

Manifestation: The Least Defensible Insurance Coverage Theory for Asbestos-Related Disease Suits

Approximately 450 asbestos-related disease lawsuits are filed against asbestos manufacturers each month in the United States.¹ From these tort actions, another type of lawsuit arose to plague the courts. This second type of lawsuit involves declaratory judgment actions among manufacturers and insurers concerning who will pay the enormous amounts of money required to compensate the asbestos-diseased victims.² The parties involved vigorously litigate the comprehensive general liability insurance policies which cover the products liability suits. The basic controversy between the insurers and manufacturers stems from the latent and pernicious character of asbestos-related diseases.³ Because manufacturers were covered by more than one

1. Hertzberg, *Asbestos Lawsuits Spur War Among Insurers, With Billions at Stake*, Wall St. J., June 14, 1982, at 1, col. 6. A Labor Department study conducted by Irving J. Selikoff of Mount Sinai Medical Center in New York predicted that at least 8,500 workers—and perhaps as many as 10,000—will die each year of asbestos-related diseases. *Id.* Asbestos-related disease lawsuits now number above 20,000. Lublin, *Occupational Diseases Receive More Scrutiny Since The Manville Case*, Wall St. J., Dec. 20, 1982, at 1, col. 6.

Amatex, the UNR Corporations, and the Manville Corporation have all filed bankruptcy in an effort to deal with these lawsuits. The UNR Corporation requested a U.S. District Court Judge to appoint a representative for all future but unknown asbestos claimants. It is not clear if the court has authority to define future claims. If the judge approves UNR's request, a Chapter 11 bankruptcy may look very attractive to the twenty or so other asbestos companies. Richards, *UNR Case May Set Legal History With Effort to Limit Asbestos Suits*, Wall St. J., Mar. 16, 1982, at 31, col. 3.

The Manville Corporation has asked a federal bankruptcy court to estimate the dollar amount of both pending and unfiled health claims against the company using actuarial and statistical data, economic matters, and pertinent historical claim and litigation records. Wall St. J., Feb. 7, 1983, at 12, col. 2.

2. Four cases have been decided by four different United States Circuit Courts of Appeal with three conflicting results. See *infra* notes 4-6 and accompanying text. The Supreme Court has denied certiorari on all four. At least thirty-six additional insurance coverage lawsuits are pending throughout the country. Wermiel, *Supreme Court Reaffirms It Won't Decide Who Is Liable for Asbestos Injury Claims*, Wall St. J., Mar. 8, 1983, at 12, col. 1. See Rosow and Liederman, *An Overview to the Interpretive Problems of "Occurrence" in Comprehensive General Liability Insurance*, 16 FORUM 1148, 1153 (1981) for a list of 18 cases.

3. Physical manifestation of the symptoms of asbestosis does not appear until ten to twenty years after initial exposure, and it is difficult to determine exactly when the

insurance policy during the years in which a victim was exposed to asbestos fibers, insurers, excess insurers and manufacturers disagree with respect to which policy's coverage is triggered by the occurrence of the disease.

The gravamen of the insurer's and manufacturer's disagreement centers upon the proper choice between two main liability theories: exposure and manifestation. The exposure theory assigns liability to the insurer covering the risk during the victim's exposure to asbestos. The manifestation theory provides that the insurer covering a company when the disease first manifests itself in medically diagnosable symptoms must provide coverage. Three circuit courts of appeal have arrived at different conclusions regarding when coverage is triggered. The Sixth Circuit in *Insurance Company of North America v. Forty-Eight Insulations*⁴ ("*Forty-Eight Insulations*") applied the exposure theory; the D.C. Circuit in *Keene Corp. v. Insurance Company of North America*⁵ ("*Keene*") combined the exposure and manifestation theories; and, in the most recent case, the First Circuit in *Eagle-Picher Industries Inc. v. Liberty Mutual Insurance Company*⁶ ("*Eagle-Picher*") opted for the manifestation theory.⁷

injury begins. See *infra* notes 9-20 and accompanying text.

4. 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814, *cert. denied* 454 U.S. 1109 (1981), *reh'g denied*, 455 U.S. 1009 (1982). *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied* 454 U.S. 1109 (1981) also adopted the exposure theory by agreeing with the decision in *Forty-Eight Insulations*.

5. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 445 U.S. 1007 (1982).

6. 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 103 S. Ct. 1279 (1983).

7. The Supreme Court has declined to resolve the issue of which insurance coverage theory should be applied. When it refused certiorari for *Eagle-Picher* "it was the fourth time in two years that the high court has refused to get involved in an issue which has bitterly divided the insurance industry and that has tied state and federal courts in knots." When the Court denied certiorari for the *Keene* case, three justices voted to hear the case. There were no votes in favor of hearing *Eagle-Picher*. Many lawyers say that the reason the justices refuse to become involved in the controversy is because the cases involve state law interpretation of insurance contracts and not federal law or the United States Constitution. Wermiel, *supra* note 2.

There is, nonetheless, a need for one theory of insurance liability to guide the courts through the congestion of insurance coverage lawsuits (see *supra* note 2) and to discourage forum shopping (see *infra* notes 75-76 and accompanying text). Consistent application of one theory would streamline the process from a litigant's standpoint. Attorneys note that the *Eagle-Picher* decision has created greater confusion in handling claims and it is very unclear how to treat the next case down the road. See Tarnoff, *Manifestation Ruling Clouds Asbestos Coverage Litigation*, Bus. Ins. July 12, 1982. One theory would provide insurers and insureds with information to plan for liability costs in the years ahead.

