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More than fifteen thousand people alleging asbestos-related injuries have filed suit against manufacturers of asbestos products. Most of the plaintiffs are workers who came into contact with asbestos products in their workplaces: installers of insulation in buildings, workers in shipyards, and others employed by the purchasers of asbestos products. Asbestosis typically develops slowly, with an extremely long delay between first exposure and diagnosis. Asbestos manufacturers often had several liability insurers during those years.

At least twenty suits have been filed to resolve the issue of insurance coverage, and both the courts and the insurance carriers are divided on

1. When Manville Corporation (Johns-Manville until 1982) filed for Chapter 11 reorganization on August 26, 1982, 11,000 suits, representing 15,550 plaintiffs, had been filed against it. New suits were being filed at the rate of 425 a month, representing 495 new plaintiffs. Manville's consultant estimated that ultimately 52,000 suits would be filed, representing $2 billion in claims. Suits are being filed against more than 400 defendants. Manville is named as a defendant in nearly all the suits, so these figures approximate the total number of suits. Telephone interview with William Keough, Associate Editor of the ASBESTOS LITIGATION REP. (NAT'L. L. REP.) (Sept. 3, 1982) (notes of the interview on file with Washington Law Review); see also Commercial Union Insurance Companies, Environmental Issues Task Force, Asbestos—A Social Problem, 1–2 (Position Paper, May 12, 1981) (hereinafter cited as Task Force); Mansfield, Asbestos: The Cases and the Insurance Problem, 15 FORUM 860, 865 (1980). Six thousand suits had been filed against Keene at the time it filed suit against its primary insurers. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1038 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982).


3. It is projected that as many as 5.6 million Americans may die from diseases caused by workplace exposure since World War II. See Task Force, supra note 1, at 13. Many of the plaintiffs in the suits were not employees of the asbestos manufacturers. They sued the manufacturers because, under workers' compensation laws, they could not sue their employers. Employees of manufacturers, as well as other workers who sue their employers, can recover only if they prove intentional misconduct not covered under the workers' compensation laws of their state. See, e.g., Johns-Manville Prods. Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980) (manufacturer is not liable for employee's initial injuries, but is liable for fraudulent concealment of his condition, which aggravated his disease).

4. See infra part IA.


6. Task Force, supra note 1, at 43 & app. C. See also infra note 31 and accompanying text.
which insurer bears the risk of loss. Two courts have held that exposure to asbestos during a policy period triggers coverage, so that the insurers during all the years of exposure may be liable.\footnote{7} One court, on the other hand, has held that coverage is not triggered until the disease manifests itself, so that only the present insurer is potentially liable.\footnote{8}

In \textit{Keene Corp. v. Insurance Co. of North America},\footnote{9} the United States Court of Appeals for the District of Columbia integrated those approaches, holding that insurance coverage is triggered both by exposure to asbestos and by development and manifestation of a related disease. Each insurer covering any period during this process is liable for indemnification of the manufacturer and for defense costs.\footnote{10} This liability is limited, however, to policy coverage, and many be reduced by the policy's other-insurance clause.\footnote{11} The court also held that the manufacturer is not proportionately liable for the periods during which it was uninsured.\footnote{12} Thus, the manufacturer's payments to plaintiffs will begin only after the insurance funds run out.\footnote{13}

Of the four decisions on insurer liability for asbestos-related injury,\footnote{14} \textit{Keene} imposes the broadest liability. For the insurance industry, the implications of \textit{Keene} are enormous. Estimates of total payments for asbestos-related injuries for 1977 to 1995 range from lows of $9.3 billion and $25.6 billion\footnote{15} to a high of $170 billion.\footnote{16} One insurance group says that this potential liability is great enough to bankrupt both the manufacturers and the insurers.\footnote{17}

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  \item \footnote{7}{See infra note 37 and accompanying text.}
  \item \footnote{8}{See infra note 53 and accompanying text.}
  \item \footnote{9}{667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982).}
  \item \footnote{10}{Id. at 1041-49. This is sometimes known as the "triple trigger" theory, because the insurer may incur liability at any of three points along the way.}
  \item \footnote{11}{See infra notes 112-16 and accompanying text (summary of the "other-insurance" problems when more than one policy covers an injury).}
  \item \footnote{12}{667 F.2d at 1049.}
  \item \footnote{13}{In theory, insurance funds should be exhausted first. In actuality, manufacturers have expended millions of dollars to establish insurer liability. \textit{See}, e.g., Wall Street Journal, Aug. 30, 1982, at 3, col. 1 (Manville Corp. claimed that it had spent $24.5 million in legal fees and $24 million in asbestos-related claims thus far).}
  \item \footnote{15}{Vagley & Blanton, \textit{Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation}, 16 \textit{FORUM} 636, 647 (1981).}
  \item \footnote{16}{Task Force, \textit{supra} note 1, at 34-35.}
  \item \footnote{17}{Id. at 36. According to one estimate, the insurers spent approximately $1.35 billion for asbestos claims in 1981 as compared with "the total insurance industry's premium for all general liabili-
This Note considers asbestosis, the principal injury caused by exposure to asbestos, in the context of the conflicting theories of insurance recovery. The Keene court’s attempt to spread liability as broadly as possible in a situation not adequately defined by the language of the insurance policies is the best judicial response yet articulated. Even this broad theory of insurer liability, however, is insufficient in light of the magnitude and extent of the occupational diseases involved. This Note proposes a national legislative solution to compensate workers who have been disabled by exposure to asbestos and other modern industrial hazards.

I. BACKGROUND

A. Asbestosis

Asbestosis is a lung disease that develops slowly, beginning shortly after a worker first inhales asbestos fibers. On the average, twenty years pass before the condition is sufficiently advanced to manifest itself through serious physical symptoms, disability, and death.

The disease was first reported in 1906 and was generally accepted as a serious risk by the 1930’s, at least for asbestos textile workers and miners. Although asbestosis was diagnosed in asbestos pipe insulation workers as early as 1934, a postwar study of shipyard workers pronounced asbestos insulation relatively safe. Hindsight shows that the study period was too short, because of the long development period for disease coverage (less medical malpractice insurance) in 1980 of just $6.3 billion. See infra notes 127 & 128.

Courts considering liability for asbestos-related disease have generally focused on asbestosis, with only brief reference to mesothelioma and lung cancer. One court, when asked for clarification, held that all three diseases should be treated the same. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 657 F.2d 814, 815 (6th Cir. 1981), aff’d on rehearing, 633 F.2d 1212 (1980), cert. denied, 102 S. Ct. 686 (1981). Whether they should be treated similarly is beyond the scope of this Note.


Mehaffy, Asbestos-Related Lung Disease, 16 Forum 341, 343 (1980); see also Mansfield, supra note 1, at 864.


Asbestos pipe insulation was in use as early as 1874. Mehaffy, supra note 21, at 342. It was heavily used in World War II shipyards. See, e.g., Vagley & Blanton, supra note 15, at 637.


