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Asbestos: When is Insurer Liability Triggered in California?

California courts are faced with resolving significant amounts of litigation prompted by claims of asbestos related injuries.¹ The nature of these injuries² presents questions that are being addressed for the first time in the California courts.³ Claims of asbestos related injuries present difficult issues for the courts because there is an extended latency period⁴ between initial exposure to asbestos fibers and manifestation of an asbestos related disease such as asbestosis.⁵ During this latency period, which often lasts twenty years or more,⁶ the manufacturer of asbestos products may have contracted with several

1. Telephone interview with Art McGuire, Editor, ASBESTOS LITIGATION REPORTER (September 3, 1987) (notes on file at *Pacific Law Journal*). Approximately 50,000 asbestos related lawsuits have been filed nationwide. *Id.* Since asbestos was used extensively in building ships the majority of claims are filed in those states that have shipyards. *Id.* While no precise statistics are available, approximately 25% of all asbestos cases are filed in California courts. *Id.* See Note, *Insurance Law and Asbestosis - When Is Coverage of a Progressive Disease Triggered?* 58 WASH. L. REV. 63 n.94 (1982) (25% of all asbestos claims are filed in California); see also *Insurance Co. of N. Am. v. Superior Court*, 108 Cal. App. 3d 758, 761, 166 Cal. Rptr. 880, 882 (1980). Out of 3,000 claims filed against Insurance Co. of North America, 800 claims came from Los Angeles County alone. *Id.* Potential liability could reach \$20 billion. *Id.*

2. Asbestosis, mesothelioma (tumor of the membranes surrounding the lungs and lining the abdominal cavity), and bronchogenic carcinoma (lung cancer) are all related to inhalation of asbestos dust. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 n.3 (D.C. Cir. 1981).

3. *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 523 n.6 (9th Cir. 1985) (review of California law revealed that the California Supreme Court had not addressed the issues involved in cases of latent disease).

4. Latency period is defined as the seemingly inactive period between exposure of tissue to an injurious agent and the manifestation of a response. DORLAND'S MEDICAL DICTIONARY 991 (26th Ed. 1981).

5. See *Borel v. Fiberboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (the court described asbestosis as a progressive, irreversible, fatal change in the lung tissue caused by exposure to asbestos fibers). See *infra* note 43 (description of the scarring process).

6. *Borel*, 493 F.2d at 1083 (generally asbestosis takes 10 to 25 or more years to manifest after initial exposure).

different insurance carriers.⁷ The courts are called on to determine which of these successive insurers must provide a defense in lawsuits against the insured manufacturer and, if necessary, indemnify against any adverse judgments.⁸

The California Supreme Court has not ruled on the issue of what triggers insurer liability for damages caused by a latent disease.⁹ Nevertheless, analogous situations involving multiple successive insurers have been litigated applying California law.¹⁰ Both federal courts¹¹ and California appellate courts¹² have attempted to determine when insurer liability is triggered.

In attempting to determine a trigger for insurer liability, the federal courts have developed three distinct theories.¹³ Several courts have employed the exposure theory whereby insurer liability is triggered by inhalation of asbestos particles.¹⁴ In contrast, another court applied the manifestation theory and held that liability is not triggered until asbestosis becomes reasonably capable of medical diagnosis.¹⁵ Lastly,

7. See e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1213 (6th Cir. 1980) (five different insurance companies provided coverage over a 20 year period); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir. 1981) (four different companies provided coverage over a 20 year period).

8. See, e.g., *Asbestos Insurance Coverage Cases* Judicial Council Coordination Proceeding No. 1072, San Francisco Superior Court, 2-3 (on file at the *Pacific Law Journal*) [hereinafter *Asbestos Insurance Coverage Cases*] (issues include trigger and scope of coverage for asbestos related injuries).

9. See L.A. Daily Journal, May 15, 1987, at 3, col. 1. In California the state appellate courts have not rendered a decision as to when latent disease occurs for purposes of triggering insurer liability; see *supra* text accompanying note 3.

10. See *infra* notes 11, 12, 130-211 and accompanying text (discussion of conflicts involving multiple successive insurers and issues of latency litigated under California law).

11. See, e.g., *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 521 n.1 (9th Cir. 1985) (diversity action applying substantive law of California).

