins. Co., 564 P.2d 63 (Alaska 1977); Linden Motor Freight Co. v. Travelers Ins. Co., 40 N.J. 511, 193 A.2d 217 (1963). *But see* Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 737-38, 74 Cal. Rptr. 367, 368-69 (1969) (an insurance policy, which is a contract of adhesion, is perfectly valid and indeed useful and in the absence of ambiguity will be enforced according to its terms. If ambiguous, the policy will be subject to the same rules of construction as are applied to other contracts).

97. Hartford Fire Ins. Co. v. Shapiro, 270 Ala. 149, 117 So. 2d 348 (1960); Dairyland Mut. Ins. Co. v. Andersen, 102 Ariz. 515, 433 P.2d 963 (1967); Pacific Ins. Co. v. Del Monte, 23 Ariz. App. 23, 530 P.2d 380 (1975); Oakland Stadium v. Underwriters at Lloyd's, 152 Cal. App. 2d 292, 313 P.2d 602 (1957); Atkins v. Bellefonte Ins. Co., 342 So. 2d 837 (Fla. Dist. Ct. App. 1977); Ditmyer v. American Liberty Ins. Co., 117 Ga. App. 512, 160 S.E.2d 844 (1968); Schwegmann Bros. Giant Super Mkts. v. Underwriters at Lloyd's, 300 So. 2d 865 (La. Ct. App. 1974).

98. Farmers Ins. Exch. v. Harmon, 42 Cal. App. 3d 805, 117 Cal. Rptr. 117 (1974); Warner v. Prudential Ins. Co. of America, 164 Colo. 35, 433 P.2d 113 (1967); Lyon v. Aetna Cas. & Sur. Co., 140 Conn. 304, 99 A.2d 141 (1953); Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363 (Iowa 1969); Limberis v. Aetna Cas. & Sur. Co., 263 A.2d 83 (Me. 1970); Boyle Rd. & Bridge Co. v. American Employers' Ins. Co., 195 S.C. 397, 11 S.E.2d 438 (1940); Schultz v. Tennessee Farmers Mut. Ins. Co., 218 Tenn. 465, 404 S.W.2d 480 (1966).

99. Furtado v. Metropolitan Life Ins. Co., 60 Cal. App. 3d 17, 131 Cal. Rptr. 250 (1976); Scott v. Keever, 212 Kan. 719, 512 P.2d 346 (1973); Robichaux v. Group Hosp. Serv., Inc., 379 S.W.2d 874 (Mo. Ct. App. 1964); Jernigan v. New Amsterdam Cas. Co., 69 N.M. 336, 367 P.2d 519 (1961); Murray Oil Prods., Inc. v. Royal Exch. Assur. Co., 21 N.Y.2d 440, 235 N.E.2d 762, 288 N.Y.S.2d 618 (1968); McGowan v. Connecticut Gen. Life Ins. Co., 110 R.I. 17, 289 A.2d 428 (1972); Morgan v. Prudential Ins. Co. of America, 86 Wash. 2d 432, 545 P.2d 1193 (1976) (en banc).

100. 13 J. Appleman & J. Appleman, Insurance Law and Practice § 7383, at 45 (rev. ed. 1976); *see* Verlo v. Equitable Life Assur. Soc'y of United States, 562 F.2d 1034 (8th Cir. 1977); Schwab v. State Farm Fire & Cas. Co., 27 Ariz. App. 747, 558 P.2d 942 (1976); Mountain States Mut. Cas. Co. v. Northeastern N. M. Fair Ass'n, 84 N.M. 779, 508 P.2d 588 (1973); Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 225 S.E.2d 344 (1976).

101. Insurance Co. of N. America v. Electronic Purification Co., 67 Cal. 2d 679, 433 P.2d 174, 63 Cal. Rptr. 382 (1967) (en banc); Shields v. Hiram C. Gardner, Inc., 92 Idaho 423, 444 P.2d 38 (1968); Shadbolt v. Farmers Ins. Exch., 275 Or. 407, 551 P.2d 478 (1976); Riordan v. Commercial Travelers Mut. Ins. Co., 11 Wash. App. 707, 525 P.2d 804 (1974); McGann v. Hobbs Lumber Co., 150 W. Va. 364, 145 S.E.2d 476 (1965).

basic methods of analysis in the interpretation of insurance contracts. One involves investigating the meaning of the words themselves, while the other concerns ascertaining the intention of the parties. Although courts have often described the latter as the "polar star"[102] or controlling element in the construction of an insurance policy,[103] it is not always analytically feasible or entirely rational to separate the inquiry into discrete channels of investigation[104] and conclude that the one clearly dominates the other. As a practical matter, language and intent are counterpoised in a reciprocal posture, with the one informing the other. Thus, when analyzing whether the introduction of streptococcic germs into, and their action upon, the tissues of the body should constitute a "bodily injury" within the terms of a disability insurance policy, the California Supreme Court looked not only to the words themselves, but to their meaning in the context of the purposes of the insurance policy.[105]

Although intention may be considered on the one hand, and language on the other, this approach should be merely an analytical model designed to facilitate interpretation. In the final analysis, any conclusion will necessarily depend upon a synthesis of the inquiries.[106] The language used in a contract or any writing represents the drafter's conscious preference of some terms to the exclusion of others. This act of rhetorical selection is, in and of itself, a manifestation of intent. Similarly, a written contract is, in the first instance, intended to be a concrete representation through the vehicle of language of the mutual intent of the parties.

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102. 13 J. Appleman & J. Appleman, *supra* note 100, § 7385, at 110.

103. Knight v. Metropolitan Life Ins. Co., 103 Ariz. 100, 437 P.2d 416 (1968) (en banc); Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co., 72 Cal. App. 3d 741, 140 Cal. Rptr. 375 (1977); Little v. First Federated Life Ins. Co., 267 Md. 1, 296 A.2d 372 (1972); Employers Mut. Cas. Co. v. Kangas, 310 Minn. 171, 245 N.W.2d 873 (1976); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967); Growers Refrigerating Co. v. American Motorists Ins. Co., 260 Or. 207, 488 P.2d 1358 (1971).

104. The interaction of language and intent is evidenced in the analytic approach taken in the following cases: Fireman's Fund Ins. Co. v. New Zealand Ins. Co., 103 Ariz. 260, 439 P.2d 1020 (1968); State Farm Mut. Auto Ins. Co. v. O'Brien, 24 Ariz. App. 18, 535 P.2d 46 (1975); Southeastern Fid. Ins. Co. v. Fluellen, 128 Ga. App. 177, 198 S.E.2d 407 (1973); Olipra v. Zambelli, 1 Ill. App. 3d 607, 274 N.E.2d 877 (1971); Oil Well Supply Co. v. New York Life Ins. Co., 214 La. 772, 38 So. 2d 777 (1949); Cain v. National Old Line Ins. Co., 85 N.M. 697, 516 P.2d 668 (1973); Dunsmore v. Co-operative Fire Ins. Ass'n, 131 Vt. 14, 298 A.2d 853 (1972); Grant County Constructors v. E.V. Lane Corp., 77 Wash. 2d 110, 459 P.2d 947 (1969); D'Angelo v. Cornell Paperboard Prods. Co., 59 Wis. 2d 46, 207 N.W.2d 846 (1973).

105. Moore v. Fidelity & Cas. Co., 203 Cal. 465, 468, 265 P. 207, 209-10 (1928). For other cases analyzing the term "bodily injury" in light of the purpose of the insurance, see Malanga v. Royal Indem. Co., 101 Ariz. 588, 422 P.2d 704 (1967) (en banc); United Am. Life Ins. Co. v. Beadel, 13 Ariz. App. 196, 475 P.2d 288 (1970); Reiser v. Metropolitan Life Ins. Co., 262 A.D. 171, 28 N.Y.S.2d 283 (1st Dep't 1941), *aff'd*, 289 N.Y. 561, 43 N.E.2d 534 (1942); Wenger v. Mutual Benefit Health & Acc. Ass'n, 203 N.Y.S.2d 945 (Sup. Ct. 1960).

106. *See generally* Fireman's Fund Ins. Co. v. New Zealand Ins. Co., 103 Ariz. 260, 439 P.2d 1020 (1968); State Farm Fire & Cas. Co. v. Quirt, 28 Md. App. 603, 346 A.2d 497 (1975); Duke v. Mutual Life Ins. Co., 286 N.C. 244, 210 S.E.2d 187 (1974); Mohn v. American Cas. Co., 458 Pa. 576, 326 A.2d 346 (1974); Medlar v. Aetna Ins. Co., 127 Vt. 337, 248 A.2d 740 (1968); Witherspoon v. St. Paul Fire & Marine Ins. Co., 86 Wash. 2d 641, 548 P.2d 302 (1976).