Id. at 1084 (citing Fleisher, Viles, Gade & Drinker, A Health Survey of Pipe-Covering Operations in Constructing Naval Vessels, 28 J. INDUS. HYG. AND TOXICOLOGY 9 (1946)).
asbestosis. In 1965, the Selikoff report\textsuperscript{26} publicized the increased manifestation of asbestosis in past and present asbestos insulation workers. Since then, the number of workers filing tort suits for asbestosis and related diseases has grown from one in 1968\textsuperscript{27} to more the fifteen thousand in mid-1982.\textsuperscript{28}

B. Theories of Insurance Recovery

The issue of insurer liability to manufacturers arose in the landmark 1973 decision of \textit{Borel v. Fibreboard Paper Products Corp.},\textsuperscript{29} the first case imposing liability on manufacturers of asbestos products for diseases caused by those products. In \textit{Borel}, the Fifth Circuit held that, if it is impossible to apportion responsibility for a worker’s asbestosis, the manufacturers of all asbestos products to which the plaintiff was exposed are jointly and severally liable.\textsuperscript{30}

Because of this decision, the extent of insurers’ liability to manufacturers has become a major issue. Many declaratory judgment actions have been filed\textsuperscript{31} to determine when a compensable “bodily injury” has occurred.\textsuperscript{32} These actions require the courts to construe the standard lan-

\textsuperscript{26} Selikoff, Churg, & Hammond, \textit{The Occurrence of Asbestosis Among Industrial Insulation Workers in the United States}, 132 ANNALS OF THE N.Y. ACADEMY OF SCI. 139 (1965); see also \textit{Borel v. Fibreboard Paper Prods. Corp.}, 493 F.2d 1076, 1085 n.15 (5th Cir. 1973) (excerpt from Selikoff, Churg, & Hammond study), \textit{cert. denied}, 419 U.S. 869 (1974). The authors of the study found evidence of asbestosis in nearly half of the 1,522 insulation workers examined. The percentage of abnormality ranged from 10.4\% in workers with less than 10 years of exposure to 94.2\% in those with more than 40 years of exposure. Continued observation of Selikoff’s study group has confirmed that it takes two or more decades to find a sharp increase in death rate of exposed insulation workers. Selikoff, Hammond & Seidman, \textit{Mortality Experience of Insulation Workers in the United States and Canada, 1943–1976}, 330 ANNALS OF THE N.Y. ACADEMY OF SCI. 91, 114 (1979).

\textsuperscript{27} Mehaffy, supra note 21, at 345.

\textsuperscript{28} See supra note 1.

\textsuperscript{29} 493 F.2d 1076 (5th Cir. 1973), \textit{cert. denied}, 419 U.S. 869 (1974). \textit{Borel} apparently was the third asbestosis case filed and the first to be tried. Mehaffy, supra note 21, at 345.

\textsuperscript{30} 493 F.2d at 1096. In some jurisdictions industry-wide liability can be established without proving exposure to the products of specific manufacturers. See \textit{Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.}, 633 F.2d 1212, 1215 n.3 (6th Cir. 1980), \textit{aff’d on rehearing}, 657 F.2d 814, \textit{cert. denied}, 102 S. Ct. 686 (1981).

The Fifth Circuit recently stated that \textit{Borel} did not hold that all asbestos products are dangerous as a matter of law. Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981). This decision raises the possibility of repeated litigation of the degree of danger inherent in particular asbestos products. See, e.g., \textit{Comment, An Examination of Recurring Issues in Asbestos Litigation}, 46 ALB. L. REV. 1307 (1982).

\textsuperscript{31} Twenty-four such actions in various state and federal jurisdictions are listed in Ward, \textit{Coverage for Exposure: Destructive Judicial Legislation}, 24 FOR THE DEF., March 1982, at 10, 16 n.1. In addition, DES and Agent Orange manufacturers have sued their insurers in the United States District Court for the District of Columbia, seeking to have the \textit{Keene} result applied in those industries. Tamoff, \textit{Asbestos Firms Hope to Copy Keene Success}, Bus. Ins., Apr. 12, 1982, at 1, col. 3.

\textsuperscript{32} The following policy language is typical:
guage of the insurers' comprehensive general liability policies.\textsuperscript{33} Two main theories of construction have evolved: (1) "bodily injury" occurs during exposure to asbestos, or (2) it occurs at the time an asbestos-related disease manifests itself.\textsuperscript{34}

1. Exposure Theory

The exposure theory characterizes asbestosis as a continuing tort for which all insurers providing coverage during the period between initial exposure and manifestation are liable.\textsuperscript{35} Advocates of this theory point to

[The insurer] will pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury or . . . property damage to which this policy applies caused by an occurrence.

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

"Occurrence" means an accident, including injurious exposure to conditions which results, during the policy period, in bodily injury . . . .


Although insurers have denied that this language was intended to cover such longterm diseases as asbestosis, at least one court has interpreted the "injurious exposure" language as indicating such an intention. 633 F.2d at 1223. The court noted that published interpretations of the clause supported such an inference, citing two analyses that concluded that exposure involving cumulative injuries might be covered under more than one policy. \textit{Id.} at 1223 n.19.

Largely as a reaction to the asbestosis-coverage litigation, insurers are planning to rewrite the standard comprehensive general liability policies so that, in the future, coverage will be provided only for those injuries first discovered or those claims first made within a policy period. This change would eliminate issues of when an injury "occurs." Densmore, \textit{Insurers Propose New Liability Form to Limit Coverage}, \textit{Bus. Ins.}, July 12, 1982, at 1, col. 3. \textit{See also} Rosow & Liederman, \textit{An Overview to the Interpretative Problems of "Occurrence" in Comprehensive General Liability Insurance, 16 Forum 1148 (1981) (discussion of when an "injury" "occurs").}

33. The Sixth Circuit, for example, noted in Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., that the various policies issued by the five insurers of Forty-Eight Insulations contained the same definitions of coverage and terms. 633 F.2d 1212, 1215 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981).

34. \textit{See, e.g.,} Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1216-17 (6th Cir. 1980), (discussing the two theories), aff'd on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981). Forty-Eight Insulations and some insurers also argued that coverage should extend from exposure through manifestation, the position ultimately adopted by the D.C. Circuit in \textit{Keene}, but this argument was not discussed by either of the \textit{Forty-Eight Insulations} courts.


medical evidence that bodily injury occurs gradually, beginning when asbes-
tos fibers are first inhaled. Two circuits have adopted the exposure
theory.

In Insurance Co. of North America v. Forty-Eight Insulations, Inc., the first reported opinion to address the issue of insurer liability, the district court adopted a variation of the exposure theory. It imposed liability for the years of the "injury-producing process," i.e., the years of exposure to asbestos. The court noted that the extent of the continuing controversy over which theory to adopt was demonstrated by the fact that the insurance industry had initially espoused the exposure theory, but some insurers had switched to espousing the manifestation theory after Borel.

One commentator has recommended a disease-by-disease determination of when a cumulative disease begins. See Comment, Liability Insurance for Insidious Disease: Who Picks Up the Tab?, 48 FORDHAM L. REV. 657 (1980). Similarly, the dissent in Forty-Eight Insulations recommended that the court arbitrarily choose a date 10 years before manifestation as the date asbestosis began. 633 F.2d at 1230–31 (Merritt, J., dissenting).


It is not entirely accurate to say that "two circuits" have adopted this theory. All four of the actions decided thus far were brought in federal courts under diversity jurisdiction. Construction of the insurance contracts is a matter of state law under the Erie doctrine. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Apparently neither the parties to these actions nor the courts gave serious consideration to the issue of which state's law might apply. The D.C. Circuit, for example, mentioned six states that might be chosen and said only that the "basic principles governing the interpretation of insurance policies are the same in each state." Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1041 n.10 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982). In all, nine states have been mentioned as sources of law in these actions, and all four courts stated similar rules of contract interpretation. Thus, applicable rules of construction can be assumed to be similar in at least these nine states, and the very lack of discussion suggests that similar principles would apply elsewhere. One could speculate that these decisions could result in an assumption that there is a general federal common law of contract. It seems reasonable, however, to assume that states use similar principles of contract interpretation and that the courts are attempting to apply state law in these cases.


41. Id. at 1238.
The Sixth Circuit Court of Appeals affirmed, stating that the district court had "reached the right result for the right reasons." It distinguished cumulative diseases such as asbestosis from ordinary accidents or diseases on the basis that a cumulative injury occurs continuously even though it takes years to manifest itself. The court construed the insurance policy definitions of "bodily injury" and "occurrence" to include asbestosis because of the logical construction of those terms and because of the parties' expectations.

The court of appeals also stated that each insurer during any part of a plaintiff's exposure to the manufacturer's product was obligated to defend and possibly to indemnify the manufacturer.

The Fifth Circuit followed the Sixth Circuit and adopted the exposure theory of liability in Porter v. American Optical Corp. The court of appeals reversed the district court's adoption of the manifestation theory.
ory, finding that the terms of the insurance policy mandated adoption of the exposure theory and proration of coverage among insurers.

2. Manifestation Theory

Under the manifestation theory, bodily injury does not occur until asbestosis becomes apparent. This is the earlier of the date on which a worker first knows or should have known of the disease, or the date on which it is diagnosed. Under this theory, the manufacturer's insurers on that date pay any liability judgment.