12. See, e.g., *California Union Ins. Co. v. Landmark Ins. Co.*, 145 Cal. App. 3d 462, 468, 193 Cal. Rptr. 461, 464 (1983) (progressive damage to swimming pool continued over a period of time during which two successive insurers provided coverage).

13. See *Hancock Laboratories Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 523 (9th Cir. 1985) (basic theories are the exposure, manifestation, and triple trigger theories). See *infra* note 149 (the *Hancock* court refers to the triple trigger theory as the continuous exposure theory). See also Levit, *Toxic Peril and Products Liability: Current Insurance and Legal Developments*, Los Angeles Daily Journal Reports (March 22, 1985). These theories were developed through application of state laws. *Id.* at 5. For this reason the United States Supreme Court has not granted review. *Id.* Because insurance contracts are usually governed by state law, other theories have been and may be developed. *Id.* at 5-6.

14. See *Insurance Co. of N. Am. v. Forty Eight Insulations, Inc.*, 633 F.2d 1212, 1223 (6th Cir 1980) (coverage triggering bodily injury includes the tissue damage which takes place after inhalation of asbestos dust). See *infra* notes 57-85 and accompanying text (discussion of exposure theory). Exposure of the lung tissue to asbestos fibers triggers liability, hence this concept is known as the exposure theory. *Id.* at 1217.

15. See *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982) *modifying* 523 F. Supp. 110 (D. Mass. 1981) (policy triggered when asbestos related

one court developed the triple trigger theory and found all insurers liable to the insured manufacturer if the insurer had a policy in effect at any time from exposure to asbestos to manifestation of asbestosis.¹⁶

California has yet to adopt a theory to determine when, during the progression of asbestosis, there is an occurrence which will trigger insurer liability.¹⁷ In *Hancock Laboratories v. Admiral Insurance Co.*¹⁸ the Ninth Circuit Court of Appeals determined that California law had to be applied to the diversity action.¹⁹ The *Hancock* court, recognizing that the California Supreme Court had not ruled on the issue of latent disease and multiple insurers, proceeded to make a determination of how the California Supreme Court would rule.²⁰ In making this decision, the *Hancock* court acknowledged, but did not follow, the case of *California Union Insurance Co. v. Landmark Insurance Co.*²¹ In *California Union*, the California Court of Appeals attempted to resolve a question of insurer liability in a latency situation.²² The *Hancock* court determined that the *California Union* case did not constitute binding authority²³ and reached a conclusion different from that of the California Appellate Court.²⁴ Neither of the above cases, however, dealt with asbestosis. More recently, a San Francisco Superior Court tentative opinion discussed the issues of insurer liability and asbestosis in a massive consolidation of asbestos

disease became reasonably capable of medical diagnosis). See *infra* notes 86-109 and accompanying text (discussion of manifestation theory). Since actual development of asbestosis is required to trigger coverage, this theory is labeled the manifestation theory. *Id.* at 16.

16. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) Inhalation of asbestos, the continuing exposure of the lungs to asbestos lodged in the lung tissue, and manifestation of asbestosis all trigger coverage. *Id.* See *infra* notes 110-35 and accompanying text (discussion of triple trigger theory). Because insurer liability may be established by finding any one of three circumstances to exist this theory is often referred to as the triple trigger theory. See Note, *supra* note 1, at 64 n.10; see also *Asbestos Insurance Coverage Cases*, *supra* note 8, at 16 (refers to theory espoused in *Keene* as the triple trigger).

17. See *supra* text accompanying note 9 (no California appellate decision on insurance trigger in asbestosis case).

18. 777 F.2d 520 (9th cir. 1985).

19. *Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 521 n.1 (appeal from a diversity action with the substantive law of California applicable, citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

20. *Id.* at 523 n.6. The court reviewed California law and discovered that the California Supreme Court had not addressed a conflict involving multiple successive insurers and extended latency periods in an asbestos case. *Id.*

21. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

22. *Id.* at 466-67, 193 Cal. Rptr. 462-64 (a swimming pool began leaking upon installation causing progressively worsening damage over a period of approximately eighteen months). See *infra* notes 171-96 and accompanying text (discussing *California Union*).

23. The *Hancock* court stated that an intermediate state appellate court ruling was not binding precedent. *Hancock*, 777 F.2d at 525 n.10.

24. *Id.* at 525 (court found only one exposure and did not prorate liability).

litigation known as the *Asbestos Insurance Coverage Cases*.²⁵ Beyond these cases, the issue of what triggers insurer liability in California when a latent disease is involved remains unsettled.