Many commentators envision a legislative fund as the solution. Victims of asbestos-

The First Circuit erred in *Eagle-Picher* by adopting yet another rule of law to adjudicate insurer's liability. Furthermore, the manifestation theory applied by the court is the least defensible rule because it is incompatible with the medical evidence. The *Eagle-Picher* court erred on two other counts: first, its application of contract interpretation principles failed to recognize the equal bargaining position between *Eagle-Picher* and the insurance companies; second, its decision failed to hold manufacturers responsible for uninsured periods. The best solution is to adopt the compromise theory proposed by Judge Wald in her concurrence in *Keene*. Wald's proposal apportions liability between insurers providing coverage during periods of both exposure and manifestation, but includes the manufacturer as a self-insurer for the years it failed to take out insurance.

This Note will first explain the nature of asbestos diseases, the standard insurance policy language, and the theories of insurance coverage. It will then demonstrate the misapplications of medical evidence and contract interpretation principles in *Eagle-Picher*, and conclude with a discussion of the wider implications of the decision and the better theory suggested by Judge Wald. Because the facts and issues involved in *Forty-Eight Insulations*, *Keene*, and *Eagle-Picher* are essentially the same,⁸

related diseases could bypass the courts and be compensated directly from a fund similar to the Black Lung Fund. A single theory of insurance coverage could serve as a basis for determining how much the insurance companies would contribute to a legislative fund. The following bills have been introduced to Congress to address the asbestos injury compensation problem: Occupational Health Hazards Compensation Act of 1982, H.R. 5735, 97th Cong., 2d Sess. (1982) (introduced by Rep. Miller); Asbestos Health Hazards Compensation Act of 1981, S. 1643, 97th Cong., 1st Sess. (1981) (introduced by Senator Hart); Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess. (1981) (introduced by Rep. Fenwick).

Observers see a reasonable chance that both Houses will approve a bill by late next year. One stumbling block is the asbestos industry itself, which insists that the federal government should pay 50% of the compensation costs because the insulation and fireproofing material was widely used by private contractors to build ships for the government during World War II. Representative George Miller is sponsoring an alternative bill which lacks any federal payments. An eventual compromise could require the government to provide partial compensation, perhaps 10% to 15%. Lublin, *supra* note 1.

The American Bar Association has urged Congress to find a way to handle the thousands of pending lawsuits involving asbestos-related diseases. It concluded the law could no longer be left to state and federal courts which apply the varied law of all 50 states. Wermiel, *Lawyers' Group Urges Congress to Find Way to Resolve Lawsuits Over Asbestos*, Wall St. J., Feb. 10, 1983, at 12, col. 1.

8. *Forty-Eight Insulations* was the first case concerning insurance for asbestos litigation to reach the appellate court level. *Forty-Eight Insulations* had varied products liability insurance policies over 20 years issued by five different insurance companies.

the conclusions drawn from *Eagle-Picher* apply equally to the other cases.

The nature of asbestos-related diseases complicates the determination of an applicable insurance coverage theory. Asbestos exposure can give rise to asbestosis and mesothelioma⁹ and is associated with increased risk of lung and gastrointestinal cancer.¹⁰ Of these diseases, asbestosis has been the most commonly reported¹¹ and has been the subject of most of the medical testimony in cases disputing the insurance coverage theories.¹² Physical symptoms of asbestosis¹³ occur ten to twenty

Before 1955 it was self-insured. Insurance Company of North America sought a declaratory judgment to settle the dispute among the insurance carriers as to which carrier or carriers were liable under the policy provisions. *Forty-Eight Insulations*, 633 F.2d at 1213-16.

From 1961 to 1982, four insurance companies provided Keene with products liability insurance during different time periods. When Keene tendered the asbestos-related damage cases to them for defense and indemnification, each company denied all responsibility for the suits or accepted only partial responsibility. The Keene Corporation sought a declaratory judgment of the rights and obligations of the parties under the comprehensive general liability policies. *Keene*, 667 F.2d at 1038-39.

For a discussion of *Eagle-Picher*, see *infra* notes 34-43 and accompanying text.

9. Mesothelioma is a type of cancer affecting primarily the lining of the lungs. It was relatively rare until the widespread use of asbestos. Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 343 (1980). Mesothelioma becomes a serious problem 30 to 35 years after onset of exposure. Untreated cases almost always result in death within a year, and current conventional treatment has done little to alter the prognosis. 4A GRAY'S ATTORNEY'S TEXTBOOK OF MEDICINE § 205C.72 (3d ed. 1980).

10. The greatest hazards from the inhalation of asbestos fibers are the late-appearing cancers. Estimates indicate that 15% of patients with clinically significant asbestosis develop bronchogenic carcinoma usually within 20 to 40 years after the asbestosis has been diagnosed. Mesothelioma is less common but its incidence is one thousand times that expected in the unexposed population. S. ROBINS & R. COTRAN, *PATHOLOGICAL BASIS OF DISEASE*, 527-28 (2d ed. 1979).