The First Circuit has adopted the manifestation theory of coverage. In Eagle-Picher Industries v. Liberty Mutual Insurance Co., the District Court for Massachusetts adopted the date of actual diagnosis or the date of death as the date of manifestation. The court based its decision on both the reasonable expectations of laypersons and the policy goals behind the rules of construction for insurance contracts. It found that the manifestation theory is closest to the layperson's definition of injury as a 'clinically evident, diagnosable disease,' whereas the exposure theory depends on 'sophisticated medical analyses.' The court also stated that the case was unlike the situation in Forty-Eight Insulations because

49. In an unreported opinion the district court had rendered judgment against the manufacturer of a respirator intended to filter out asbestos fibers and against the insurer at the time the plaintiff's disease manifested itself. Porter v. American Optical Corp., No. 75-2202 (E.D. La., Dec. 23, 1977), rev'd, 641 F.2d 1128 (5th Cir.), cert. denied sub nom. Aetna Casualty and Surety Co. v. Porter, 102 S. Ct. 686 (1981). The Fifth Circuit adopted the Sixth Circuit's reasoning, affirming the judgment against the respirator manufacturer and reversing the judgment against the manifestation-period insurer. The court stated that the controlling principles of insurance coverage should be the same as if the suit had been against a manufacturer of asbestos products. 641 F.2d at 1144.

50. 641 F.2d at 1145. The court stated: "We accept the 'injurious exposure' theory and the logically consequent rule of proration of liability for insurance carriers who were on the coverage while the injured party was exposed to the asbestos hazards which resulted in illness and death." 641 F.2d at 1144.


52. Id. at 1216–17.


54. 523 F. Supp. at 118. The court based its choice of date on certainty of coverage and ease of administration. Id.

55. On appeal, the First Circuit extensively explained the rules of construing contracts in general and insurance contracts in particular. The court stated that the dominant purpose was "to give effect to the intentions of the parties." Eagle-Picher Ind. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982). If the language was clear, then the intent was ascertained by the plain meaning of the language. If the language was ambiguous, then the court could consider extrinsic evidence of intent. "If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage." Id. at 17. The court observed that here, the parties agreed that the language was clear, but disagreed on what it "clearly" stated. Id. at 18.

56. 523 F. Supp. at 114.
the exposure theory would leave Eagle-Picher largely uninsured.\textsuperscript{57} Thus, although the \textit{Eagle-Picher} court interpreted similar insurance policy language differently, its result followed the two other circuits in providing maximum coverage of the manufacturer.\textsuperscript{58} This result reflects a basic objective in construing insurance contracts: to provide coverage.\textsuperscript{59}

On appeal, Eagle-Picher, which had argued for the manifestation theory below, argued for the result reached in \textit{Keene}. The corporation also argued that, in any case, the district court had chosen the wrong date of manifestation.\textsuperscript{60} The court of appeals said that the principal issue was whether asbestosis “results” soon after exposure or after it manifests itself clinically.\textsuperscript{61} The court of appeals agreed that, based on the medical

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  \item \textsuperscript{57} Id. at 118. Eagle-Picher was uninsured for most of the years in which it manufactured asbestos products, but continued to buy liability insurance for asbestos injuries after it ceased production. The court therefore found that the manifestation theory best fit with the expectations of the parties. Id. In contrast, the manifestation theory would have left Forty-Eight Insulations uninsured. Id. at 117. The \textit{Eagle-Picher} court noted that the \textit{Forty-Eight Insulations} decision appeared to rest on public policy grounds, but to the extent it was based on the medical evidence, the court did not agree. Id. at 117 n.9.
  \item \textsuperscript{58} Although Eagle-Picher manufactured asbestos products between 1931 and 1971, it had liability insurance coverage only from 1968 through 1979. At the time of suit, Eagle-Picher had been named a defendant in 5,500 suits alleging injury from contact with its asbestos products. 523 F. Supp. at 111, 113. These facts made the manifestation theory the best method of increasing liability coverage.
  \item \textsuperscript{59} See supra note 55.
  \item \textsuperscript{60} Eagle-Picher Ind. v. Liberty Mut. Ins. Co., 682 F.2d 12, 16 (1st Cir. 1982). The district court had chosen the date of actual diagnosis or death. 523 F. Supp. at 118. The court of appeals concluded that “injury” during the policy period was not the same as “diagnosis” during the policy period, and the policy was clearly intended to cover “injury.” 682 F.2d at 24. See infra note 64.
  \item \textsuperscript{61} 682 F.2d at 17. Because all parties had agreed that the language of the parties was unambiguous, the district court had not admitted extrinsic evidence to show the parties’ intent. It had relied only on medical testimony “bearing on the nature of asbestosis.” Id. at 18; see also supra note 55. Secondarily, the court had to decide when an “occurrence” causing personal injury takes place under one of the policies at issue. 682 F.2d at 17.
\end{itemize}
evidence concerning when asbestos fibers actually cause injury, the ordinary meaning of the policy language supported the manifestation theory. 62

The court concluded that although "the medical testimony and the plain meaning of the policy language strongly support the manifestation approach, any remaining doubts about interpretation of the policies are properly resolved in favor of the insured, in order to effectuate the policies' purpose of providing coverage." 63 The court modified the district court's choice of a manifestation date to the date on which "the asbestos-related disease became reasonably capable of medical diagnosis." 64

II. THE KEENE COURT'S REASONING

For twenty-four years, Keene Corporation and its predecessors manufactured thermal insulation products containing asbestos. 65 Today Keene faces more than 6,000 suits that allege personal injury or wrongful death from use of its products. 66 Keene has sought defense and indemnification from its comprehensive general liability insurers. The insurers either denied their responsibility to Keene or sought to limit it. 67

Keene therefore filed a declaratory judgment action against its insurers. 68 The district court adopted the exposure theory of coverage and held

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62. Id. at 19. The court also decided that it was not error to refuse to admit extrinsic evidence to show the parties' intent, because the proffered evidence did not show clearly an intent that insurance coverage be provided on the basis of the exposure theory. Id. at 21–22.

63. Id. at 23. Eagle-Picher had continued to buy liability insurance even after it stopped manufacturing asbestos products, an act the court considered inconsistent with reliance on the exposure theory.

64. Id. at 25. The court said the policies required that disease result during the policy period, not that it be diagnosed during that period. Id. at 24. When a disease could have been diagnosed is an issue for future litigation. See, e.g., Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.). cert. denied sub nom. Aetna Casualty and Surety Co. v. Porter, 102 S. Ct. 686 (1981) (plaintiff treated for a variety of complaints over several years; with the benefit of hindsight, these complaints were probably clinically diagnosable asbestosis). The court also did not address the consequences of potential diagnosis in one policy period and actual diagnosis in another.


66. Id.

67. Id. at 1039. See infra note 68.

68. Keene sought a determination of the extent to which each policy covered its liability for asbestos-related diseases. 667 F.2d at 1038. Keene manufactured asbestos products from 1948 until 1972. It was covered by general liability insurance from 1961 until 1980. In chronological order, the policies were issued by Insurance Company of North America, Liberty Mutual, Aetna Casualty and Surety Company, Hartford Accident and Indemnity Company, and Liberty Mutual. Id.

Keene and the insurers presented three different theories of coverage. Keene argued that any stage in the progression of an asbestos-related disease, from exposure through manifestation, triggered full coverage under each insurance policy. Three insurers (Aetna, Insurance Company of North America, and Liberty Mutual) argued that only manifestation of bodily injury triggered coverage. The fourth
that each company insuring Keene during part of the exposure period was liable for a pro rata share of indemnification and defense costs. It held Keene liable on the same basis for the years in which Keene was uninsured. The court, sua sponte, certified its order for interlocutory appeal.

The court of appeals reversed. It held that all insurers during the exposure and manifestation periods were liable to the extent of their policy limits. It held further that Keene did not share that liability. In reaching this result, the court had to resolve three issues: (1) what event triggers policy coverage; (2) the extent of the coverage once it is triggered; and (3) the allocation of liability among insurers if more than one policy is triggered.