When set against general rules of contract interpretation, the shortcomings of both the exposure theory and the manifestation theory become apparent because both require a court construing the policy to add a term that would potentially extend or diminish the rights and obligations of the parties to the contract. As written, the CGL policy provides coverage for bodily injury[107] "caused by an occurrence."[108] Under the manifestation theory,[109] the court necessarily has to construe the term "occurrence"[110] restrictively to include only "bodily injury *that is manifest during the policy period.*" Under the exposure theory,[111] a somewhat less expansive departure from the standard insurance terminology given in the policy is required: "Occurrence" would include "bodily injury, *which shall be deemed to occur upon initial exposure to injurious conditions.*"

Insistence upon either of these formulations seems to ask a court not to construe, but rather, to rewrite and thus remake the contract between the parties. Generally the courts will not do this.[112] Even if the suggested changes required under the manifestation and exposure theories were more charitably described as mere annotations or interpretations, they would not command judicial recognition absent a finding of ambiguity[113] or a violation of either a statute or public policy.[114] The latter two alternatives can safely be ignored here because to date no challenge has been brought by an insured suggesting that the comprehensive general liability insurance policy either fails to meet or otherwise violates statutory requirements or in any way contravenes public policy. The existence of ambiguity, however, cannot be similarly dismissed.

### B. *The Question of Ambiguity*

Some of the parties currently litigating the issue of successive insurer liability in cases of insidious disease insist that the CGL policy is ambigu-

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107. Bodily injury is defined as including "bodily injury, sickness or disease." Standard Policy, *supra* note 11 at GA-3.

108. *Id.* at CGL-2; *see* note 152 *infra* and accompanying text.

109. *See* notes 56-58 *supra* and accompanying text.

110. Standard Policy, *supra* note 11, at GA-4.

111. *See* notes 53-54 *supra* and accompanying text.

112. Universal Towing Co. v. Hartford Fire Ins. Co., 421 F.2d 379 (8th Cir. 1970); Stauffer Chem. Co. v. Insurance Co. of N. America, 372 F. Supp. 1303 (S.D.N.Y. 1973); Occidental Fire & Cas. Co. v. Cook, 92 Idaho 7, 435 P.2d 364 (1967); Anderson v. Rexroad, 175 Kan. 676, 266 P.2d 320 (1954); Squires v. Hayes, 13 Mich. App. 449, 164 N.W.2d 565 (1968); Sperling v. Great Am. Indem. Co., 7 N.Y.2d 442, 166 N.E.2d 482, 199 N.Y.S.2d 465 (1960).

113. Whaley v. American Nat'l Ins. Co., 30 Ill. App. 3d 32, 331 N.E.2d 571 (1975); Limberis v. Aetna Cas. & Sur. Co., 263 A.2d 83 (Me. 1970); Moskowitz v. Equitable Life Assur. Soc'y of the United States, 544 S.W.2d 13 (Mo. 1976); Kearbey v. Reliable Life Ins. Co., 526 S.W.2d 866 (Mo. Ct. App. 1975); Wyatt v. Woodmen Acc. & Life Co., 194 Neb. 614, 234 N.W 2d 217 (1975); Thompson v. Occidental Life Ins. Co., 90 N.M. 620, 567 P.2d 62 (Ct. App., 1977); Wiley v. Travelers Ins. Co., 534 P.2d 1293 (Okla. 1974); Silver Eagle Co. v. National Union Fire Ins. Co., 246 Or. 398, 423 P.2d 944 (1967); Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975); Martin v. Shepard, 134 Vt. 491, 365 A.2d 971 (1976).

114. Oakland Stadium v. Underwriters at Lloyd's, 152 Cal. App. 2d 292, 313 P.2d 602 (1957); Ditmyer v. American Liberty Ins. Co., 117 Ga. App. 512, 160 S.E.2d 844 (1968); Gibson v. Metropolitan Life Ins. Co., 213 Kan. 764, 518 P.2d 422 (1974); Gabrelcik v. National Indem.

ous[115] while others emphatically assert that it is not.[116] In view of the rather simple, nontechnical language and straightforward linguistic structure used in the policy to define "bodily injury"[117] and "occurrence,"[118] an argument alleging ambiguity seems dubious. To be sure, even if reasonable minds could differ as to when bodily injury occurs during the policy period, mere controversy over different meanings or questions of fact should not be sufficient to sustain a finding of ambiguity.[119] The test applied by many courts to determine whether ambiguity exists is whether an ordinary or reasonably intelligent person, untrained in law or the insurance business, would understand the meaning of the terms.[120] Although the knowledge required to evaluate physiological symptoms for the purpose of diagnosing a pathological condition and linking it to some causative factor might be beyond the understanding of the average person, it is highly unlikely that he would find the CGL provisions vague, equivocal, or obscure.[121] Moreover, the lay person probably does not expect to evaluate medical evidence without assistance. When injury or disease is not obviously present, an understanding of "bodily injury during the policy period" will usually be derived exclusively from what an expert tells him this means. Although the requisite medical evidence is complex and difficult for those untrained in the sciences, this is not pertinent to whether the CGL policy is ambiguous.

Notwithstanding the rather clear and commonsense language of the CGL policy, the possibility of ambiguity cannot be ruled out in light of another test that courts have applied to determine whether ambiguity exists. Under this approach, the clarity of the policy language is not dispositive. If the words as

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Co., 269 Minn. 445, 131 N.W.2d 534 (1964); Wright v. Fidelity & Cas. Co., 270 N.C. 577, 155 S.E.2d 100 (1967).

115. *E.g.*, Brief for Defendant/Appellee-Cross Appellant Forty-Eight Insulations, Inc., at 50, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). "The definitions of 'bodily injury' contained in all of the policies are utterly meaningless. The Insurers define a term with a term. 'Bodily injury' is defined as 'bodily injury'!!! This is not a definition, it is a chant. It is an ambiguity." *Id.*

116. *E.g.*, Brief of Appellant Insurance Co. of N. America at 54, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978). "The policy language is plain and unambiguous. Each policy extends coverage to diseases which happen during its policy period and which are caused by an appropriate causative event. . . . In each and every instance, the policy language pleads for a determination of when the disease happened. Once this question is answered, no other questions exist. Either the disease happened during the policy period or it didn't. Either the policy applies completely and exclusively or it doesn't apply at all." *Id.*

117. *See* note 50 *supra* and accompanying text.

118. *See* note 52 *supra* and accompanying text.

119. *See, e.g.*, Antram v. Stuyvesant Life Ins. Co., 291 Ala. 716, 287 So. 2d 837 (1973); Coombs v. Lumbermen's Mut. Cas. Co., 23 Ariz. App. 207, 531 P.2d 1145 (1975); LaBonte v. Federal Mut. Ins. Co., 159 Conn. 252, 268 A.2d 663 (1970); O'Meara v. American States Ins. Co., 148 Ind. App. 563, 268 N.E.2d 109 (1971).

120. *See, e.g.*, Droz v. Paul Revere Life Ins. Co., 1 Ariz. App. 581, 405 P.2d 833 (1965); Trousdell v. Equitable Life Assur. Soc'y of United States, 55 Cal. App. 2d 74, 130 P.2d 173 (1942); Jeffries v. Stewart, 159 Ind. App. 701, 309 N.E.2d 448 (1974).

121. *See* Webster's Third New International Dictionary of the English Language 66 (unabr. ed. 1976) (definition of "ambiguity").

applied to a particular set of facts yield uncertainty, they might be ambiguous.[122] Assume, for example, that a finding of ambiguity could be sustained because of the special difficulties involved in applying the terms "bodily injury during the policy period" to an insidious physiological condition that is caused by long-term injurious exposure. The court should then apply the "liberal construction rule," which provides that because the language of an insurance policy is selected by the insurer, it will be strictly construed against that insurer and liberally construed in favor of the insured to afford the desired protection.[123] Liberal construction in favor of the insured, however, is not a license for the court either to expand, distort, or disregard the plain language of the policy.[124] Consequently, the liberal doctrine of construction is often posed in converse form: liberal construction when ambiguity exists does not justify a departure from the general principles of construction if to do so would yield an interpretation that varies the meaning of the contract and the intent of the parties.[125] This returns the inquiry to its point of departure: the need to define the meaning of the CGL policy language and ascertain the intention or reasonable expectations of the parties.

### C. *The Plain Meaning of the Language*

Courts generally follow the rule that a policy should be interpreted according to the "common, popular, and ordinary meaning" of its terms.[126] Although some courts approach the inquiry from the point of view of the ordinary lay person,[127] others prefer to use either the vantage point of the

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122. *See, e.g.*, American Charm Corp. v. St. Paul Life & Marine Ins. Co., 53 Misc. 2d 246, 247, 278 N.Y.S.2d 270, 271 (Civ. Ct. N.Y. 1967) ("If the jewelry was stolen from the private, padlocked garage, there is coverage under the policy. If the jewelry was stolen from an unattended, locked motor vehicle, there is no coverage. What is the case when the jewelry is locked in the automobile and the automobile is stolen from the private padlocked garage?"), *rev'd on other grounds*, 56 Misc. 2d 574, 289 N.Y.S.2d 383 (Sup. Ct. 1968); Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 167 S.E.2d 420 (1969) (under a combination automobile liability and theft policy covering plaintiff's tractor and trailer unit, it was not clear whether the theft coverage extended only to the tractor or to the trailer as well).