Asbestosis affects 7% of exposed asbestos workers; mesothelioma kills 7-10% of exposed asbestos workers; gastrointestinal cancer kills 8-9% of exposed asbestos workers. Before government regulation, 20-25% of exposed asbestos workers (both smokers and nonsmokers) died of lung cancer. *Occupational Diseases and Their Compensation*, 1979: *Hearings Before the Subcommittee on Education and Labor*, 96th Cong., 1st Sess. 79-80 (1979) (statement of Dr. David P. Rall, Director, National Institute of Environmental Health Sciences) (hereinafter cited as *Hearings*).

11. Mortality statistics in a National Institute for Occupational Safety & Health epidemiologic study of workers employed in an asbestos manufacturing plant suggest that lung cancer and asbestosis have peaked and mesothelioma is just beginning to be observed. *Hearings*, *supra* note 10 at 50 (statement of Dr. Anthony Robbins, Director of National Institute for Occupational Safety and Health Center for Disease Control, Department of Health, Education and Welfare). "[W]ith mesothelioma we have yet to see the worst of the disease." *Hearings*, *supra* note 10 at 70.

12. It is unclear whether the courts would interpret medical evidence from all asbestos-related diseases similarly. See, e.g., *Keene*, 667 F.2d at 1038 n.3 (disregarding details of medical development of diseases); *Forty-Eight Insulations*, 657 F.2d at 815 (relying

years after working with asbestos products.¹⁴ After exposure and before physical symptoms, the lungs are scarred by the inhaled silicated fibers comprising asbestos.¹⁵ Because of the body's immune defense system located in the nasal and throat passages, not every inhaled fiber reaches the lungs.¹⁶ Those that do are enveloped by an alveolar macrophage, a scavenger cell that secretes dissolving enzymes in a futile attempt to destroy the fiber.¹⁷ The secreted enzymes eventually destroy surrounding tissue and produce scarring.¹⁸ Breathlessness upon exertion is the first physical sign of asbestosis.¹⁹ As the disease progresses, the victim becomes susceptible to incidental lung infections and death from respiratory ailments.²⁰ Problems arise when standard insurance policy language is applied to indemnify manufacturers who are being sued by individuals afflicted with this disease.

The insurance policies involved in asbestos-related disease litigation typically use the same language. The relevant clauses generally state that the insurer agrees to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence."²¹ Bodily injury is defined as "bodily injury, sickness or disease."²² An "occurrence" is defined as "an accident, including continuous or repeated exposure to conditions."²³ Given this language, the courts try to decide when bodily injury results—a very difficult problem since the pathogenesis of asbestos-related diseases is frequently undefinable.²⁴

Courts have responded to the problems of asbestos-related

on medical evidence and policy grounds of administrative convenience to treat them alike); *Eagle-Picher*, 682 F.2d at 19 n.3 (finding support for the manifestation theory in the medical evidence of other asbestos-related diseases. Mesothelioma and bronchogenic carcinoma, although closely related, are not cumulative as is asbestosis).

13. Symptoms of asbestosis are shortness of breath, chest pains, coughing and clubbing of the fingers. GRAY's, *supra* note 9 at 205C.30.

14. ROBINS & COTRAN, *supra* note 10 at 527.

15. *Eagle-Picher*, 682 F.2d at 18.

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

17. *Id.*

18. *Id.*

19. GRAY's, *supra* note 9 at § 205C.30.

20. *Id.*

21. *Eagle-Picher*, 682 F.2d at 17; *Forty-Eight Insulations*, 633 F.2d at 1216; *Keene*, 667 F.2d at 1057.

22. *Id.*

23. *Id.*

24. See *supra* notes 9-20 and accompanying text.

diseases by applying three different theories of insurer liability: exposure, manifestation and combination. Liability has been apportioned among the manufacturers and insurance companies in two ways: pro rata and liability in full.²⁵

Under the exposure theory, insurers providing coverage to the manufacturer during the course of a victim's exposure to asbestos must indemnify the insured. Each insult that results in injury is an occurrence for the purpose of determining which coverage applies. Thus, if a worker was exposed to asbestos from 1950 to 1953 and manifested symptoms of an asbestos-related disease in 1977, the insurance company or companies insuring against the risk from 1950 to 1953 would be responsible.²⁶ *Forty-Eight Insulations* adopted the exposure theory and prorated liability among all of the insurance companies which covered the manufacturer while the injured victim was inhaling asbestos.²⁷ *Forty-Eight Insulations* was treated as a self-insurer for the years it was without insurance and thus was responsible for a pro rata share of indemnification and defense costs.²⁸

Under the manifestation theory, the insurer covering the manufacturer when the disease first manifests itself in physically diagnosable symptoms must provide compensation. Using the same example, the insurer in 1977 would indemnify the manufacturer. The First Circuit applied this theory in *Eagle-Picher*.

A third theory combines exposure and manifestation. This combination theory is also referred to as "triple trigger" or "injurious process."²⁹ It views asbestos inhalation as an injurious process. All insurers who provided insurance to the manufacturer from the time of first exposure, during exposure in residence (the period during which the disease is developing), and

25. Pro rata means "proportionately; according to a certain rate, percentage, or proportion. According to measure, interest or liability." BLACK'S LAW DICTIONARY 1098 (5th ed. 1979).

26. See Mansfield, *Asbestos: The Case and the Insurance Problem*, 15 FORUM 860, 876 (1980) [hereinafter cited as Mansfield].