A. What Event Triggers Coverage

The court of appeals examined the language of the policies at issue to determine whether they provided coverage in this situation. Each policy provided that an "injury," rather than an "occurrence that causes injury," triggered coverage. To determine whether "injury" included the inhalation of asbestos triggered coverage and therefore each company that covered part of the exposure period was liable according to the ratio of exposure years during its coverage to the total exposure period.

Keene and Hartford filed motions for partial summary judgment based on their theories. Aetna filed a motion for summary judgment on the ground that no case or controversy had been presented because the coverage issue was not raised in conjunction with any of the underlying tort suits. The district court denied Aetna's motion and granted Hartford's motion, relying largely on the Sixth Circuit's decision in Insurance Co. of N. Am. v. Forty-Eight Insulations. It granted Keene's motion in part and denied it in part. Keene Corp. v. Insurance Co. of N. Am., 513 F. Supp. 47 (D.D.C.), rev'd, 667 F.2d 1034 (1981).

69. See infra notes 112–16 and accompanying text.
71. Id.
73. The court recognized that a cumulative injury necessarily fell within several policy periods. Keene argued that it was entitled to indemnity up to the sum of the limits of all the policies triggered. The court found, however, that Keene was entitled to only the extent of coverage it would have had for a traditional injury and held that only one policy's limits could apply to any one injury. Id. at 1049.
74. Id. at 1047–49. In light of its holdings, the court reversed the district court's order and remanded the case to trial on the issue of damages for failure to indemnify or defend Keene and on the issue of the applicability of one of Keene's insurance policies. Id. at 1052.
75. Id. at 1042.
76. The court quoted typical coverage language from the Hartford policy: [T]he company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the
cumulative diseases such as asbestosis, the court used standard rules of construction for insurance contracts. The court said that it would "give effect to the policies' dominant purpose of indemnity" and that any ambiguity in the insurance contract would be construed in favor of the insured.\textsuperscript{77} The court stated that it would use "the reasonable expectations of Keene when it purchased the policies" to discern the scope of the insurance policy.\textsuperscript{78} Using these standards, the court adopted both the manifestation and the exposure theories of insurer liability and interpreted "bodily injury" to mean "any part of the single injurious process that asbestos-related diseases entail."\textsuperscript{79}

The court also concluded that Keene could have reasonably expected coverage of injuries caused by exposure to its products during the insurer's coverage period, even if the injury did not become known until after the insurance policy's expiration. The court noted that otherwise insurers could avoid liability by terminating coverage after the magnitude of the problem became obvious but before many cases of disease manifested themselves.\textsuperscript{80} The court placed on the insurers the burden of proving that the plaintiff was not exposed during the period covered by the policy.

The court based its decision to accept the manifestation theory largely on Keene's reasonable expectations. It concluded that Keene could have reasonably expected coverage for asbestosis manifested during a particular insurer's coverage period because the policies state that the insured is covered for all "injuries" occurring during the policy period.\textsuperscript{81}

\textsuperscript{77} \textit{Id.} at 1039 (emphasis added by court). \textit{See also supra note 3 (typical policy language concerning "bodily injury" and "occurrence").}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 1047. The court stated that the rights and obligations under the policies would be undermined if either manifestation or exposure alone triggered coverage. \textit{Id.}
\textsuperscript{80} Most insurance companies did, in fact, cease to cover asbestos-related diseases in 1976, when the magnitude of the problem became evident. \textit{Id.} at 1045. The court stated that if only manifestation triggered coverage, insurance companies would bear only a fraction of Keene's liability, which "would undermine the function of the insurance policies." \textit{Id.} at 1046. The court compared the situation to one in which loss begins during a policy period but continues to develop after the policy expires, as when an insurance policy expires while a house is being damaged by unstable ground. \textit{Id.} at 1046 (citing Snapp v. State Farm Fire & Cas. Co., 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962)) (insurer not permitted to terminate liability while the peril that materialized during the policy period is still alive).
\textsuperscript{81} \textit{Id.} at 1044. Because the policies gave no indication that the parties contemplated exclusion of diseases that began to develop before the policy period, the court decided that a "latent injury, unknown and unknowable to Keene at the time it purchased insurance," was covered under the policies. \textit{Id.}
Insurance Law and Asbestosis

B. Extent of Coverage

During the twenty-four years that Keene manufactured asbestos products, it had four insurers. Keene had no insurance for thirteen of those years. Because the court defined "injury" as a process, one asbestos-related injury might trigger coverage of several different policies.\(^8\) This raised issues of the extent of each insurer's liability and of Keene's liability for its uninsured periods.

The court rejected arguments that each insurer's liability should be limited to a pro rata share, because the insurance policies provided that the insurer would pay "all sums" that Keene became legally obligated to pay because of bodily injury during the policy period.\(^8\) The court said that this represented "the insurers' promises of certainty to Keene" and reiterated that each policy gave Keene the right to be free of liability for asbestos-related disease.\(^8\) The court noted that the policy language did not provide for a reduction in liability if only part of an injury occurred during a policy period.\(^8\) Therefore, the court held that each insurer whose policy was triggered was liable in full, to the extent of the policy limit and subject to "other insurance" provisions.\(^8\)

The court rejected arguments that Keene should be proportionately liable for injuries that occurred partly during its uninsured periods. The court said it would have had to "pretend" that Keene had a "self-insurance policy" and would have had to improvise the limits and provisions.

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8. Id. at 1047. In addition to occurring in several policy periods, bodily injury might occur partly during an uninsured period. Id.

8. Id.

8. Id.

8. Id. at 1048.

8. Id. See infra notes 112–16 and accompanying text (summary of the "other-insurance" problems when more than one policy covers an injury).

8. 667 F.2d at 1047. The "other-insurance" provisions provide for apportionment when more than one policy covers a loss. One such provision states: "When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA [Insurance Company of North America] shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision below." Id. at 1050. The contribution provision provided for "contribution by equal shares" or "contribution by limits," depending on the language of the other policies. Id.

8. Id. at 1051.

The court recognized that certain factual issues would arise in determining apportionment. Although the same set of facts would show both tort liability of the manufacturer and contractual liability of the insurer in the ordinary product liability suit, this is not necessarily true if several manufacturers in an asbestos-disease suit are held jointly and severally liable. In the latter case a tort plaintiff need not prove that a particular manufacturer caused all of the injury claimed. Id. at 1051.

Nevertheless, information concerning a particular manufacturer's liability would be necessary to show the extent of an insurer's liability to the manufacturer. The court put the burden on the insurers to show that Keene's products could not have been involved for certain years. If this burden is met, the insurer is relieved of liability for those years. This determination can be made separately from the underlying tort suits. Id. at 1051–52.
of this "'policy.'" Using the same reasoning, the court held that Keene was not liable for a proportionate share of its defense costs. The court noted, however, that Keene would not be covered for an injury if it had no insurance during any part of the exposure or manifestation period.

C. Allocation of Liability

The court next addressed allocation of the insurers' liability when several insurance policies are triggered by one injury. The court allowed Keene to collect the full amount due under any one policy from any insurer whose policy was triggered, subject to the other-insurance clauses. In addition, it allowed Keene to select the policy that would provide coverage for a given injury. The rationale was that the primary duty of the insurers is to indemnify Keene, and that the selected insurance company could use its other-insurance clause to reallocate liability among the appropriate insurers. The effect of the court's decision was to spread the manufacturer's liability over the broadest possible base.

88. Id. at 1049. Judge Wald, in a concurring opinion, disagreed with the decision to exempt the manufacturer from a share of the liability for voluntary uninsured periods. In her view, "'[i]f asbestos-related diseases are understood as progressive or cumulative, then all those who voluntarily assumed risk during the period when the disease progressed must share the responsibility for the judgment and this includes self-insurers.'" Id. at 1058 (Wald, J., concurring in part).