123. 12 J. Appleman & J. Appleman, *supra* note 100, § 7401, at 197-211, *see, e.g.*, Schmidt v. Pacific Mut. Life Ins. Co., 268 Cal. App. 2d 735, 74 Cal. Rptr. 367 (1969); Marsh v. Zurich Ins. Co., 118 Ga. App. 409, 163 S.E.2d 867 (1968); Guaranty Trust Co. v. Continental Life Ins. Co., 159 Wash. 683, 294 P. 585 (1930).

124. *See, e.g.*, McDowell v. United States Fid. & Guar. Co., 260 Ala. 412, 71 So. 2d 64 (1954); Holz Rubber Co. v. General Acc. & Life Assur. Corp., 36 Cal. App. 3d 783, 111 Cal. Rptr. 883 (1974); Hawkins Iron & Metal Co. v. Continental Ins. Co., 128 Ga. App. 462, 196 S.E.2d 903 (1973); Heritage Ins. Co. of America v. Phelan, 59 Ill. 2d 389, 321 N.E.2d 257 (1974); Giokaris v. Kincaid, 331 S.W.2d 633 (Mo. 1960); Davis v. North Am. Acc. Ins. Co., 42 Wash. 2d 291, 254 P.2d 722 (1953).

125. 13 J. Appleman & J. Appleman, *supra* note 100, § 7402, at 270-71.

126. *Id.* § 7384, at 71; *see, e.g.*, United States Fid. & Guar. Co. v. Guenther, 281 U.S. 34 (1930); Hyer v. Inter-Ins. Exch., 77 Cal. App. 343, 246 P. 1055 (1926); Riefflin v. Hartford Steam Boiler Inspection & Ins. Co., 164 Mont. 287, 521 P.2d 675 (1974); Schmidt v. Luchterhand, 62 Wis. 2d 125, 214 N.W.2d 393 (1974).

127. *See, e.g.*, Atlantic Lines Ltd. v. American Motorists Ins. Co., 547 F.2d 11 (2d Cir. 1976); Cass Bank & Trust Co. v. National Indem. Co., 326 F.2d 308 (8th Cir. 1964), Federal Ins. Co. v. P.A.T. Homes, Inc., 113 Ariz. 136, 547 P.2d 1050 (1976) (en banc); United Am. Life Ins.

insured,[128] the reasonable expectation of someone standing in the position of the insured,[129] or a reasonable assessment of the mutual understanding of the parties.[130] With the latter alternative, it is clear that the issues of language and intent become inextricably linked.

From the point of view of the ordinary lay person, a diagnosis of disease or physiological impairment leaves little doubt that a bodily injury has taken place regardless of whether the individual manifested any outward signs of abnormality or dysfunction. An example is the case of an asymptomatic female patient who, after a routine annual examination, is informed that a Pap smear reveals the presence of vaginal cancer. Although there is no obvious manifestation, the lay person can easily apply the label "bodily injury" or "disease" to this situation.[131]

The difficult issue is determining when this woman first became diseased. As the inquiry is pushed back in time from the date of diagnosis, it is beyond the personal ability of the lay person to determine when the disease began. Medical experts, however, may be able to provide guidance in forming a reasoned estimate of when the disease first existed.

Thus, in an early silicosis case,[132] the Supreme Court of Missouri explicitly recognized that the determination of when an insidious disease actually occurred was a question of fact within the province of the jury to determine with the aid of expert medical testimony.[133] In *Tomnitz v. Employers' Liability*,[134] the insurer conceded that claimant's silicosis was undiscoverable

Co. v. Beadel, 13 Ariz. App. 196, 475 P.2d 288 (1970); Becker v. State Farm Mut. Auto. Ins. Co., 52 Cal. App. 3d 282, 124 Cal. Rptr. 739 (1975); American Ins. Co. v. Tutt, 314 A.2d 481 (D.C. 1974); Connie's Constr. Co. v. Fireman's Fund Ins. Co., 227 N.W.2d 207 (Iowa 1975); Clark v. Prudential Ins. Co. of America, 204 Kan. 487, 464 P.2d 253 (1970); Arrigo's Fleet Serv., Inc. v. Aetna Life & Cas. Co., 54 Mich. App. 482, 221 N.W.2d 206 (1974).

128. *See, e.g.*, Shields v. Hiram C. Gardner, Inc., 92 Idaho 423, 444 P.2d 38 (1968).

129. *See, e.g.*, Berkshire Mut. Ins. Co. v. LaChance, 115 N.H. 487, 343 A.2d 642 (1975); Marriott Financial Servs. Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975).

130. *See, e.g.*, Shadbolt v. Farmers Ins. Exch., 275 Or. 407, 551 P.2d 478 (1976); Noyes v. Order of United Commercial Travelers of America, 125 Vt. 336, 215 A.2d 495 (1965).

131. Dr. George Wright, a specialist in occupational and pulmonary lung diseases and a consultant to Johns-Manville, has noted that a worker may be diagnosed as suffering from asbestosis and yet experience no symptoms of the disease. Deposition of George Wright at 3-9, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed*, Nos. 78-1322 to 1326 (6th Cir. July 21, 1979). Dr. Wright noted: "[W]e have the opportunity to look at annual films, that is, films taken every year, on individuals who have been exposed to asbestos. And some of them have clear-cut pulmonary fibrosis, which we call asbestosis, and they haven't a symptom in the world. Even when you ask them, 'Are you having any problem?' And give them the opportunity to examine themselves in terms of symptoms, and they will still say they don't have any impairment, any recognizable difficulties.

"So what I am saying is that you can have easily recognized X-ray abnormality, you can even have measurable pulmonary function abnormality in a person with asbestosis, and he will not have a symptom or a complaint at all. And in fact, if you measure his abilities to perform physical work, they retain these. Now, they may do it at a higher rate of breathing or a higher rate of muscular effort in order to breathe, but this will not intrude on their consciousness at that time. Later on it will." *Id.* at 44.

132. Tomnitz v. Employers' Liab. Assur. Corp., 343 Mo. 321, 121 S.W.2d 745 (1938).

133. *Id.* at 334, 121 S.W.2d at 752.

134. In an underlying suit against the plaintiff's employer, it was established that the silicosis

prior to the termination of the insurance policy in question.[135] Nevertheless, the expert trial testimony concerning the typical pathogenesis of dust diseases of the lungs convinced the court that the presence of silicosis as a disease must have preceded the manifestation of symptoms and the subsequent medical diagnosis.[136] Accordingly, the Missouri court refused to upset the trial court's finding that Tomnitz had acquired silicosis during his employment in a silica plant six years prior to the diagnosis that he was chronically ill.[137] Finding the evidence of Tomnitz's silicosis lacking in detail, however, the court remanded the case for determination of whether this particular decedent acquired the disease during the first insurer's policy period, which was not coterminous with the decedent's entire period of employment in the silica plant. The court left to the jury the determination of when the inhalation of silica dust caused actual damage to the decedent's lungs.[138]

### D. *Intention of the Parties*

Today, fifty years after *Tomnitz*,[139] CGL policies still do not specify that the bodily injury must be manifest or diagnosed to qualify as a bodily injury within the meaning of the policy. Notwithstanding this failure to provide an annotation for the term "bodily injury," it might be argued that the parties to the insurance contract simply intended that only manifest bodily injuries be covered. It is perhaps too simplistic to respond that if that is what they meant, they should have said so, but there is considerable judicial support for such a position.[140] A basic tenet of the principle of freedom of contract is that the parties have a right to include in and omit from an agreement whatever

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was acquired while Tomnitz was working at the plant. The judgment of liability was apportioned among three of Pioneer's insurance companies, which were determined by the trial court to have been on the risk during Tomnitz's employment. 343 Mo. at 325, 121 S.W.2d at 746. On appeal, one of the insurance companies denied liability on the ground that the disease was not "sustained" during its particular policy period. *Id.* at 326, 121 S.W.2d at 747.

135. *Id.* at 333, 121 S.W.2d at 751.

136. *Id.* at 334-36, 121 S.W.2d at 752-53.

137. *Id.* at 336, 121 S.W.2d at 753.

138. *Id.*

139. The liability policy in *Tomnitz* provided: " 'The Employers' Liability Assurance Corporation . . . hereby agrees with the assured . . . , as respects *bodily injuries*, including death at any time resulting therefrom, covered by this policy and *accidentally sustained* by any person or persons employed by the assured, as follows:

" 'Agreement I. (a) To settle or to defend in the manner hereinafter set forth against claims resulting from the liability imposed upon the assured by law for damages on account of *such injuries*.

. . . .

" 'Agreement VI. This policy covers only such injuries so sustained by reason of *accidents* occurring within the policy period.' " *Id.* at 325-26, 121 S.W.2d at 747 (emphasis added by the court).