California courts will have to determine which, if any, of the three federal court theories should be applied. In making this determination the courts should look to general policies of state law for guidance. California courts recognize the general principle that insurance contracts should be interpreted to give effect to the intent of the parties as indicated by the plain meaning of the policy language.²⁶ When a contract is unclear as to when the progression of asbestosis can trigger an insurance policy, the policy should be interpreted to promote coverage of the insured.²⁷

This comment will first provide background information on asbestos and related insurance coverage.²⁸ Next, this comment will examine the exposure, manifestation, and triple trigger theories articulated by the federal courts to determine the extent to which coverage is promoted.²⁹ This will be followed by a discussion of cases applying California law to conflicts involving extended latency.³⁰ Finally, this comment will propose that the triple trigger theory should be adopted in California.³¹

BACKGROUND

A. *Asbestos*

Asbestos is a mineral which is mined and can be readily separated into fibers that can be woven into cloth.³² These fibers will not burn or readily conduct heat and are highly resistant to acids.³³ For

25. See *supra* note 8 and accompanying text. The court adopted a theory resembling the triple trigger theory. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 43-50.

26. See, e.g., *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 807, 640 P.2d 764, 767, 180 Cal. Rptr. 628, 631 (1982) (words used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them); *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, 182 Cal. App. 3d 462, 466, 227 Cal. Rptr. 203, 205 (1986).

27. See *Harris v. Glen Fall Ins. Co.*, 6 Cal. 3d 699, 701, 493 P.2d 861, 862, 100 Cal. Rptr. 134, 135 (1972) (any ambiguity or uncertainty to be resolved against the insurer).

28. See *infra* notes 32-56 and accompanying text.

29. See *infra* notes 57-135 and accompanying text.

30. See *infra* notes 136-224 and accompanying text.

31. See *infra* notes 225-49 and accompanying text.

32. See G.L. BAUM, TEXTBOOK OF PULMONARY DISEASES 498-99 (1974) [hereinafter G.L. BAUM]. There are six varieties of asbestos, but they all share basic similarities. *Id.* See *supra* note 8, *Asbestos Insurance Coverage Cases*, at 26. Various types of asbestos have been used interchangeably and in mixtures for years. *Id.* Medical evidence indicates that each type of asbestos contributes to the disease processes of asbestosis. *Id.*

33. See G.L. BAUM, *supra* note 32 at 499.

centuries these characteristics have made asbestos a very useful substance for insulation, fireproofing, and other industrial uses.³⁴ The modern asbestos industry began in the 1870's.³⁵ Approximately twenty years later, researchers made the first reports of ill effects associated with asbestos.³⁶ The death in 1906 of an employee who worked in a carding³⁷ room of an asbestos products manufacturer is considered to be the first death in modern times proven to be the result of exposure to asbestos.³⁸

Asbestosis is an insidious disease³⁹ that begins with injury to the lungs shortly after asbestos particles are inhaled.⁴⁰ The quality of near indestructibility that makes asbestos useful to industry is the same quality that renders asbestos toxic.⁴¹ Particles of asbestos that are deposited in the lungs cannot be absorbed by the normal defense mechanisms of the body.⁴² Scarring of the lungs occurs as a result of the efforts of the body to neutralize the asbestos particles.⁴³ Twenty years or more usually elapse before a person exposed to harmful asbestos fibers manifests asbestosis.⁴⁴ During the latency period there are no observable symptoms of the disease.⁴⁵

34. See B. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 1 (1984). Both the mineral and the hazardous qualities of asbestos were known as far back as the time of Christ. *Id.* The Romans were aware of the useful properties of asbestos as well as the hazards of working with asbestos. *Id.* Slaves who worked with asbestos often were provided with masks to prevent inhalation of asbestos dust and thereby increase their productive lifespan. *Id.*

35. *Id.* at 3.

36. *Id.* at 2. In 1897 a Vienna physician wrote that there was no doubt that pulmonary disorders among asbestos weavers and their families was caused by inhalation of asbestos fibers. *Id.*

37. Carding is a process of separating fibers and laying them in a web to remove impurities. *Id.* at 4.

38. *Id.*

39. Insidious disease is defined as progressing with few or no symptoms to indicate its gravity. *STEDMAN'S MEDICAL DICTIONARY* 711 (23rd ed. 1976).