27. For a discussion of the case, see Note, *Duty to Indemnify and to Defend—Each Insurer Which Provides Coverage During Worker's Exposure to Asbestos is Proportionately and Individually Liable to Defend and Indemnify its Insured*, 26 VILL. L. REV. 1080 (1981) and Note, *Products Liability Insurance—Time of Exposure Triggers Coverage for Asbestos-Related Diseases*, 26 WAYNE L. REV. 1127 (1980).

28. *Forty-Eight Insulations*, 633 F.2d at 1224, 1225.

29. See Rundle, *Keene Jackpot: \$300 million in coverage*, Bus. Ins. Oct. 26, 1981, at 1. For further discussion of Keene see Note, *Insurance Law and Asbestosis—When is Coverage of a Progressive Disease Triggered?* 58 WASH. L. REV. 63 (1982); Comment, *Asbestos Litigation: The Insurance Coverage Question*, 15 IND. L. REV. 831 (1982).

manifestation are liable.³⁰ The *Keene* court adopted this theory. Each insurer was fully liable subject to "other insurance" provisions which allocate liability among insurers when more than one policy covers an injury.³¹ The *Keene Corp.* was not held liable for periods of time it was uninsured.³² Judge Wald in her concurrence advocated the combination theory, but with a pro rata distribution of financial responsibility and with the manufacturer treated as a self-insurer for the years it failed to take out insurance.³³

The *Eagle-Picher* court followed neither *Forty-Eight Insulations* nor *Keene*. The experience of *Eagle-Picher* was typical of other manufacturers except *Eagle-Picher* did not obtain insurance coverage for liability resulting from exposure to its asbestos products until 1968.³⁴ It manufactured asbestos products between 1931 and 1971.³⁵ From January 1968 through 1978, Liberty Mutual provided primary insurance coverage, and from June 1973 to 1979, *Eagle-Picher* had first one, and later two, layers of excess insurance coverage.³⁶ In 1977, Liberty Mutual informed *Eagle-Picher* that the policy limits for 1974 and 1975 were about to be reached.³⁷ Additionally, two excess insurers disputed their coverage responsibilities to *Eagle-Picher*.³⁸ *Eagle-*

30. *Keene*, 667 F.2d at 1047.

31. *Id.* at 1050. "Other insurance" provisions provide a scheme by which the insurer's liability is to be apportioned. Insurance Co. of North America (INA) policy states, "When both this insurance and other insurance apply to the loss on the same basis, whether primary, excessive or contingent, INA shall not be liable under this policy for a greater proportion of the loss than stated in the applicable contribution provision." *Id.* For an example of a contribution provision see *Id.* at n.35.

32. *Id.* at 1048-50.

33. *Id.* at 1057-58.

34. *Eagle-Picher*, 682 F.2d at 16. *Keene Corp.* could prove products liability coverage beginning 1961, *Keene*, 667 F.2d at 1038; *Forty-Eight Insulations* has been insured for products liability suits since 1955, *Forty-Eight Insulations*, 633 F.2d at 1215.

35. *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 111 (D. Mass. 1981).

36. Excess insurance is the amount of insurance coverage that is beyond the dollar amount of coverage of one carrier but which is required to pay a particular loss, as distinguished from "other insurance" which may be used to pay or contribute to the loss. BLACK'S LAW DICTIONARY 504 (5th ed. 1979). Excess insurers for *Eagle-Picher* are American Motorists Insurance Company and various underwriters in the London Market. *Eagle-Picher*, 682 F.2d at 15.

37. *Eagle-Picher*, 682 F.2d at 15.

38. American Motorists acknowledged receipt of the notice but indicated disagreement with Liberty Mutual's assignment of claims to policy periods and its handling of claims. *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 523 F. Supp. 110, 112 (D. Mass. 1981). American Motorists implied that Liberty Mutual's coverage would not be exhausted under the proper interpretation. *Eagle-Picher*, 682 F.2d at 15. The London

Picher brought an action seeking a declaration of rights and liabilities of its various insurers pursuant to the applicable policies.

Only two theories of insurance coverage were presented in the district court: exposure and manifestation.³⁹ The district court invoked the manifestation theory based on the medical evidence, the common meaning of the policy language, and the principle of construing contracts to promote coverage.⁴⁰ The insurers covering a company at the time the asbestos-related disease first manifested itself by way of medically diagnosable symptoms would provide coverage under this theory. This decision placed the burden on Liberty Mutual and the excess insurers to defend and indemnify. The years 1974 and 1975 would be covered by excess insurers when Liberty Mutual's policy limits were reached.

The exposure theorists (basically the excess insurers) appealed. They argued that the district court erred by excluding extrinsic evidence of Eagle-Picher's intent in obtaining the policies and that the court misconstrued the policies as a matter of law.⁴¹ Eagle-Picher cross-appealed and, relying on *Keene*, argued for the first time that all policies in force from the time of initial exposure until and including the time of manifestation are triggered by an asbestos claim.⁴² The court of appeals nevertheless affirmed the district court by interpreting the medical evidence and contract language as consistent with the manifestation theory.

The *Eagle-Picher* court reasoned that exposure cannot trigger coverage because subclinical injuries⁴³ do not occur simultaneously with initial exposure.⁴⁴ Even when the fiber is inhaled, disabling disease and death are not inevitable.⁴⁵ If a single exposure was intended to trigger coverage, the policy language would

Market excess insurers sent a reservation of rights letter pending resolution of the correct theory of liability. *Id.* at 16.