140. In Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed*, Nos. 78-1322 to 1326 (6th Cir. July 21, 1978) the court made this very point, suggesting that a manifestation requirement "could have easily been drafted within the definition of 'occurrence'," as long as public policy did not forbid it. *Id.* at 1241.

terms remain within the confines of statutory prohibitions and public policy.[141]

Although the insurance industry is restricted by statutory regulations from the freedom it might desire,[142] it nonetheless does have sufficient latitude to graft, among other things, a manifestation requirement onto the definition of "occurrence."[143] As an exclusionary mechanism, this provision would render the policy analogous to a "discovery" or "claims made" policy, under which coverage becomes effective only if the injury giving rise to the claim is discovered and brought to the attention of the insurer during the policy period.[144] "Where a policy unambiguously and clearly limits coverage to acts

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141. "[I]nsurers have the same rights as do individuals to limit their liability and to enforce whatever conditions they please upon their obligations. In such an event unambiguous provisions in the insurance contract limiting liability must be given effect." Oceanonics, Inc. v. Petroleum Distrib. Co., 292 So. 2d 190, 192 (La. 1974) (quoting Niles v. American Bankers Ins. Co., 258 So. 2d 705, 707 (La. Ct. App. 1972)); *accord,* Fitzgerald v. Universal Underwriters Ins. Co., 132 Ga. App. 610, 208 S.E.2d 619 (1974); Bertini v. State Farm Mut. Auto. Ins. Co., 48 Ill. App. 3d 851, 362 N.E.2d 1355 (1977); Burgett v. Stuyvesant Life Ins. Co., 236 So. 2d 306 (La. Ct. App. 1970); Weisberg v. Detroit Auto. Inter-Ins. Exch., 36 Mich. App. 513, 194 N.W.2d 193 (1971); Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 282 Minn. 477, 165 N.W.2d 554 (1969); Miles v. State Farm Mut. Auto. Ins. Co., 519 S.W.2d 378 (Mo. Ct. App. 1975); Automobile Club Inter-Ins. Exch. v. Diebold, 511 S.W.2d 135 (Mo. Ct App. 1974).

142. *See* House Comm. on Small Business, Product Liability Insurance, A Report of the Subcomm. on Capital, Investment, and Business Opportunities, H.R. Rep. No. 997, 95th Cong., 2d Sess. 26-31 (1978) [hereinafter cited as Product Insurance Report].

143. In a letter dated April 6, 1972, Liberty Mutual Ins. Co. and Eagle-Picher Industries, Inc., a manufacturer of asbestos insulation products, agreed to graft a manifestation requirement onto their CGL policy: "Because asbestosis develops slowly and progressively from exposure to asbestos, it is agreed that Liberty Mutual's Comprehensive General Liability Policy shall cover asbestosis cases allegedly resulting from exposure to Eagle-Picher's products, as follows: (1) A 'bodily injury' within the coverage of the policy shall be deemed to have first occurred in all such cases when the first medical diagnosis of asbestosis was made. In cases in which death is alleged to have resulted from such exposure and no medical diagnosis of asbestosis is made until after death, the 'bodily injury' shall be deemed to have occurred on the date of death. . . . (3) Liberty Mutual shall defend and indemnify Eagle-Picher with respect to asbestosis cases which result in 'bodily injury' only as determined in Paragraph (1) above." Letter from Vincent Rhoney, Corp. Ins. Dir., Eagle-Picher Indus., Inc., April 6, 1972, *reprinted in* Reply Brief for Defendant/Appellee-Cross Appellant Forty-Eight Insulations, Inc. App. 1, at 2, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., Nos. 78-1322 to 1326 (6th Cir., filed July 21, 1978).

144. The distinction between a "discovery" policy and an "occurrence" policy was clearly described by a Louisiana Court of Appeals in a case that turned on this very question: "It appears, therefore, that in large measure the outcome of this matter depends upon whether the policy in question is a 'discovery policy' or an 'occurrence policy'. The former is one wherein coverage is effective if the negligent or omitted act is discovered and brought to the attention of the insurer within the policy period. The latter is a policy in which the coverage is effective if the negligent or omitted act occurs within the policy period, regardless of the date of discovery." J.M. Brown Constr. Co. v. D & M Mechanical Contractors, Inc., 222 So. 2d 93, 95 (La. Ct. App. 1969). *See also* J.G. Link & Co. v. Continental Cas. Co., 470 F.2d 1133 (9th Cir. 1972), *cert. denied,* 414 U.S. 829 (1973); Samuel N. Zarpas, Inc. v. Morrow, 215 F. Supp. 887 (D.N.J. 1963); Livingston Parish School Bd. v. Fireman's Fund Am. Ins. Co., 263 So. 2d 356 (La. Ct. App. 1972), *aff'd,* 282 So. 2d 478 (La. 1973); Taylor Contracting & Supply Co. v. American Mut. Liab. Ins. Co., 163 So. 2d 450 (La. Ct. App. 1964).

discovered and reported during the policy term, such limitation of liability is not per se impermissible."[145] Apparently, the drafters and issuers of the CGL policy did not seek, at least by contractual provision, to limit their liability in this way.

"[I]n the quest for intent the Court must put itself in the position of the parties. This is not a rule simply to dispel ambiguities. It is a rule for all seasons."[146] From the point of view of the insured, the question of intent is a matter of common sense: the manufacturer wants coverage, notwithstanding the peculiarities and medical complexities of a plaintiff's theory of liability. This, after all, satisfies the primary purpose of all insurance—to insure against risk.[147]

To understand the perspective of the insurer, it should not be forgotten that insurance is not a public service, but a business.[148] Insurers make careful and considered analyses of the potential risks posed by the products manufactured and sold by their insureds,[149] and even the vagaries of tort litigation figure in the determination of whether to provide a particular buyer with coverage, and if coverage is offered, at what price.[150]

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145. Livingston Parish School Bd. v. Fireman's Fund Am. Ins. Co., 282 So. 2d 478, 481 (La. 1973). For other decisions upholding the validity of "discovery" policies, see Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Cas. Co., 465 F.2d 22 (9th Cir. 1972); Samuel N Zarpas, Inc. v. Morrow, 215 F. Supp. 887 (D.N.J. 1963); San Pedro Properties, Inc. v Sayre & Toso, Inc., 203 Cal. App 2d 750, 21 Cal. Rptr. 844 (1962); J.M. Brown Constr. Co. v. D & M Mechanical Contractors, Inc., 222 So. 2d 93 (La. Ct. App. 1969); Lehr v. Professional Underwriters, 296 Mich. 693, 296 N.W. 843 (1941); Rotwein v. General Acc. Group, 103 N.J. Super. 406, 247 A.2d 370 (Law Div. 1968).

146. Abilene Sav. Ass'n v. Westchester Fire Ins. Co., 461 F.2d 557, 564 (5th Cir. 1972) (Brown, C.J., dissenting). *See also* W.C. Shepherd Co. v. Royal Indem. Co., 192 F.2d 710 (5th Cir. 1951); Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G., 3 Cal. 3d 434, 476 P.2d 406, 91 Cal. Rptr. 6 (1970) (en banc); Bramlett v. State Farm Mut. Auto. Ins. Co., 205 Kan. 128, 468 P.2d 157 (1970); Hardware Dealers Mut. Ins. Co. v. Berglund, 393 S.W 2d 309 (Tex. 1965).

147. "While the courts protect insurers against unjust claims and enforce regulations necessary for their protection, it must not be forgotten that the primary object of all insurance is to insure." 13 J. Appleman & J. Appleman, *supra* note 100, § 7386, at 148 (footnote omitted).

148. An insurer offers a mechanism through which a buyer can finance risk for a set price. "Through insurance, [risk] is transferred from the insured to the insurer for a consideration—a premium. The insurer, or professional risk bearer, expects premium dollars to cover loss costs and underwriting expenses so that the company shows a satisfactory return on the capital at risk." Task Force. Report, *supra* note 13, at 1-4.

149. In fairness, any speculation about the probable intent or reasonable expectations of an insurer must be confined within the boundaries of its business objectives. Describing the mechanics of product liability insurance, the Interagency Task Force on Product Liability characterized the procedure as one that "involves the interplay of a number of dynamic forces: the quality of manufactured products, the use made of these products; the rules of law, and the risk selection and pricing process. Since each of these forces is dynamic, rates charged for insurance are only 'roughly right' at best even when they are based on the actuarial projections of past experience. And because insurance is a loss-spreading mechanism, when technology develops new products with unknown hazards and loss potential or when new legal precedents limit defenses, insurers must respond judgementally by adjusting their rates to reflect these changing loss-producing factors." *Id.* at 1-5.

150. For a general discussion of product liability rate-making practices and procedures, see

Knowledge of potential liability for insidious diseases arising out of prolonged exposure to asbestos and other occupational disease hazards is not new to product liability insurers.[151] Purportedly, it was this knowledge that led insurers to change the CGL policy from an "accident" to an "occurrence" basis of recovery in 1966.[152] Statements made at the time of the conversion by

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Product Insurance Report, *supra* note 142, at 14-18; Task Force Report, *supra* note 13, at 1-21 to 1-40.

151. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974).

152. In discussing the underwriting intent of the policy revisers, Richard Elliott, then Secretary of the National Bureau of Casualty Underwriters, commented on the new occurrence basis for recovery: "[T]he reference to injurious exposure to conditions which results in injury . . . eliminates any requirement that the injury result from a sudden event. 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.

"In some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford coverage to the bodily injury or property damage which occurs during the policy period." Elliott, *The New Comprehensive General Liability Policy,* in Liability Insurance Disputes 12-3, 12-5 (S. Schreiber ed. 1968). *See also* Obrist, *supra* note 50, at 6. In light of Mr. Elliott's avowed purpose "to explain just what Standard Provisions policies are and why we have them," it is probably a safe assumption that he chose his words carefully. Elliott, *supra,* at 12-3. Interestingly, other commentators who have analyzed the CGL policy also fail to suggest that the coverage is contingent on the injury being evident or manifest during the policy period. *E.g.,* Even, *The Corporate Insurance Administrator—Problems with the 1966 Revised Liability Policy,* 3 Forum 95 (1968). Even's article is particularly revealing. Although he finds the "occurrence" definition to be a muddle of ambiguities, all of which he tangles with at some length, there is no mention in his discussion of any problem arising over the question of whether the injury must be manifest during the policy period. *Id.; see, e.g.,* 1 R. Long, *supra* note 50, § 11.05A (1979); Obrist, *supra* note 50; Reichenberger, *supra* note 50. Of course, it could be argued that the quarrel over a manifestation or exposure annotation on the term bodily injury is a semantic puzzle only for the linguist and that the businessman could not seriously doubt that the requirement that the injury occur during the policy period means that it be evident. This contention, though initially appealing, is seriously undercut by the expressed awareness of the drafters of the policy that an injury might occur before it was evident and that the definition of occurrence was meant to meet this possibility. Moreover, the pathogenesis of various lung diseases has been known about and argued in worker compensation cases for decades. *See* Gentry v. Swann Chem. Co., 234 Ala. 313, 174 So. 530 (1937); Solid Steel Scissors Co. v. Kennedy, 205 Ark. 958, 171 S.W.2d 929 (1943); Morrison v. Industrial Acc. Comm'n, 42 Cal. App. 685, 109 P.2d 767 (1941); Howard v. Texas Owyhee Mining & Dev. Co., 62 Idaho 707, 115 P.2d 749 (1941); Brown v. St. Joseph Lead Co., 60 Idaho 49, 87 P.2d 1000 (1939); *In re* Jefferies, 105 Ind. App. 349, 14 N.E.2d 751 (1938); Kentucky Stone Co. v. Phillips, 294 Ky. 576, 172 S.W.2d 216 (1943); State, *ex rel.* Wilson v. North East Fire Brick Co., 180 Md. 367, 24 A.2d 287 (1942); Sutter v. Kalamazoo Stove & Furnace Co., 297 Mich. 226, 297 N.W. 475 (1941); Fink v. Cold Spring Granite Co., 262 Minn. 393, 115 N.W.2d 22 (1962); Anderson v. City of Minneapolis, 258 Minn. 221, 103 N.W.2d 397 (1960); Bolosino v. Laclede-Christy Clay Prods. Co., 124 S.W.2d 581 (Mo. Ct. App. 1939); Simion v. Molybdenum Corp. of America, 49 N.M. 265, 161 P.2d 875 (1945); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959); Maynard Elec. Steel Casting Co. v. Industrial Comm'n, 273 Wis. 38, 76 N.W.2d 604 (1956).

representatives of the insurance industry reveal a recognition that an injury may take place prior to its being evident. It is also clear that the only limitation imposed by the revisers on coverage for such an injury is that it "take place" during the policy period. There is no express requirement that the injury be evident or manifest to trigger coverage.[153] That an individual may harbor an insidious disease years before there is any manifestation of symptoms is the very risk the CGL policy is, by its own language, intended to cover.[154] Rather than ascribe the absence of a manifestation requirement in the language of the policy to the fact that this is implicit in the term itself or to the drafters' carelessness, it seems more likely that the failure to restrict coverage to bodily injuries that become manifest during the policy period is at least some evidence of an intention not to do so. Similarly, the failure to include a provision that in cases of insidious disease "bodily injury" will be coincident with exposure, supports the inference that this is not what the parties intended either.

### E. *Prior Conduct of the Parties*

"There is no surer way to find out what parties meant, than to see what they have done."[155] Unfortunately, there is a paucity of data available to the public on this question.[156] Consequently, the conduct of insurers during the last few years in settling claims, defending suits, and satisfying judgments in

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153. *See* notes 51-52 *supra* and accompanying text.

154. Worker compensation statutes have long recognized the problems attendant upon the insidious nature of diseases caused by injurious exposure to workplace conditions, and have dealt with the problem forthrightly. Typically, coverage for occupational diseases applies only upon a showing of disability, not mere bodily injury. *See* note 86 *supra*. Furthermore, in cases of successive exposure to injurious conditions, liability will attach solely to the carrier that last insured the employer of "last injurious exposure." Cordero v. Triple A Mach. Shop, 580 F.2d 1331, 1337 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); General Dynamics Corp. v. Benefits Review Bd., 565 F.2d 208, 210 (2d Cir. 1977); Travelers Ins. Co. v. Cardillo, 225 F 2d 137, 144-45 (2d Cir. 1955); Alloy Surfaces Co. v. Cicamore, 221 A.2d 480, 485-86 (Del. 1966); Caterpillar Tractor Co. v. Industrial Comm'n, 63 Ill. 2d 153, 157-58, 345 N.E.2d 471, 473 (1976); McCormick v. United Nuclear Corp., 89 N.M. 740, 745, 557 P.2d 589, 594 (1976); Glenn v. Columbia Silica Sand Co., 236 S.C. 13, 20, 112 S.E.2d 711, 714 (1960); Wilson v. Van Buren County, 198 Tenn. 179, 185, 278 S.W.2d 685, 687 (1955); Cooper v. Mary E. Coal Corp., 215 Va. 806, 810, 214 S.E.2d 162, 165 (1975).

155. Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1877). This view has achieved widespread support in the area of sales law as well. "[T]he course of actual performance by the parties is considered the best indication of what they intended the writing to mean." U.C.C. § 2-202, Comment 2 (1978 version).

156. This is not surprising because the vast majority of product liability claims are settled without the filing of a lawsuit. In a survey of claims closed between July 1, 1976 and March 15, 1977, conducted by the Insurance Services Office, 73% of bodily injury and 83% of property damage claims were settled without a lawsuit ever being filed. Less than four percent of all claims went to verdict, and of these, the defendant was found liable in fewer than 25% of the cases. Insurance Services Office, Product Liability Closed Claims Survey: A Technical Analysis of Survey Results (1977), Highlights *reprinted in Product Liability Insurance: Hearings Before the Subcomm. on Capital, Investment and Business Opportunities of the House Comm. on Small Business*, 95th Cong., 1st Sess. 1316 (1977). The percentage of these cases that involved claims arising out of latent injury or damage was not reported.

cases involving coverage for diseases that manifest themselves only after a long period of latency is primarily a matter of speculation.[157] Nevertheless, many courts accept the conduct of the parties as evidence of what they intended a contract to mean,[158] and this will likely be an area of serious concern in future litigation. In *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[159] for example, the federal district court gave considerable weight to the fact that for three immediately preceding years, Forty-Eight Insulations tendered approximately 150 lawsuits to its various insurers, and in every case, an insurer provided a defense "without a reservation of rights raising the point that manifestation of the disease must occur during the coverage period as a requirement for coverage."[160] Furthermore, there was evidence that at least one insurer that advocated the manifestation theory had sought contribution and litigation expenses from other insurers on some of the earlier claims based on an exposure theory. The court also determined that this insurer had defended Forty-Eight Insulations when the claimant's disease became manifest after the policy with the insured had expired.[161] Still other insurers that urged application of the manifestation theory had declined to provide coverage in some of these earlier cases because the dates of exposure alleged by the claimants fell outside their respective coverage periods.[162] The

157. In light of the current flurry of litigation over insurer liability for insidious diseases, any data that could be collected by general inquiry or from examination of the briefs filed in the cases now before the courts would be of questionable value. Unbiased, verifiable data are not readily available. The only case involving asbestos-related injury in which there has been an analysis and finding by a court on this issue is Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1239 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir., July 21, 1978). In Porter v. American Optical Corp., No. 75-2202 (E.D. La. Nov. 25, 1977), which is the only other declaratory judgment action that has been decided to date on this question of insurer liability for insidious diseases, the issue of prior insurer conduct was not addressed in the court's opinion. Apparently, this was because the three insurance companies reserved by stipulation the question of coverage liability for later determination by the court. *Id.*, slip op. at 1. The decision deals exclusively with the question of which insurers have a duty to defend the action for the insured. *See id.* at 2.