89. See infra note 93. As the court observed, if an insurer is fully liable for indemnification for a given injury, it follows logically that the insurer also bears the full defense cost. 667 F.2d at 1050. The complexities that can arise from a duty to defend were avoided by the court and are not discussed in this Note. See generally R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.6 (1971) (general discussion of the nature and scope of the liability insurer's duty to defend).

90. 667 F.2d at 1049. The court placed the burden of proof on the insurers to show that exposure to asbestos in the manufacturer's products could not have occurred during or before the insurers' policy periods; such a showing would relieve the insurers of liability. Id. at 1052. Although the insured usually has the burden of proof in this situation, the court determined that the unique character of asbestos-related disease required a different approach. Id. at 1052 n.42.

91. See supra note 87. The court's "'one-policy'" ruling prevents the manufacturer from stacking the various policies to obtain higher coverage of one injury. See infra note 106.

92. 667 F.2d at 1049. The court rejected Hartford's argument that under this analysis a manufacturer with only a few years of insurance coverage was as well off as one that had many years of coverage. Because only one policy can be applied to a given injury, the manufacturer can collect on only one of the several policies for which it might have paid. The court saw this as providing more benefit to the insurers than to the insured. Id.

93. Id. at 1050. The court also found that the policy language stated a broader duty to defend than to indemnify. Id. Because the court had held each insurer fully liable for indemnification, "'it follows that each is fully liable for defense costs.'" Id. As with indemnification, allocation of defense costs among insurers would be controlled by other-insurance clauses or the doctrine of contribution. Id. at 1050 n.37. Defense costs would be borne initially by the insurer selected by Keene; if any insurance contract dispute could not be resolved without undue inconvenience to the plaintiff in the underlying tort suit, then the insurance dispute would be resolved separately. Id. at 1051–52.
Insurance Law and Asbestosis

III. ANALYSIS

The validity of the Keene court’s decision to adopt both the exposure and the manifestation theories must be analyzed in light of precedent, the parties’ expectations, social policy, and potential consequences. This section shows that Keene represents the best judicial response to the problem of insurer liability. It also questions the adequacy of tort actions for compensating the growing numbers of asbestosis victims and proposes a statutory solution.

A. The Decision in Keene

The court of appeals’ decision in Keene in effect embraces all three prior decisions on asbestos-insurer liability. The prior decisions reached different conclusions on the basis of the policy language and medical testimony, but each adopted the theory that provided maximum coverage to the manufacturer. By holding that all insurers with policies covering any period from exposure through manifestation must indemnify the manufacturer, the D.C. Circuit adopted a theory that assures maximum coverage regardless of the individual manufacturer’s pattern of insurance coverage.

Similarly, the court’s shifting of the burden of proof to the insurers to show absence of exposure is a logical extension of prior decisions that placed the burden of proof on two or more defendants to apportion damages between themselves. The rationale is that multiple negligent actors

94. The adoption of the exposure-through-manifestation theory resembles the proration-by-years theory which was proposed by Travelers Insurance Company in similar litigation in California state courts. 2 INS. LITIGATION REP. (LITIG. RESEARCH GROUP) 114 (May, 1981). Under that theory, each insurer on risk from exposure through death, settlement, or filing suit, plus the manufacturer during its uninsured periods, would prorate a claim according to their years of coverage. The manufacturer would not share defense costs. It is estimated that 25% of all asbestosis cases filed in the country are in the California courts. Because a number of actions by manufacturers against insurers have been consolidated, whatever theory of coverage is adopted in California will affect a sizable percentage of the nation’s underlying tort suits. Id.

95. See supra notes 57 & 58.

96. By the time of its decision, the D.C. Circuit had available all the prior asbestos insurance decisions, see supra note 14, as well as American Motorists Ins. Co. v. E.R. Squibb & Sons, 95 Misc. 2d 222, 406 N.Y.S.2d 658 (N.Y. Sup. Ct. 1978), in which the court held that the insurer at the time of a daughter’s manifestation of cancer as a result of her mother’s use of DES must provide coverage. The insurers before the D.C. Circuit, as well as Keene, had participated in several of the prior actions as parties or as amici curiae. See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1213 (6th Cir. 1980) (listing the participants), aff’d on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981).

should not be allowed to escape liability to an innocent plaintiff, and that
the defendants have better access to the needed evidence. The court’s rul-
ing in *Keene*, however, does reduce the manufacturer’s incentive to coop-
erate fully with its insurers in defending against the underlying lawsuits, at
least until it has exhausted its insurance coverage.

*Keene*’s broad approach to insurer liability is superior to the other
courts’ resolution of the coverage issue for several reasons. First, this all-
inclusive interpretation\(^9\) will expedite future litigation, if *Keene*’s analy-
sis becomes the norm. The decision might limit future litigation on insur-
ance coverage to questions of apportionment between insurers, without
involving the manufacturer or the underlying tort suits.\(^9\)

Second, the court’s definition of asbestos-related injury as one long
process, rather than a series of discrete injuries that occur with each phys-
ical reaction to inhalation, is a more accurate characterization of the med-
ical testimony. “Once begun, [asbestosis] progresses without additional
inhalation of asbestos. . . .”\(^10\) The court’s conclusion that every stage
from initial exposure through manifestation is part of a single injury
should prove useful in other tort areas as well.\(^10\)

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9. Although the D.C. Circuit did not discuss the exposure or manifestation question in other
counties, the question is not a new one nor is it unique to diseases such as asbestosis. See Oshinsky,
*Comprehensive General Liability Insurance: Trigger and Scope of Coverage in Long-Term Exposure
Cases*, 17 FORUM 1035 (1982). The question has arisen in the context of latent defects causing injury
to property, and several cases have allowed recovery on an exposure theory when the injury involves
cumulative damage (as in the case of dry rot). In the personal injury area, adoption of a manifestation
theory appears to have grown out of attempts to avoid the statute of limitations problems that
stemmed from the “exposure” (i.e., initial conduct) theory in medical malpractice actions. See In-
surance Law, supra note 35, at 1130–32.

10. Although the D.C. Circuit did not discuss the exposure or manifestation question in various contexts may be the
result of policy language that cannot be made precise enough to cover all possible injuries. Although
Keene’s later policies included continuous exposure to injurious conditions as part of the definition of
“occurrence.” the language failed to specify how it would affect the insurer’s liability. The court
used this lack of specificity as part of its basis for allowing a reasonable expectation of coverage. See
667 F.2d at 1047 n.28 & app. A for comparative definitions.

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10. 667 F.2d at 1038 n.3. Asbestosis is described in more detail in Borel *v.* Fibreboard Paper
Prods. Corp., 493 F 2d 1076, 1083 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); see also
supra note 2 (discussing asbestosis).

101 As noted in the concurring opinion in *Keene*, the “injurious process” definition of injury
Third, characterization of asbestosis as an “injurious process” simplifies litigation by making one insurer liable for a tort plaintiff’s total injury. Because a single insurer is liable in full in a given tort suit, litigation will be more expedient and less expensive for the manufacturer and plaintiff, if not for the insurer. This removes disputes over the extent of insurance coverage from the concern of the tort plaintiff and manufacturer and properly confines them to a separate issue to be negotiated among insurers themselves.

Fourth, the court’s conclusion that the manufacturer is not liable for its uninsured period avoids having to create both “policy limits” and “other-insurance” clauses for the manufacturers. Despite the dissent’s position in Keene, there do not appear to be any available guidelines for defining either clause. Without a policy limit, if Keene selected itself as the “insurer” liable to a given plaintiff, its liability would be virtually limitless. This result is consistent with the court’s determination that Keene reasonably expected insurance coverage for injuries that man-


Saying that the process is all part of a single injury is not the same as saying that everyone who has been exposed to asbestos deserves compensation. As observed by the Eagle-Picher court, 90% of urban dwellers show some lung scarring from asbestos fibers, yet these persons will not necessarily ever become disabled from it. Eagle-Picher Indus. v. Liberty Mutual Ins. Co., 523 F.Supp. 110, 115 (D. Mass. 1981), aff’d as modified, 682 F.2d 12 (1st Cir. 1982). Compensation still depends on a discoverable injury that caused a measurable amount of harm. For those who became disabled, the disease did indeed begin many years earlier.