39. *Id.* Eagle-Picher, Liberty Mutual, and various London Market underwriters argued for the manifestation theory. American Motorists and other London Market insurers argued for an "exposure" theory. At that time, Eagle-Picher was the only manufacturer advocating manifestation; all others advocated exposure. See Mansfield, *supra* note 26, at 876.

40. *Eagle-Picher*, 682 F.2d at 16.

41. *Id.*

42. *Id.*

43. Subclinical means "[o]nly slightly abnormal and not detectable by the usual clinical tests." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 874 (1976).

44. See *Eagle-Picher*, 682 F.2d at 19.

45. *Id.*

have reflected this intent, rather than defining occurrence in part as a "continuous or repeated" exposure to conditions.⁴⁶ The resulting injury, not the exposure, must take place during the policy period.⁴⁷ In addition, the court agreed that the common meaning of the policy language supported manifestation because an ordinary person with scarred lungs would not claim that the disease resulted until his sense of well-being was impaired.⁴⁸ The court concluded from the medical evidence that the insurer covering the manufacturer at the time of manifestation of the disease should be responsible.

The court in *Eagle-Picher* misjudged the medical evidence by ignoring the period when the lungs are being scarred. The view that the manifestation theory was justified because death and disease were not inevitable and because injury did not occur simultaneously with exposure, does not comport with the long-term, insidious nature of the disease. While an asbestos worker's lungs may not be injured simultaneously with inhalation, eventually his lungs will suffer deleterious effects from the inhaled fibers that invade and remain in the pulmonary tissue.

Efforts to categorize this disease under a solely manifestation or exposure theory are too simplistic and do not recognize the special qualities of asbestosis. Asbestosis is a relentlessly progressive disease characterized by pulmonary fibrotic⁴⁹ changes which develop slowly over the years.⁵⁰ The process begins near the time of initial exposure. The fibers insidiously injure the lungs throughout the period of exposure, and the process continues even after physical symptoms become evident. Asbestosis is not an exact disease with a beginning that can be pinpointed by either theory. Medical facts demonstrate that injury occurs first to the lungs and, later, to physical well-being as the condition progresses. Although death and disease do not result for everyone, those who are afflicted with the disease experience the process at a later stage. The *Keene* court's view that the medical evidence presents asbestosis as part of an injurious process most accurately describes the disease.⁵¹

46. *Id.*

47. *Id.*

48. *Id.*

49. "Fibrotic" describes a condition marked by increase in interstitial fibrous tissue. WEBSTER's, *supra* note 44.

50. See *supra* notes 9-20 and accompanying text.

51. "Regardless of whether exposure to asbestos causes an immediate and discrete

In addition to weighing the medical evidence, the *Eagle-Picher* court examined the insurance policy language in light of contract interpretation principles. As stated by the First Circuit, the foremost contract interpretation principle is to ascertain the intent of the parties. Where the contract language is clear, courts ascertain intent from the plain and ordinary meaning of the language. Where the language is ambiguous, courts consider extrinsic evidence. If the meaning of the contract language remains unclear, courts construe the policy in favor of the insured.⁵³ Regardless of whether courts involved in asbestos insurance litigation have correctly or incorrectly applied these principles by actually declaring the language ambiguous,⁵³ all of them have relied on the theory of *contra proferentem*, construing language in favor of the insured, in order to maximize coverage to the insured.⁵⁴

The *contra proferentem* theory rests on the assumption that insurance contracts are contracts of adhesion.⁵⁵ Insurance contracts are considered adhesion contracts because most are drafted by insurers and there is a presumption that the industry uses highly technical and obscure language in its policies that places the customer at a disadvantage.⁵⁶ However, most of the

injury, the fact that it is part of an injurious process is enough for it to constitute 'injury' under the policies." *Keene*, 667 F.2d at 1046.

52. *Eagle-Picher*, 682 F.2d at 17.

53. In the *Eagle-Picher* case, on the district court level, the parties agreed the language was unambiguous, yet they were diametrically opposed as to what they thought the language meant. *Id.* at 18. The district court took them at their word and refused extrinsic evidence regarding *Eagle-Picher's* bargaining power. *Id.* at 18, 21 n.6. However, if the language of an insurance policy is subject to interpretation in opposite ways, or has been interpreted differently by different courts, it is ambiguous, so as to permit the introduction of extrinsic evidence in interpretation. 1 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 15:58 (2d ed. 1959). In this case a declaration of ambiguity was in order. The *Eagle-Picher* court reasoned that because the issue of ambiguity was not raised below and had not been urged on appeal, they would not consider it a basis for error. While the *Eagle-Picher* court incorrectly found the language to be unambiguous, the other courts have correctly found the language to be ambiguous. See *Keene*, 667 F.2d at 1041; *Forty-Eight Insulations*, 633 F.2d at 1219.

54. It has been argued that *Eagle-Picher* is not just another case of maximizing coverage, because the *Keene* triple trigger approach was refused on appeal, and the *Keene* approach would have given *Eagle-Picher* more coverage than just the manifestation theory. However, the appellate court may not have granted *Eagle-Picher's* request for an interpretation similar to *Keene* because such a theory had not been argued at the district court level. See *Eagle-Picher*, 682 F.2d at 23, and Tarnoff, *supra* note 7.

55. See generally 1 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW*, § 15:77 (2d ed. 1959); R. KEETON, *BASIC TEXT ON INSURANCE LAW*, § 6.3(a) at 350 (1971).