158. Pirrone v. Monarch Wine Co., 497 F.2d 25 (5th Cir. 1974); Philips Elecs. & Pharm. Indus. Corp. v. Leavens, 421 F.2d 39 (3d Cir. 1970); Reynolds Bros. Lumber Co. v. W.S. Newell Constr. Co., 284 Ala. 352, 224 So. 2d 899 (1969); General Pump Serv., Inc. v. Ohio Cas. Ins. Co., 238 Cal. App. 2d 81, 47 Cal. Rptr. 533 (1965); Maskel Constr. Co. v. Town of Glastonbury, 158 Conn. 592, 264 A.2d 557 (1969); Margolin v. Franklin, 132 Ill. App. 2d 527, 270 N.E.2d 140 (1971); Blue Rock Indus., Inc. v. Raymond Int'l, Inc., 325 A.2d 66 (Me. 1974); Detroit Greyhound Emp. Fed. Credit Union v. Aetna Life Ins. Co., 381 Mich. 683, 167 N.W.2d 274 (1969); Aetna Cas. & Sur. Co. v. Haas, 422 S.W.2d 316 (Mo. 1968); American Stevedores, Inc. v. American Policyholders' Ins. Co., 138 N.Y.S.2d 513 (Sup. Ct. 1955).

159. 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978).

160. *Id.* at 1239.

161. *Id.*

162. This position seems to be of questionable merit in light of the express language of the CGL policy. *See* note 51-52 *supra* and accompanying text. An occurrence policy operates with absolute disregard of the timing of the causative event. "The policy will not depend upon the causative event of occurrence but will be based upon injuries or damages which result from such an event and which happened during the policy period. It will not be material whether the causative event happened during or before the policy period." Obrist, *supra* note 50, at 6.

court concluded, therefore, that the conduct of the insurers in the earlier cases was "implicit approval of the exposure theory as the correct interpretation" of what they believed the language of the policies to mean.[163] The district court's rather brief treatment of this issue, however, betrays the complexity of some of the difficult problems underlying the use of prior conduct as a guide to interpretation of a contract as well as the more specific question of the weight to be given such evidence in light of the insurer's broadly defined duty to defend.

Although evidence of a course of dealing[164] or course of performance[165] between parties has often been construed as a manifestation of the intended meaning of a contract,[166] this is not necessarily the only way to view such evidence and should not, therefore, be dispositive of the issue. Some commentators[167] have suggested that a course of performance should be treated as a modification or waiver of a term in a contract that is inconsistent with the conduct of the parties.[168] The practical effect of such an interpretation is that past conduct under an exposure theory of liability by an insurer that subsequently urged a manifestation approach could be viewed as a mere waiver of the condition that the injury become manifest during the policy period.[169] Such a finding would not necessarily estop the insurer from declining coverage on a manifestation theory of liability in later suits.[170] Arguably, this turnabout can be construed as a withdrawal of the waiver and reimposition of the condition that the injury become manifest during the policy period. In some instances, even repeated waivers have not barred a party from later insisting, with adequate notice, on strict adherence to the terms of the contract.[171]

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163. Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1239 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir., July 21, 1978).

164. *See* U.C.C. § 1-205(1) (1978 version) ("A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.").

165. *See* U.C.C. § 2-208(1) (1978 version) ("Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.").

166. *See* cases cited note 158 *supra.* In the area of sales law, for example, U.C.C. § 2-208(1) (1978 version) provides that in contracts involving repeated occasions for performance, the past course of performance is relevant in determining what the contract means. "The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was." *Id.,* Comment 1. *See also* Restatement of Contracts § 235 (1932).

167. J. Calamari & J. Perillo, The Law of Contracts, § 3-15, at 130 (2d ed. 1977); Comment, *Evaluating the Conduct of Successors in the Interpretation of Contract Terms: Practical Construction and Judicial Method,* 57 Iowa L. Rev. 215 (1971).

168. *See, e.g.,* Pirrone v. Monarch Wine Co., 497 F.2d 25 (5th Cir. 1974); Margolin v. Franklin, 132 Ill. App. 2d 527, 270 N.E.2d 140 (1971). *See also* U.C.C. §§ 2-208(3), -209.

169. *See* 3A A. Corbin, Contracts § 752 (1960).

170. *Id.* §§ 752, 764.

171. *See, e.g.,* United Shoe Mach. Co. v. Abbott, 158 F. 762 (8th Cir. 1908); Crofoot Lumber, Inc. v. Thompson, 163 Cal. App. 2d 324, 329 P.2d 302 (1958); Daniels v. Boston & M.R.R., 184 Mass. 337, 68 N.E. 337 (1903).

Generally, a waiver can be withdrawn if the other party has not changed position in reliance on the waiver and as long as the reinstatement of the condition will not thereby operate unfairly.[172]

One reason that an insurer might gratuitously expand the scope of coverage under a CGL policy by waiving the condition that the injury or damage manifest itself during the policy period is that this might enable the insurer to cut its losses in insidious disease cases. Because more than one policy might afford coverage,[173] an insurer on the risk at the time the disease became manifest might decide to urge an exposure analysis and seek contribution from other insurers that were on the risk during the long period of the claimant's exposure.[174]

Depending on its overall risk position, a carrier having greater liability exposure for latent injuries that might become manifest under current policies, would probably prefer to urge a basis of coverage that permits contribution and apportionment of any liability. It might be less costly to pay an apportioned share for all injuries arising out of a few old policies than to advocate a theory of liability that requires underwriting the entire loss for injuries that become manifest under policies still in effect.[175] Once current policies expire, however, and the insurer decides not to underwrite any such risks in the future, the manifestation theory should then be the desired approach.

Accordingly, the legal significance of evidence of prior conduct will differ depending on the court's analytic approach. If the prior conduct is viewed as a manifestation of intended meaning, the meaning of the agreement may thereby be conclusively established.[176] If, on the other hand, the prior conduct is viewed as a waiver or modification, the meaning of the agreement will ultimately remain in doubt. Moreover, the general utility of prior conduct evidence as a guide to interpretation may be further undercut in the specific

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172. *See, e.g.*, Salvatore v. Trace, 109 N.J. Super. 83, 262 A.2d 409 (App. Div. 1969), *aff'd*, 55 N.J. 362, 262 A.2d 385 (1970); Imperator Realty Co. v. Tull, 228 N.Y. 447, 127 N.E. 263 (1920). *See also* U.C.C. § 2-209(5) (1978 version); 3A A. Corbin, Contracts § 752, at 481 (1960).

173. *See* note 152 *supra* and accompanying text.

174. In Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed*, Nos. 78-1322 to 1326 (6th Cir. July 21, 1978), the court found evidence that the Insurance Company of North America had in fact sought contribution from other insurers on the basis of exposure being the determinative factor in assessing coverage liability. *Id.* at 1239. Apportionment among insurers has become a recognized practice in worker compensation law. Although the general rule in occupational disease and successive injury cases continues to be that the employer during the last injurious exposure is solely and fully liable to the disabled employee, many states now permit apportionment of that liability among all prior employers whose employment contributed to the injury or disease. *See* note 95 *supra*. Similarly, apportionment of liability among insurers has also been followed in the area of real property law when the insured has sustained damages of a continuing and often indivisible nature. *See, e.g.*, Gruol Constr. Co., Inc. v. Insurance Co. of N. America, 11 Wash. App. 632, 524 P.2d 427 (1974).

175. Advocates of the manifestation theory urge that the carrier on the risk at the time the disease becomes manifest should bear the entire loss. *See* notes 55-58 *supra* and accompanying text.

176. *See* note 158 *supra* and accompanying text.

area of insurance contracts because of the rigorously defined rules relating to an insurer's duty to defend.

Comprehensive general liability policies contain a provision whereby the insurer promises to defend its insured in actions for damages "even if any of the allegations of the suit are groundless, false or fraudulent."[177] Thus, the duty to defend is contractual in nature,[178] and the general rule in nearly all jurisdictions is that the allegations in the injured party's complaint against the insured define the scope of the insurer's duty to defend.[179] It is irrelevant that the facts alleged may be untrue and incapable of proof. The insurer has a clear duty to defend if the complaint merely states facts that, if true, are within the risk covered by the policy.[180]

Even when the facts alleged in the complaint arguably fall outside the risk covered, courts usually favor the insured[181] and declare that the insurer has a duty to defend unless the facts are unambiguously excluded from coverage.[182]

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177. Standard Policy, *supra* note 11, at CGL-2.

178. "The nature of the insurer's duty to defend is purely contractual. There is no common law duty as to which the courts are free to devise rules. The obligation on the court is merely to interpret the language of the insurance contract." All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160, 163 (N.D. Ind. 1971); *accord,* International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 320 N.E.2d 619, 361 N.Y.S.2d 873 (1974). *See also* 1 R. Long, *supra* note 50, § 5.01, at 5-2 to 5-5 (1979).