Both the Keene and the Forty-Eight Insulations courts were unwilling to equate the definition of “injury” for the purpose of when a statute of limitations begins to run with the definition of “injury” for the purpose of deciding the extent of an insurer’s duty to indemnify. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1220 (6th Cir. 1980), aff’d on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981). Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1043–44 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982).

102. See supra notes 29–30 and accompanying text.

103. The majority opinion does not set out the applicable policy limits of Keene’s coverage over the years. By way of comparison, Forty-Eight Insulations’ coverage ranged from $100,000/person, $300,000/aggregate up to $500,000/$500,000 and back down to $300,000/$300,000; it stood at $1,000,000/$1,000,000 with a deductible of $100,000 at the time of suit. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230, 1234 (E.D. Mich. 1978), aff’d, 633 F.2d 1212 (6th Cir. 1980), aff’d on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981). For a discussion on the effects of conflicting “other-insurance” clauses, see infra notes 112–16 and accompanying text.

104. It is unlikely that Keene would select itself as the “insurer” with primary liability until the limits of every insurance policy has been reached. In any case, Keene is more properly regarded as uninsured than self-insured: there is no indication of an internal plan to manage potential liability loss during the uninsured years. See R. Keeton, supra note 89, § 1.2(b)(6).
ifested themselves during a policy period and for those that were caused
during a policy period but remained undiscovered until later. It is impor-
tant to note that this ruling does not absolve Keene from financial respon-
sibility, but merely delays it until the policy limits of all insurers are ex-
husted.\textsuperscript{105}

In addition, the court’s decision that only one policy applies to any one
injury avoids stacking and is consistent with an attempt to treat cumula-
tive diseases like ordinary accidental injuries. In the ordinary accident,
only one policy is triggered, with its sole policy limit applying.\textsuperscript{106} Similarly, in the ordinary accident, Keene would have a duty to notify only its
current insurer of the potential claim.\textsuperscript{107} The court’s theory of coverage
makes all insurers “current” in the cumulative disease situation and
makes Keene responsible for notifying any one of them that a policy has
been triggered. This is the simplest administrative solution for matching
policies with the tort claims against Keene.\textsuperscript{108}

The court was unwise, however, in relying on Keene’s “reasonable
expectations” as a basis for its theory of insurer liability.\textsuperscript{109} By introduc-
ing the reasonable expectations of the insured,\textsuperscript{110} the court unnecessarily
added a potential source of conflict because the decision is supportable by
the medical testimony alone. “Reasonable expectations” is an elastic

\textsuperscript{105} Further, as of 1976, Liberty Mutual’s coverage of Keene contained a “large” deductible
clause, plus administrative charges. 667 F.2d 1034, 1045 n.21. Liberty Mutual’s coverage of Forty-
Eight Insulations contained a $100,000-per-person deductible clause; the Sixth Circuit observed that
since most cases had been settling for less than that amount, the deductible meant Forty-Eight Insula-
tions would be, for practical purposes, uninsured for asbestosis that occurred after 1976. Insurance
Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1216 n.6 (6th Cir. 1980), aff’d on

\textsuperscript{106} The stacking issue usually arises in the context of whether more than one concurrent policy,
or sections within a policy, should apply to an occurrence. See, e.g., R. Keeton, supra note 89, \S
5.5(c) (recovery from medical payments or liability section of automobile insurance policy) and \S
3.11 (other-insurance clauses; proration when more than one policy applies). The court in Keene
was concerned with the application of successive policies, a situation apparently not contemplated by the
policy language. See supra note 98 and accompanying text.

\textsuperscript{107} See generally R. Keeton, supra note 89, \S 7.2 (discussing presentment of claims).

\textsuperscript{108} It is unclear whether the choose-one-policy approach becomes complicated when a manu-
facturer’s excess insurers are also involved. These insurers provide additional layers of coverage that
are triggered only when lower layers are exhausted. On March 8, 1982, Keene filed suit against its
excess insurers, seeking the same result that the D.C. Circuit reached against its primary, or first-

\textsuperscript{109} See supra notes 77–81 and accompanying text; but see Comment. Insurer Liability in the
239 (1982) (approving use of the doctrine as a common basis for decision in the asbestos insurance
cases).

\textsuperscript{110} The doctrine of reasonable expectations began to emerge in the 1960’s, partly as a result of
the courts’ increasingly strained attempts to characterize insurance clauses as “ambiguous” and then
to construe these clauses against the insurer. See R. Keeton, supra note 89, \S 6.3(a); Keeton, Rea-
term that can be adjusted to fit a desired result, and the attempt to prove or disprove its applicability may lead to more litigation. It is also questionable whether Keene reasonably expected the insurer of thirty years ago to cover the injury for which Keene is sued today. Moreover, it is extremely unlikely that Keene expected to be able to choose which of its former or present insurance policies would cover a given injury.\textsuperscript{111}

The court also did not address the effect of conflicting other-insurance clauses, which are handled differently from jurisdiction to jurisdiction.\textsuperscript{112} For example, policies may contain "pro rata," "excess," or "escape" other-insurance clauses.\textsuperscript{113} Not only do courts differ on which clause controls when two policies conflict, they also differ on the consequences when two policies contain duplicate other-insurance clauses.\textsuperscript{114} Courts are increasingly likely to prorate the two coverages, but there are at least four methods of proration.\textsuperscript{115} The court thus left open an area of consider-

\textsuperscript{111} This extension of the reasonable expectations principle has been called "mandated coverage," or "expectations" created by the courts because of "the desirability of providing coverage that is currently unavailable." Abraham, Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured, 67 Va. L. Rev. 1151, 1163 (1981). Abraham distinguishes between individual consumers and "institutional" insurance: "[A]lmost all the cases [that rely on the expectations principle] involve ordinary consumers without a sophisticated understanding of insurance." Id. at 1154.

The president of Commercial Union Insurance Companies, a major insurer of asbestos manufacturers, has stated that where "institutional" insurance is concerned, "the buyer and seller . . . are represented by sophisticated agents and attorneys and . . . the policy provisions, in many instances, are in fact negotiated line by line, clause by clause." See Ward, supra note 31, at 12. This statement and its implication that there are no reasonable expectations apart from policy language appear exaggerated in light of the finding of every "asbestos-coverage" court that the applicable language of all the "negotiated" policies was the same. Eagle-Picher Ind. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17 (1st Cir. 1982); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1039 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982); Porter v. American Optical Corp., 641 F.2d 1128, 1145 (5th Cir.), cert. denied sub nom. Aetna Casualty and Surety Co. v. Porter, 102 S. Ct. 686 (1981); Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1215–16 (6th Cir. 1980), aff'd on rehearing, 657 F.2d 814, cert. denied, 102 S. Ct. 686 (1981).

\textsuperscript{112} See R. Keeton, supra note 89, § 3.11(b). See also Comment, Toward a More Equitable Method of Prorating Liability Insurance Policies, 52 S. Cal. L. Rev. 943 (1978) (advocating a method based on the maximum loss that each potentially liable insurer would bear if it alone covered the incident).

\textsuperscript{113} These terms are defined as follows:

A standard escape clause provides that the carrier will be not liable for the loss if there exists other valid and collectible insurance. An excess clause provides that the policy will extend coverage only after the policy limits of other valid and collectible insurance policies have been exhausted. A pro rata clause provides that in case of double insurance, the loss shall be prorated according to the sum of the total applicable coverage.

Comment, supra note 112, at 947 (footnote omitted).

\textsuperscript{114} Id. at 947–48.

\textsuperscript{115} Id. at 950–51. These four methods can be briefly summarized as follows:

Under the long-established majority method, the loss is apportioned between the policies according to the ratio of the coverage limits of each insurance policy. The premium ratio method, in contrast, prorates the loss according to the ratio of the premiums charged for each policy.
able controversy. Its failure to come to grips with this issue and its unfortunate reliance on Keene’s reasonable expectations make additional litigation inevitable.