56. *Id.* See also Ward, *Coverage for Exposure: Destructive Judicial Legislation*, 24 *FOR THE DEFENSE*, No. 3 at 12 (1982).

manufacturers involved in asbestos litigation are large sophisticated companies capable of negotiating an insurance contract.⁵⁷ In *Eagle-Picher*, the exposure theorists unsuccessfully proffered overwhelming evidence⁵⁸ relative to the sophistication of the manufacturer.⁵⁹ Sophisticated companies generally have attor-

57. The most common defendants are Johns-Manville, Eagle-Picher, Owens-Corning, Pittsburgh Corning, Celotex, Keene Corp., Armstrong Cork Co. and Raybestos-Manhattan. Mansfield, *supra* note 26. Amici Curiae to the *Eagle-Picher* appeal were Armstrong World Industries Inc., Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Fibreboard Corporation, Amatex Corporation, Asten Group, Inc., The Celotex Corporation, Crown Cork & Seal Company, Inc., and Standard Insulations, Inc. Brief of Amici Curiae, *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins.*, 682 F.2d 12 (1st Cir. 1982).

58. The district court rejected the offer of evidence because it concluded that whether or not the policies were contracts of adhesion could be determined by reading the policies. The appellate court could find no Ohio or Illinois cases which abandoned or weakened the presumption of construing ambiguous language in favor of the insured. They also found that *Eagle-Picher* did not have unusual sophistication and did not so actively participate in drafting so as to be denied benefit of the usual rule. The appellate court reasoned that the district court relied on this policy only as an "additional strand of support" and that any error in excluding evidence of *Eagle-Picher's* bargaining power was harmless. *Eagle-Picher*, 682 F.2d at 21, n.6.

59. The evidence introduced at trial demonstrated that at least as early as 1965 *Eagle-Picher* had not only the resources and facilities of its own full time corporate insurance director, but also the advice of in-house legal staff on such matters.

Evidence proffered by exposure theorists demonstrates that representatives of *Eagle-Picher* were aware of risks inherent in asbestos-containing insulation products in 1964; that prior to negotiating for and obtaining comprehensive general liability coverage from Liberty Mutual in 1968, which included coverage for asbestos-related claims, *Eagle-Picher* had made the deliberate and conscious decision to maintain a self-insured status for such claims; that during the period from 1955 through 1965 *Eagle-Picher* had been offered products liability coverage with respect to claims arising from all of its products (including asbestos-containing insulation products), but had rejected the same in favor of a piecemeal program of self-insurance; that *Eagle-Picher* negotiated and obtained its primary liability insurance directly from Liberty Mutual, without broker involvement, for the period since January 1, 1968; that *Eagle-Picher* negotiated and obtained its excess or umbrella coverage from the London Market with the assistance of brokers; that asbestos-related claims made against *Eagle-Picher* during the period from January 1, 1968 to an indeterminate date in 1971 were treated by both *Eagle-Picher* and Liberty Mutual in accordance with the exposure position; that in 1971 *Eagle-Picher* proposed to Liberty Mutual that coverage be afforded on a different basis, a proposal which, after considerable negotiation, Liberty Mutual accepted in the form of the special letter agreement between *Eagle-Picher* and Liberty Mutual dated April 6, 1972; that *Eagle-Picher* was at all relevant times aware of its insurance coverages and counseled concerning insurance matters; that the insurance director of *Eagle-Picher* kept abreast of insurance industry developments and publications in which relevant insurance subjects were discussed; and that the duties of *Eagle-Picher's* insurance director included the negotiation of insurance coverage and keeping abreast of the state of the art of risk management

neys and insurance departments which can place them in a relatively equal bargaining position with an insurance company.⁶⁰ Thus, reliance on the contra proferentem canon is unjustified.

In addition, reliance on contra proferentem is misplaced because a different theory of insurance coverage can be reached depending on the facts of the case. *Eagle-Picher* was first covered by products liability insurance beginning in 1968.⁶¹ The First Circuit recognized that the exposure theory would not give as much coverage to *Eagle-Picher* as the manifestation theory since many workers were exposed prior to 1968. In order to maximize coverage under the facts of this case, the court adopted the manifestation theory. Other courts have adopted different liability theories in order to maximize coverage. The triple trigger theory⁶² advanced in *Keene* also gave the manufacturer the maximum coverage possible including coverage for the years the manufacturer was uninsured. In *Forty-Eight Insulations*, the exposure theory provided more coverage than the manifestation theory.

Construing ambiguous contract language in favor of the insured in asbestos cases can lead to a different theory of insurance liability depending on when insurance is obtained. Since large asbestos products manufacturers and insurers are generally equal in bargaining power, there is no reason for the courts to continue vacillating between exposure and manifestation using the inherent ambiguity in the contract language to decide in favor of the insured. The *Eagle-Picher* decision favoring the manifestation theory of insurance coverage has added to the confusion and raised additional problems.

Some implications of the *Eagle-Picher* decision are troublesome. The court held the insurer liable for the period of time when workers were exposed even though *Eagle-Picher* had not

and insurance coverage matters, including the evaluation, analysis and determination of insurance coverage issues.

Brief of Defendants-Appellants Philip Alan Froude, Excess Insurance Company and Turegum Insurance Company, Ltd. at 22-23, *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins.*, 682 F.2d 12 (1st Cir. 1982) (citations to trial record omitted) [hereinafter cited as Brief of Defendants-Appellants].