179. The New Jersey Supreme Court explained in Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970): "The obligation to defend 'groundless, false or fraudulent' claims does not mean that the carrier will defend claims which would be beyond the covenant to pay if the claimant prevailed. It means only that a carrier may not refuse to defend a suit on the ground that the claim asserted against the insured cannot possibly succeed because either in law or in fact there is no basis for a plaintiff's judgment." *Id.* at 389, 267 A.2d at 10; *see, e.g.,* Firestine v. Poverman, 388 F. Supp. 948 (D. Conn. 1975); Smedley Co. v. Employers Mut. Liab. Ins. Co., 143 Conn. 510, 123 A.2d 755 (1956); Aetna Cas. & Sur. Co. v. Coronet Ins. Co., 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976); Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 210 A.2d 221 (1965); Lionel Freedman, Inc. v. Glens Falls Ins. Co., 27 N.Y.2d 364, 267 N.E.2d 93, 318 N.Y.S.2d 303 (1971); Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 77 N.E.2d 131 (1948); Grand Union Co. v. General Acc., Fire & Life Assur. Corp., 254 A.D. 274, 4 N.Y.S.2d 704 (1st Dep't), *aff'd,* 279 N.Y. 638, 18 N.E.2d 38 (1938); Crist v. Potomac Ins. Co., 243 Or. 254, 413 P.2d 407 (1966); Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co., 387 S.W.2d 22 (Tex. 1965); Security Title & Trust Co. v. Tower Land & Inv. Co., 560 S.W.2d 208 (Tex. Civ. App. 1977); Smith Burlington v. American Fid. Co., 125 Vt. 348, 215 A.2d 508 (1965); Seaboard Sur. Co. v. Ralph Williams' Nw. Chrylser Plymouth, Inc., 81 Wash. 2d 740, 504 P.2d 1139 (1973); Waite v. Aetna Cas. & Sur. Co., 77 Wash. 2d 850, 467 P.2d 847 (1970).

180. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805 (Miss. 1970); Kyllo v. Northland Chem. Co., 209 N.W.2d 629 (N.D. 1973); C.W. Davis Supply Co. v. Newark Ins. Co., 60 Misc. 2d 946, 304 N.Y.S.2d 124 (Sup. Ct. 1969); Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968). *See generally* cases cited note 179 *supra.*

181. *See, e.g.,* Continental Cas. Co. v. Alexis I. duPont School Dist., 317 A.2d 101 (Del. 1974); Pendlebury v. Western Cas. & Sur. Co., 89 Idaho 456, 406 P.2d 129 (1965); Mt. Hope Inn v. Travelers Indem. Co., 157 N.J. Super. 431, 384 A.2d 1159 (1978); Farris v. United States Fid. & Guar. Co., 273 Or. 628, 542 P.2d 1031 (1975); Security Title & Trust Co. v. Tower Land & Inv. Co., 560 S.W.2d 208 (Tex. Civ. App. 1977).

182. *See, e.g.,* Wheeler v. Aetna Cas. & Sur. Co., 11 Ill. App. 3d 841, 298 N.E.2d 329 (1973), *vacated as moot,* 57 Ill. 2d 184, 311 N.E.2d 134 (1974); American Auto. Ass'n, Inc. v. Globe

The duty to defend nevertheless arises even when there exists only the barest possibility that the insurer could be liable.[183] Accordingly, when a plaintiff alleges a theory or facts that are unquestionably excluded from coverage, if any of the other allegations in the complaint would be covered, the insurer has a duty to defend.[184]

Under so broad a duty to defend, an insurer faced with a request for a defense in an insidious disease case might well be compelled to offer a defense, regardless of the particular theory of liability it favors on the question of whether it will be required to indemnify.[185] The pleadings might not set forth with sufficient specificity the time frame in which the claimant either was exposed to a hazardous substance or suffered the bodily injury or disease. Thus, the claim could conceivably fall within the risk covered, and this mere possibility alone would be sufficient to trigger the carrier's duty to defend.[186]

The insurer's ultimate liability, however, does not necessarily follow if the claimant succeeds in his action against the insured. Courts often describe the duty to defend as being broader than the duty to indemnify.[187] Ultimate

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Indem. Co., 362 So. 2d 1206 (La. Ct. App. 1978); Sturges Mfg. Co. v. Utica Mut. Ins. Co., 37 N.Y.2d 69, 332 N.E.2d 319, 371 N.Y.S.2d 444 (1975).

183. Hartford Accident & Indem. v. Krekeler, 491 F.2d 884 (8th Cir. 1974); First Ins. Co. v. Continental Cas. Co., 466 F.2d 807 (9th Cir. 1972); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); Ranger Ins. Co. v. Mercantile Trust Co., 363 F. Supp. 795 (E.D. Mo. 1973); Capitol Indem. Corp. v. St. Paul Fire & Marine Ins. Co., 357 F. Supp. 399 (W.D. Wis. 1972); Lane v. Hartford Fire Ins. Co., 343 F. Supp. 79 (E.D. Mo. 1972); Continental Ins. Co. v. United States Fid. & Guar. Co., 528 P.2d 430 (Alaska 1974); Wint v. Fidelity & Cas. Co., 9 Cal. 3d 257, 507 P.2d 1383, 107 Cal. Rptr. 175 (1973); Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); Domas v. Fidelity & Cas. Co., 113 Ill. App. 2d 22, 251 N.E.2d 284 (1969); Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 212 Kan. 681, 512 P.2d 403 (1973); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975); McGroarty v. Great Am. Ins. Co., 36 N.Y.2d 358, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975); Casey v. Northwestern Sec. Ins. Co., 260 Or. 485, 491 P.2d 208 (1971).

184. Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531 (8th Cir. 1970); Schurgast v. Schumann, 156 Conn. 471, 242 A.2d 695 (1968); Stevens v. Horne, 325 So. 2d 459 (Fla. Dist. Ct. App. 1975); Garden Sanctuary, Inc. v. Insurance Co. of N. America, 292 So. 2d 75 (Fla. Dist. Ct. App. 1974); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); Marston v. Merchants Mut. Ins. Co., 319 A.2d 111 (Me. 1974); Western Fire Ins. Co. v. J.R. Snyder, Inc., 76 Mich. App. 242, 256 N.W.2d 451 (1977); Dunne v. Fireman's Fund Am. Ins. Co., 69 N.J. 244, 353 A.2d 508 (1976); Schwamb v. Fireman's Ins. Co., 41 N.Y.2d 947, 363 N.E.2d 356, 394 N.Y.S.2d 632 (1977); Lionel Freedman, Inc. v. Glens Falls Ins. Co., 27 N.Y.2d 364, 267 N.E.2d 93, 318 N.Y.S.2d 303 (1971); Marine Midland Servs. Corp. v. Samuel Kosoff & Sons, Inc., 60 A.D.2d 767, 400 N.Y.S.2d 959 (4th Dep't 1977); Grand River Lime Co. v. Ohio Cas. Ins. Co., 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972); Ferguson v. Birmingham Fire Ins. Co., 254 Or. 496, 460 P.2d 342 (1969); Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968).

185. The consequences of a wrongful failure or refusal to defend a suit brought against an insured will put the insurer in breach of contract, thus rendering it liable for any damages occasioned as a direct result of the breach. "This is so even though the refusal to defend is based on a mistake." 1 R. Long, *supra* note 50, § 5.04, at 5-22.1 (1979) (footnote omitted); 7A J. Appleman & J. Appleman, *supra* note 100, § 4689 (1962).

186. *See* notes 177-84 *supra* and accompanying text.

187. Carboline Co. v. Home Indem. Co., 522 F.2d 363 (7th Cir. 1975); Paulin v. Fireman's Fund Ins. Co., 1 Ariz. App. 408, 403 P.2d 555 (1965); Eichler Homes, Inc. v. Underwriters at Lloyd's, 238 Cal. App. 2d 532, 47 Cal. Rptr. 843 (1965); Missionaries of Co. of Mary, Inc. v.

liability depends entirely upon the facts as found in the underlying lawsuit[188] or, in the absence of any such finding at trial, in a declaratory judgment action to determine the question of coverage.[189]

Thus, the prior conduct of insurers in defending suits should not inevitably lead to a conclusion that the insurer had adopted either a manifestation or an exposure theory with respect to that policy. On the question of intended meaning, investigation of prior conduct in light of the expansive duty to defend yields ambiguous conclusions. Probably the most that can be said with any certainty about an insurer that defended or settled asbestos cases in the past under a CGL policy is that the defense was tendered pursuant to the duty assumed in the policy. The carrier recognized first, that it would not be impossible for bodily injury or disease to occur prior to its becoming evident, and second, that the trier of fact might find that such bodily injury or disease occurred at some point during exposure, which preceded diagnosis and was coincident with the carrier's policy period.