B. Inadequacy of Private Tort Actions for Asbestos

The courts in Forty-Eight Insulations, Porter, Eagle-Picher, and Keene have interpreted virtually identical policy language to mean that the insurer on the risk at the time of a victim’s exposure to asbestos is liable, that the insurer at the time of manifestation is liable, or that all the insurers from the time of first exposure through development and manifestation are liable. Other actions involving other manufacturers are pending in various jurisdictions. One explanation for the diversity is that the courts apparently have sought to spread coverage as broadly as possible in each case. Certainly that has been the effect of the decisions.

Only a handful of the underlying tort suits have gone to judgment. Plaintiffs have won about half of them. Worker’s compensation provides little or no relief for many victims of asbestosis, and litigation costs are extremely high for all parties.

Under the equal footing method, if the loss is within the coverage limits of the applicable policies, each insurer assumes an equal share of the loss. Finally, the Ruan method apportions the loss according to the loss each insurer would have borne had there been no double insurance.


Eight months after the decision, Keene and its insurers were in court again, fighting over how to implement the decision. The insurers accused Keene of manipulating the decision. Insurance Company of North America said the issues were so complex it was nearly impossible for a court to write an opinion that covered everything. Still unanswered, for example, was the question of when Keene must select a policy to cover a given injury and whether it could later change its mind. Possibilities include selection when a claim is filed or when judgment is entered for a plaintiff. Tarnoff, Keene, Insurers Still Fighting Over How Claims Will Be Paid, Bus. Ins., June 21, 1982, at 1, col. 3.

These unresolved questions help to give validity to Aetna’s position in Keene that the declaratory judgment action was inappropriate outside the context of a specific claim for injury, with its attendant specific facts. The court of appeals rejected this argument. Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1039–40 (D.C. Cir. 1981), cert. denied, 102 S. Ct. 1644 (1982).

As of December 1981, about 20,000 cases were pending, with about 300 new cases filed every month. Approximately 60 had been tried. Granelli, Asbestos Litigation: Background and Update, 3 INS. LITIGATION REP. (LITIG. RESEARCH GROUP) 50 (Dec. 1981). Hundreds of cases have been settled, but not at a rate that reduces the overall caseload. See infra note 128.

Granelli, supra note 118, at 51. These were suits against Johns-Manville but should be representative of the total because the corporation is a defendant in most suits. See supra, note 1.

Studies have found that, although occupational diseases are usually covered under state worker’s compensation programs, a number of obstacles intervene to deny adequate compensation. Chief among them is proving a work-related cause. In addition, the average total payment received is likely to be lower than that for an accident; for example, approximately $9,700 for total disability from an occupational disease compared with $23,000 for total disability from an accident. and ap-
These circumstances suggest that the solution to adequately compensating victims of asbestos-related injury does not lie in the courts. Their efforts to interpret and apply various insurance policies have resulted in uneven awards in tort suits, no compensation at all for some plaintiffs, and varied interpretations of the same policy language in different jurisdictions. This lack of uniformity undermines stability and predictability and causes unfair hardship for many plaintiffs.

Further, private funds available for compensation of plaintiffs are not unlimited. As the Keene court recognized, "we can still expect thousands of cases of [asbestos-related diseases] to manifest themselves throughout the rest of the century." If no alternative method of compensation is devised, then presumably thousands of claimants will sue manufacturers in the future. But because insurance coverage has been almost unavailable since 1976, the manufacturers have, in effect, a lump-sum amount of protection equal to the extent of past insurance. When that has been exhausted, compensation will depend on the solvency of the manufacturers.

If the manufacturers go bankrupt under the burden, the plaintiffs have approximately $3,500 benefit to the survivor of an occupational-disease victim compared with $57,000 to the survivor of an accident victim. About half the victims of occupational diseases are compensated by social security and around 15% by welfare. U.S. Dept. of Labor, An Interim Report to Congress on Occupational Diseases 61-74 (1980) [hereinafter cited as Interim Report]. See also Edes, Compensation for Occupational Diseases, October 1980 LABOR L. J. 595. Given the long development period of asbestosis and other occupational diseases, it is possible that at least part of the difference is based on the greater age and therefore shorter life expectancy of both the disabled and their survivors.

121. "The Defense Research Institute estimates the cost of pending [underlying] litigation may exceed $400 million." Granelli, supra note 118, at 50. It is estimated that plaintiffs lose 33 to 40% of any recovery to legal fees and costs, and that insurers pay 35 cents in defense costs for every dollar paid a claimant. Defense costs may reach 95 cents per dollar paid for a claim that goes to trial and judgment. Task Force supra note 1, at 29-30. See also supra note 13.

122. See supra note 35.

123. See supra notes 118-21 and accompanying text.


125. See supra notes 32-33 and accompanying text.


127. Manville Corp. (Johns-Manville Corp. until 1982), considered the leading producer of asbestos in the Western world, filed for protection under Chapter 11 of the federal bankruptcy code on August 26, 1982. The move came shortly after a study projected the possibility of 52,000 claims
nowhere else to turn. Even the resources of the insurance industry may be inadequate to fund the potential liability. 128

C. Suggested Alternatives to Tort Litigation

Another solution, preferably federal legislation, is needed to provide a reasonable level of compensation to all victims of asbestos-related disease. Alternative solutions include a revision of worker's compensation acts,129 a revision of the social security disability program,130 or specific totaling $2 billion in liability. Manville had, at that date, $1.1 billion in net worth, but under accounting rules, once a liability is estimated, a reserve fund must be set up. The move also apparently was an attempt to persuade the government to pass a compensation bill. Manville attributes the necessity of filing under Chapter 11 to the bad faith of its insurers in refusing to pay the claims. The tort suits were stayed indefinitely. Wall Street Journal, Aug. 27, 1982, at 1, col. 6. The study projected a range of potential liability. Using the higher figures, Manville's liability could approach $5 billion. Wall Street Journal, Sept. 15, 1982, at 14, col. 1.

Manville subsequently said it would stop payment on a $6.1 million settlement with 141 plaintiffs that was reached three months before the corporation's Chapter 11 filing and intimated that it would stop paying on all settlements. Wall Street Journal, Oct. 6, 1982, at 8, col. 1.

At least one other manufacturer has made a Chapter 11 filing. On July 29, 1982, UNR Industries, which has not made asbestos since 1962 but had a number of tort suits pending against it, filed under Chapter 11. Wall Street Journal, Aug. 27, 1982, at 1, col. 6.

It is possible that this move could backfire. Within a few days of Manville’s act, Sen. Robert Dole (R. Kan.) called the move “dubious and unusual at best” and indicated that the judiciary subcommittee that he heads should consider changing the bankruptcy code to ensure that other companies do not file for Chapter 11 protection when faced with product-liability suits. Wall Street Journal, Aug. 30, 1982, at 3, col. 2.

128. In 1980, settlements or awards to plaintiffs averaged $76,000 in 395 cases. In 1981, 302 cases were disposed of at an average cost of $58,500. According to one set of figures, judgments against Johns-Manville (now called Manville), one of the largest defendants, have ranged from $16,000 to $1,857,600 in the 25 trials won by plaintiffs. The latter included a verdict of $750,000 for punitive damages. Granelli, supra noted 118, at 51. Figures from different sources tend to vary and should be taken more as an indication of the potential magnitude of the problem than as a specific status report.

Commercial Union’s position paper states that the asbestos litigation cost “threatens the financial stability of many of the insurance companies that are presently defending and indemnifying the various asbestos defendants,” and has implications for “society as a whole.” Task Force, supra note 1 at 34.

Another report (for which Commercial Union provided financial support) estimates the present value of future asbestos disease claims at $38.2 billion. It says that 51 insurance companies were involved in paying these claims in 1980 and that their combined net worth was $11.5 billion. The combined book value net worth of all property and liability U.S. insurance companies was $52.2 billion. The combined book value of asbestos manufacturers was $25.6 billion, which, according to the report, was probably an overstatement of actual market value. P. MacAvoy, The Economic Consequences of Asbestos-Related Disease 76-78. Working Paper No. 27 of the Yale School of Organization and Management (January 1982) (on file with the Washington Law Review).