60. "This doctrine has absolutely *no place* in negotiated contracts in commercial lines, where both the buyer and the seller, being large corporations, are represented by sophisticated agents and attorneys and where the policy provisions, in many instances, are in fact negotiated line by line, clause by clause." Ward, *Coverage for Exposure: Destructive Judicial Legislation*, 24 FOR THE DEFENSE, No. 3 at 12 (1982).

61. *Eagle-Picher*, 682 F.2d at 15, 23.

62. See *supra* notes 29-33 and accompanying text.

then obtained products liability insurance.⁶³ The court's rationale in part was that the corporation's reasonable contractual expectations were met by invoking the manifestation theory.⁶⁴ However, to extrapolate retroactive insurance coverage for the years Eagle-Picher was uninsured collides with the public policy of encouraging manufacturers of dangerous products not only to research products carefully but also to be adequately insured or self-insured so that victims of unsafe products will be compensated for any loss.

The hazards of asbestos dust have been known since the beginning of this century⁶⁵ and were widely acknowledged in the United States by the mid-1930's.⁶⁶ Documents illustrate that the

63. Manufacturers may be uninsured for a significant portion of the "exposure period" for several reasons: no products liability insurance was purchased for business reasons; no policies can be located because of record destruction programs; no coverage is available because of corporate acquisitions and mergers. Mansfield, *supra* note 26, at 877. The court in *Eagle-Picher* specifically states that Eagle-Picher Industries was uninsured prior to 1968. *Eagle-Picher*, 682 F.2d at 23. However, a review of the Brief of Defendants-Appellants *supra* note 60, at 22-23 reveals that Eagle-Picher had a piecemeal program of self-insurance.

64. *Eagle-Picher*, 682 F.2d at 23. Similarly, the *Keene* court held that the manufacturer was not liable during the period it was uninsured, finding each insurance policy triggered was liable in full because of Keene's reasonable expectations in purchasing the policy. *Keene*, 667 F.2d at 1047-49. See also Comment, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S.D.L. Rev. 239 (1982)(approving of this doctrine as a common basis for decision in the asbestos insurance cases). But see Note, *Insurance Law and Asbestosis—When Is Coverage of a Progressive Disease Triggered?*, 58 WASH. L. REV. 63 (1982)(disagreeing with Keene's reliance on the reasonable expectations doctrine because it adds a potential source of conflict and the decision is supportable by medical testimony alone).

65. In 1902 asbestos was included by the Inspector of Factories in England in the list of dusts known to be dangerous to man. In 1918 a vice-president of the Prudential Life Insurance Company called attention to the probable harmfulness of asbestos dust and intimated his company would not issue life insurance policies on asbestos workers. Mehaffy, *Asbestos-Related Lung Disease*, 16 FORUM 341, 343 (1980). Medical reports began in 1906 when Dr. Montagu-Murray reported the first asbestos-related death. Medical reports continued but the report of W.E. Cooke in 1924 (Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, BRIT. MED. J. II 147 (1924)) has been termed a turning point. Mansfield, *supra* note 26, at 864.

66. See *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) for a history of medical and industrial discovery of dangers of asbestos. The first modern medical study made of the effects of prolonged exposure to asbestos was the Meriwether-Price Study completed in England in the early 1930's. This report documented medical evidence that contact with asbestos was associated with pulmonary disease. It was widely reported among medical researchers and within the asbestos manufacturing industry. See generally Vagley and Blanton, *Aggregation of Claims: Liability for Certain Illnesses With Long Latency Periods before Manifestation*, 16 FORUM 636, 637 (1981).

asbestos industry had early knowledge of these health hazards.⁶⁷ Asbestosis has even been recognized in some states as a compensable disease since then.⁶⁸ A landmark case that opened the floodgates of litigation against manufacturers, *Borel v. Fibreboard Paper Products Corp.*,⁶⁹ established that manufacturers must have known of the dangers of their products and thus were guilty of a failure to warn.⁷⁰ A manufacturer is held to possess the skill of an expert in its field for those dangers of which it has knowledge.⁷¹ Yet the First Circuit rewards Eagle-Picher for its failure to insure or set up an adequate self-insurance fund.⁷² The main goal of the courts in the underlying products liability tort lawsuits is to compensate the injured victim. However, an important subsidiary goal of the courts in the insurance coverage lawsuits should be to encourage manufactur-

67. Mansfield, *supra* note 26 at 866, 870. Codefendants may benefit in the long run from Manville's Chapter 11 declaration. Now, three out of four cases are being won by defendants; prior to Manville's Chapter 11 declaration, defendants won only a third of the suits. This may result from the greater difficulty of proving that the remaining asbestos manufacturers had actual knowledge of the harmful effects of asbestos now that Manville is no longer a defendant. Manville allegedly knew asbestos was dangerous as early as the 1930's and tried to suppress the information. Correspondence from Manville to other companies discusses the danger, and the letters were introduced into evidence in several cases. Because Manville is no longer a defendant, it is more difficult to introduce these letters as evidence. Joseph, *After a Lull, Asbestos Suits Being Revived*, Wall St. J. Feb. 9, 1983, at 29, col. 3.

68. Mansfield, *supra* note 26.

69. 493 F.2d 1076 (1973).