## CONCLUSION

The lack of any mandate of the manifestation or exposure theory by either the terms of the CGL insurance policy or by the courts on the grounds of public policy, coupled with the insurer's unassailable duty to defend, means that all of the manufacturer's insurers on the risk from plaintiff's first exposure to the time of suit owe the insured a defense. Because ultimate liability for a plaintiff's judgment will turn on a finding of fact that may not be resolved in the underlying suit,[190] a second action will be required in each case to determine when the plaintiff's injury actually occurred and to resolve the issue of which insurer has the duty to indemnify.[191]

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Aetna Cas. & Sur. Co., 155 Conn. 104, 230 A.2d 21 (1967); Palace Laundry Co. v. Hartford Acc. & Indem. Co., 27 Conn. Supp. 222, 234 A.2d 640 (1967); State Farm Mut. Auto. Ins. Co. v. Murphy, 38 Ill. App. 3d 709, 348 N.E.2d 491 (1976); Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 212 Kan. 681, 512 P.2d 403 (1973); St. Paul Fire & Marine Ins. Co. v. Thompson, 150 Mont. 182, 433 P.2d 795 (1967); Sturges Mfg. Co. v. Utica Mut. Ins. Co., 37 N.Y.2d 69, 332 N.E.2d 319, 371 N.Y.S.2d 444 (1975); International Paper Co. v. Continental Cas. Co., 35 N.Y.2d 322, 320 N.E.2d 619, 361 N.Y.S.2d 873 (1974); State v. Glens Falls Ins. Co., 132 Vt. 97, 315 A.2d 257 (1974).

188. *See, e.g.*, Dillon v. Hartford Acc. & Indem. Co., 38 Cal. App. 3d 335, 113 Cal. Rptr. 396 (1974); American Policyholders' Ins. Co. v. Cumberland Cold Storage Co., 373 A.2d 247 (Me. 1977); Goldberg v. Lumber Mut. Cas. Ins. Co., 297 N.Y. 148, 77 N.E.2d 131 (1948); Campbell v. Commercial Standard Ins. Co., 502 S.W.2d 232 (Tex. Civ. App. 1973).

189. *See* Note, *Use of the Declaratory Judgment to Determine a Liability Insurer's Duty to Defend—Conflict of Interests*, 41 Ind. L.J. 87 (1965).

190. In the underlying product liability action only the causal relationship between the injured plaintiff's disease and the manufacturer's product and product defect needs to be established. The precise time when the injury actually occurred is of moment only to the carrier and the insured, and it need not be resolved to support a finding of tort liability against the manufacturer. *See* notes 6-7 *supra* and accompanying text.

191. On the question of whether to challenge coverage in a declaratory judgment action before defending under a reservation of rights or a nonwaiver agreement, or after conclusion of the underlying suit, compare Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970) with Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966).

The legal relationship between the manufacturer and the injured plaintiff arises out of a breach of the common law duty to exercise reasonable care. Thus, the tort system may constructively disregard the latency period on grounds of equitable policy considerations. The doctrines of tort law, however, control only the underlying products liability lawsuit, not the issue of insurer liability for coverage. The legal relationship between the manufacturer and its insurers arises out of contract, and the terms of the agreement binding the parties will not permit a disregard of the latency period for it is at some point during this time that liability attached to an insurer.

Without a general theory of liability imposed by a court, however, insurers will be unable to anticipate both whether they will ultimately be liable, and if so, for what part of the judgment. This uncertainty will doubtless discourage the parties from negotiating settlements. Moreover, the administrative details of choosing a single insurer to control the manufacturer's defense and apportion the costs among the insurers will be difficult to resolve. A likely result from this confusion is an increase in product liability premiums, which would be required to meet the transaction costs for the multiplicity of lawsuits necessary to resolve fully all the controversies among the various parties that can arise in the litigation of a single product liability suit.

A consistent resolution of the controversy can be achieved, however, if a theory of liability is based, not on some hidden term in the insurance policy nor on an arbitrary analytic scheme drawn from inapposite policy rationales in analogous areas of law, but on a factual finding extracted from actual and reasonably hypothesized medical evidence about a particular disease.[192] This theory of insurer liability will depend on generalizations drawn from scientific data, which can be universally and consistently applied.

Absolute certitude as to when and how an insidious disease occurs may

192. At some point in a court's analysis, the medical data will support a conclusion that it is "more likely than not" that bodily injury, disease, or sickness occurred at a particular point along the continuum beginning at first exposure. This was essentially the approach taken in Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978). The court reviewed a comprehensive presentation of medical evidence describing the typical pathogenesis of the diseases related to asbestos products and adopted an exposure theory as a factual synthesis of the scientific data. *Id.* at 1236-37. Admitting that "it is virtually impossible to determine which exposure or exposures to asbestos cause the disease," the court nevertheless was able to generalize from the medical evidence presented that "[d]amage begins with the initial insult." *Id.* at 1237. One physician-expert had noted: "I think the initial injury occurs within a fairly brief period of time, within months or certainly a year after the inhalation of the fibers." Deposition of George Wright at 46, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978). Another expert indicated that "[y]ou'd have to say that the initial insult occurred with the inhalation and as the inhalation kept on over a man's working life period . . . these effects would begin to build up and become noticeable. . . . [T]here is an immediate or very early response by the body. How soon that results in recognizable fibrosis, we really can't say. But it certainly begins fairly soon." Deposition of Henry Anderson at 13-16, Insurance Co. of N. America v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), *appeal docketed,* Nos. 78-1322 to 1326 (6th Cir. July 21, 1978). Although the medical evidence submitted by deposition was proffered by the defendant, the court determined that the testimony offered at trial by plaintiff's expert was in substantial accord. 451 F. Supp. at 1236.

never be possible, but the law does not require the precision of a surgeon's scalpel. It is enough to make considered judgments based on facts that are ascertainable, and to draw dispassionate, reasoned conclusions therefrom.[193] Because different insidious diseases progress in different ways, a theory of liability applicable to one type of disease will not necessarily be appropriate to another. A comprehensive presentation of medical evidence will be required in each category of disease to determine when bodily injury may generally be deemed to occur, and thus, which insurers will have a duty to indemnify.

Moreover, if the analysis is confined to the factual data presented, the conclusion should have considerable precedential weight because, unlike the rules of contract interpretation and different policy rationales, which may vary from jurisdiction to jurisdiction, the medical evidence remains constant despite jurisdictional proclivities.[194] Thus, an insurer covering an asbestos manufacturer in Michigan can reasonably anticipate a similar approach with respect to its insureds in Louisiana.

That insidious diseases present unusually difficult evidentiary problems is a factor not to be minimized. By the same token, it is not a license to abandon altogether a search for facts that would resolve the dispute within at least an approximation of the explicit terms of the policy. In declaratory judgment actions in which insurers seek to determine their liability in cases of insidious disease suits, the better approach is for the court to forge a medico-legal nexus out of a thorough analysis of what is known about the pathogenesis of an insidious disease. Only in this way can the controversy over successive insurer liability in cases of insidious disease be resolved fairly and within the terms of the agreement that defines the legal relationship of the parties.

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193. This was the approach taken by the district court in Illinois in Needham v. White Labs., Inc., No. 76-1101 (N.D. Ill. Jan. 10, 1980). In a product liability action against a drug manufacturer, the plaintiff sought to establish that a drug taken by her mother during pregnancy caused the cancer for which plaintiff now sought damages. *Id.*, slip op. at 1. The court struggled with the medical testimony on the issue of causation and concluded that "despite the fact that the record supports the conclusion that the scientific community does not 'completely understand the process in which cancer begins, develops, metasticizes and the like,' it could also support the conclusion that the medical community is also aware that there are certain conditions which are capable of generating—by whatever means—cancerous growths. Specifically, the jury was entitled to conclude on this record that maternal ingestion of synthetic estrogens during pregnancy is one such condition. It was also entitled to conclude that reputable statistical analysis of confirmed data has led qualified experts to believe that the coincidence of this potentially carcinogenic condition with the actual fact of a case of clearcell adenocarcinoma makes 'the chances of a causal relationship . . . extremely high.' Finally, the jury was entitled to conclude . . . that such statistically well established generalizations are equally as reliable as, and the functional equivalents of, flat causal pronouncements." *Id.*, slip op. at 14.

194. Moreover, offensive use of issue preclusion might be invoked against an insurer by a manufacturer not joined in a prior action over coverage liability if the insurer in that prior action had a full and fair opportunity to litigate the identical issue. The trend in recent cases has been to find that there is no inherent difference between offensive and defensive use of issue preclusion by a nonparty. *See* Vanguard Recording Soc'y, Inc. v. Fantasy Records, Inc., 24 Cal. App. 3d 410, 417, 100 Cal. Rptr. 826, 831 (1972); Thill v. Modern Erecting Co., 284 Minn. 508, 515-16, 170 N.W.2d 865, 870-71 (1969); Bahler v. Fletcher, 257 Or. 1, 474 P.2d 329, 337-39 (1970); Restatement (Second) of Judgments § 88, at 99 (Tent. Draft No. 2, 1975).