129. See supra note 120.

130. About half the victims of occupational diseases are not eligible for social security benefits because they are not fully insured, do not meet recency of employment requirements, have enough earnings to exceed the program's limitations, or do not meet disability requirements because they are deemed able to engage in less strenuous employment than their usual occupation. Those who are
asbestos-related legislation similar to the Black Lung Benefits Act.\textsuperscript{131} Three such bills have been introduced into Congress.\textsuperscript{132}

Although a legislative solution is regarded by some as a manufacturer's bailout,\textsuperscript{133} it best solves the problem of achieving adequate compensation for victims of asbestosis and other occupational diseases. Of course, at least partial funding of a compensation program should come from the manufacturers whose products cause the diseases, and from the insurers who are thereby relieved of defense costs and potential liability. The federal government\textsuperscript{134} and the tobacco industry\textsuperscript{135} might also be included as responsible parties.

Of the several bills introduced into Congress, the one given the best chance of success is designed along the lines of worker's compensation: its funding is intended to come from a worker's most recent employer or from the asbestos manufacturers in general.\textsuperscript{136} As in worker's compensa-

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\item[\textsuperscript{131}] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 16, 92 Stat. 105 (1978). This legislation originated as part of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 2, 83 Stat. 742 (1969), the first federal legislation to provide benefits for a single occupational disease. The program has had difficulties in funding and in establishing eligibility requirements and the Act has been amended several times. The Black Lung Benefits Revenue Act of 1981 (H.R. 5159) was designed to return the program to solvency by increasing the share paid by mine operators. See Interim Report, supra note 120, at 85–91. See also Meiser, The Black Lung Benefits Act, 17 Forum 813 (1982).
\item[\textsuperscript{133}] E.g., Smith & Shannon, The Rising Storm, 17 Forum 139, 153 (1981).
\item[\textsuperscript{134}] Many workers were exposed to asbestos while installing insulation in ships in government shipyards. See Winter, Lawscape: Asbestos Legal 'Tidal Wave' Is Closing In, 68 A.B.A.J. 397 (1982). The Department of Justice, however, denies that the government had any legal responsibility. It says it will defend to the limit the 13,000 claims against the government. Seattle Times, Sept. 10, 1982, at 6, col. 1.
\item[\textsuperscript{135}] Nonsmoking asbestos workers are five times more likely than the nonsmoking general population to die of lung cancer. Smoking asbestos workers are fifty times more likely to die of lung cancer than nonsmoking non-asbestos workers. Similarly, risk of death from asbestosis is higher in smokers than nonsmokers. See Hammond, Selikoff & Seidman, Asbestos Exposure, Cigarette Smoking, and Death Rates, 330 Annals of the N.Y. Acad. of Sci. 473–90 (1979). At least one asbestos manufacturer may try to make tobacco companies codefendants in 900 pending tort suits. See Review of Recent Tort Trends, 30 Def. L.J. 10–11 (1981). Because of the problems of showing causation in tobacco cases, this defense tactic would further complicate this type of litigation. See, e.g., Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678, 696–724 (1966) (discussion of problems of proving causation). The Fenwick bill provides for funding by contributions from asbestos manufacturers and cigarette manufacturers. Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess. (1981).
\item[\textsuperscript{136}] Occupational Health Hazards Compensation Act of 1982, H.R. 5735, 97th Cong., 2d Sess. (1982). When representatives of Manville Corp. appeared before the House Labor Standards subcommittee seeking legislation that would require government as well as industry to contribute to a
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tion, compensation under this program is the worker’s exclusive remedy against the employer.\textsuperscript{137} However, because many of the present suits were filed by workers who were not employees of the manufacturers, the exclusive-remedy element of this bill should be changed to include the manufacturers as well as employers in order to relieve concerns about the quantity of litigation.\textsuperscript{138} The bill, which presently covers workers exposed to asbestos or to uranium, is the foundation of a program to compensate victims of occupational diseases.\textsuperscript{139}

One of the problems in designing a suitable compensation program has been distinguishing occupational diseases from diseases that are not work-related.\textsuperscript{140} This problem shows one of the weaknesses of this country’s disability compensation programs. A disabled person needs adequate compensation that is not contingent on the source of disability. The United States covers fewer occupational diseases under worker’s compensation than many other industrialized countries.\textsuperscript{141} One reason for this difference is that in Europe worker’s compensation programs are generally integrated with national social insurance programs\textsuperscript{142} that presumably place less emphasis on the origin of the disease. In addition, European

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\item \textsuperscript{137} It also provides the exclusive remedy against the employer’s insurer or the worker’s union.
\item \textsuperscript{138} A high percentage of workers exposed to asbestos are not employed directly by manufacturers. Asbestos has been used in various types of insulation, and as a component of cement waterpipes, paints, acoustical tiles, flooring, brake linings, clutch facings, gaskets, draperies, ironing board covers, hotpads, stove linings, and innumerable other industrial and domestic products. Families of persons who work with asbestos also show a higher rate of asbestos-related disease than the general population. See I. Selikoff & D. Lee, Asbestos and Disease, (1978) (extensive discussion of the history of use of asbestos, its nature, and its effects). After those engaged in primary asbestos manufacturing and insulation work, workers at greatest risk are those employed in making secondary asbestos products or in shipbuilding and repair (other than insulation). See, e.g., P. MacAvoy, The Economic Consequences of Asbestos-Related Disease 12, Working Paper No. 27 of the Yale School of Organization and Management (January 1982) (table of relative risk of asbestos-related cancer from employment in selected industries).
\item \textsuperscript{139} See Interim Report, supra note 120, at 12–38 (discussion of other occupationally related pulmonary and respiratory diseases: byssinosis (from cotton dust), silicosis, chronic beryllium disease, and the effects of cadmium, chromium, arsenic, nickel, coal tar products, and diisocyanates).
\item \textsuperscript{140} See Note, Compensating Victims of Occupational Disease, 93 Harv. L. Rev. 916 (1980) (concluding that any new compensation scheme will be inherently flawed because of the complexities of identifying compensable diseases).
\item \textsuperscript{141} Interim Report, supra note 120, at 72. The United States compensated a greater number of people, but when the figures were adjusted to reflect the greater size of the U.S. work force, the results were: Sweden 340,000; Ontario, Canada 140,000; Belgium 140,000; Switzerland 125,000; Great Britain 50,000; France 40,000; United States 30,000.
\item \textsuperscript{142} Id.
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countries have longer recognized and compensated for occupational diseases.\textsuperscript{143}

The asbestos-insurance litigation makes clear that this country’s system of supporting those unable to work is increasingly inadequate to cope with occupational diseases. Short-term legislation concerned only with asbestos-related illness is inadequate. Comprehensive federal legislation is necessary to adequately and fairly compensate victims of a wide range of occupational diseases.

IV. CONCLUSION

The current controversy over asbestos-insurance coverage has spawned an enormous amount of litigation with vast social and economic consequences. The \textit{Keene} court’s adoption of both the exposure and the manifestation interpretations of injury guarantees maximum insurance for manufacturers to the extent of their insurance policies. This is the logical extension of the prior holdings in this field and provides the most sensible short-term approach to the problem.

The decision nevertheless provides only a temporary solution to a complex problem\textsuperscript{144} and still leaves many questions unanswered. Legislation is needed to provide benefits for victims of the increasing number of long-term, occupational diseases for which traditional liability insurance and courtroom solutions are inadequate.

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\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} The holding is, of course, a solution only for the Keene Corporation and its primary insurers. The United States Supreme Court has declined to review the conflicting decisions in \textit{Keene}, \textit{Forty-Eight}, and \textit{Porter}. Since the First Circuit upheld the decision of the district court in \textit{Eagle-Picher}, yet another court is in conflict. The First Circuit decision will also be appealed. Bus. Ins., Oct. 18, 1982, at 2, col. 4. An attorney for petitioning insurers said that \textit{Eagle-Picher} had increased the confusion, as well as the conflict among circuits, and that many people wanted the issue of the proper theory of coverage resolved. \textit{Id}. It is possible, of course, that the Court will not be disturbed that different results have been reached under the laws of the various states. \textit{See supra} note 37.
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