70. Manufacturers have argued that they did not know of hazards of asbestos because medical studies in the 1930's were conducted in mining, milling or carding operations and textile plants. No studies were made of shipyard workers, insulation workers or bystanders. Also in 1946, the Fleisher-Drinker Report, a health survey of shipyard workers, may have misled the industry by declaring the occupation of covering pipe of naval vessels with asbestos to be relatively safe. However, plaintiffs argue that medical articles should have alerted the manufacturer to the possible danger of exposure to even small amounts of asbestos, and thus they should have provided warnings or conducted further investigation. Mehaffy, *supra* note 9, at 343-46.

Regarding whether the decision in *Borel* can be used to collaterally estop manufacturers from presenting evidence concerning their knowledge of asbestos hazards, see *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (courts cannot read *Borel* to stand for the proposition that, as matters of fact, asbestos products are unreasonably dangerous or that asbestos as a generic element is in all products a competent producing cause of cancer); see also *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1982) (*Borel* cannot serve as precedential authority for the proposition that all asbestos products are unreasonably dangerous as a matter of law).

71. *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975).

72. Self-insurance is considered to be any plan of risk retention in which a program or procedure has been established to meet the adverse results of a financial loss. R. KEETON, *Basic Text on Insurance Law* § 1.2(b)(6) (1971).

ers to be responsible by spreading the costs through the purchase of insurance.

Besides failing to provide incentives for manufacturers to insure, the court advocates a theory that is least advantageous to other manufacturers. Although the manifestation theory allows some benefit for those uninsured in previous years, in the long run it loses its effect. A principal reason courts have turned away from the manifestation theory is because of the difficulty in obtaining insurance in recent years. Since the mid-1970's, many insurers have refused to offer any further coverage or only offered coverage subject to restrictions such as large deductibles.⁷³ Thus, the exposure or triple trigger theories work best to spread the loss over the years to include insurers on the risk in the 40's, 50's, and 60's. For the companies that were conscientious enough to obtain insurance at an early date, the manifestation theory is unfair because it places the burden on the most recent insurers. With the large deductibles recently imposed by insurance companies, the manufacturers will be shouldering an increased burden under the manifestation theory.

Finally, a different theory of insurance coverage in different circuit courts encourages the parties to file suit in the circuit that will be most advantageous to them.⁷⁴ The manifestation theory is considered most favorable to insurers because insurance companies providing coverage over the exposure years will not be held responsible. The triple trigger theory of *Keene* is generally most favorable to policy holders.⁷⁵ Therefore the insurers would select the First Circuit, while policy holders would choose the D.C. Circuit.

A sounder theory is suggested by Judge Wald in her concurring opinion in *Keene*.⁷⁶ Wald agrees with the injurious process approach of the majority—that all insurers covering a manufacturer from the time of the first exposure, during exposure in residence and including the manifestation period should be liable.⁷⁷ However, Wald disagrees with the court's decision to cover the manufacturer for the years it consciously chose not to insure.⁷⁸

73. *Forty-Eight Insulations*, 633 F.2d at 1215, 1216 n.6; *Keene*, 667 F.2d at 1045.

74. Tarnoff, *Manifestation Ruling Clouds Asbestos Coverage Litigation*, Bus. Ins., July 12, 1982 at 47.

75. *Id.*

76. *Keene*, 667 F.2d at 1058.

77. *Id.* at 1047.

78. "I just do not understand why an asbestos manufacturer, which has consciously

Essentially, Wald advocates pro rata apportionment of financial responsibility with the manufacturer treated as a self-insurer for the years it failed to take out insurance.⁷⁹ The manufacturer could still target one company to defend the suit, and if judgment is awarded for the victim, the targeted insurance company would pay the victim to the extent of the coverage and then seek contribution from other on-line insurers.⁸⁰ The self-insured manufacturer would be included as one of the contributors.⁸¹

This solution has the advantage of comporting with the medical evidence by viewing the disease as an injurious process. It would spread the loss over as many insurers and years as possible yet be consistent so that each court would not decide on a different theory in order to maximize coverage using the contra proferentem rationale. By requiring asbestos manufacturers that were uninsured for certain years to pay their pro rata share, the courts encourage the purchase of products liability insurance for dangerous products. Adoption of this theory by the courts would discourage forum shopping and speed resolution of asbestos-related disease litigation.

The precedent set by *Eagle-Picher* is not workable in other cases. The suggestion by Judge Wald is the best theory yet to emerge. Under her analysis, all insurers during exposure, exposure in residence, and manifestation are liable; and manufacturers are responsible for the periods of time they are uninsured. Unless or until a legislative solution is reached,⁸² an adoption of this approach by the courts would facilitate litigation in this burdened area of the law.

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decided not to insure itself during particular years of the exposure-manifestation period, should have a reasonable expectation that it would be exempt from any liability for injuries that were occurring during the uninsured period." *Id.* at 1058.

79. The majority in *Keene* found Judge Wald's alternative appealing but it contradicted their primary rationale that each policy provides Keene with the right to be free of liability for asbestos-related disease unless such a disease was known or knowable by Keene at the time it purchased an insurance policy. *Id.* at 1048. Judge Wald argues that this initial premise is not to be found in the terms of the policies or in canons of interpreting insurance policies and that she must seek her own first premises in notions of fairness rather than principles of logic. *Id.* at 1058.

80. *Id.*

81. *Id.*

82. See discussion *supra* note 7.