40. *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (1973).

41. See *Asbestos Insurance Coverage Cases*, *supra* note 8, at 28.

42. *Id.* (the lungs normal clearance mechanisms are ineffective in removing asbestos fibers once the fibers are imbedded in the lung tissues).

43. *Id.* at 27-28. The court described the scarring process:

Fibrosis refers to the formation of fibrous tissue, and is more commonly called scarring. When associated with an external cut to the skin, fibrosis may be considered a necessary and helpful form of healing which restores the body to a functional—albeit altered—state. When associated with the inhalation of asbestos, however, fibrosis results in the impairment and destruction of the alveolar/capillary gas exchange units necessary to breathe. As such, and because of the irreversible nature of the fibrotic process on the lung tissue, fibrosis caused by the inhalation of asbestos is more appropriately characterized as a form of injury than of healing or repair.

Id.

44. *Borel*, 493 F.2d at 1083. See also G.L. BAUM *supra* note 32, at 502 (onset of symptoms rarely occurs less than seven to ten years after exposure to asbestos dust).

45. See generally *Borel*, 493 F.2d at 1083-85 (oft quoted discussion of asbestos related disease).

B. Latency and Insurance

After the first proven asbestos related death in 1906, over sixty years passed before a lawsuit was brought against a manufacturer of asbestos.⁴⁶ In *Borel v. Fiberboard Paper Products Corp.*,⁴⁷ the court held that an asbestos manufacturer was liable for the injuries caused to employees of the manufacturer by exposure to asbestos dust.⁴⁸ Since the *Borel* decision there has been a flood of litigation centering on asbestos related injuries.⁴⁹ The extended latency period which is characteristic of the disease caused by exposure to asbestos, creates difficulty in the determination of when the disease or injury actually occurs.⁵⁰ Nevertheless, when a manufacturer of asbestos products has several successive insurers the determination of when the disease or injury occurs becomes critical.⁵¹ This determination will indicate which insurer or insurers are liable to defend and possibly indemnify the insured manufacturer.⁵²

Each of the manufacturers in the federal cases which gave rise to the three theories of insurer liability held comprehensive general liability insurance policies⁵³ that had nearly identical terms.⁵⁴ The policies stated (in pertinent part):

[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 because of an occurrence.

"Bodily injury" means bodily injury, sickness or disease sustained

46. See Mehaffy, *Asbestos Related Lung Disease*, 16 FORUM 341, 345 (1980). The first asbestosis suit was brought in 1968. *Id.* *Borel v. Fibreboard Paper Products Corp.*, 403 F.2d 1076 (5th Cir. 1973), was the first asbestosis case tried to verdict. *Id.*

47. 493 F.2d 1076 (5th Cir. 1973).

48. *Borel*, 493 F.2d at 1096.

49. See Mehaffy, *supra* note 46, at 345 (more than 10,000 suits filed in the seven years following the *Borel* decision).

50. See, e.g., *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216 (6th Cir. 1981).

51. See, e.g., *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1042 (D.C. Cir. 1981) (to find the trigger of coverage a determination of when injury occurred must be made).

52. See *id.* at 1042 (first step in analysis of the insurer's duty is to find when injury occurred).

53. See *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 17 (1st Cir. 1982); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir. 1981); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1216 (6th Cir. 1980).

54. See *Eagle-Picher*, 682 F.2d at 17 (quoting policy language); *Keene*, 667 F.2d at 1039 (quoting policy language); *Forty-Eight Insulations*, 633 F.2d at 1216 (quoting policy language).

by any person which occurs during the policy period including death resulting therefrom.

"Occurrence" means an accident, including injurious exposure to conditions which results, during the policy period, in bodily injury.⁵⁵

Additional similarities existed in these federal cases. In each case the insured was an asbestos products manufacturer with several successive insurers.⁵⁶ From essentially identical fact patterns three distinct theories of insurer liability have emerged.

THEORIES OF INSURER LIABILITY

A. Exposure Theory

Exposure to an injury producing agent, such as asbestos, triggers insurer liability under the exposure theory.⁵⁷ The exposure theory was first described in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*⁵⁸ The defendant manufacturer, Forty-Eight Insulations Inc., was faced with huge potential liability due to the numerous lawsuits filed by people claiming injury as a result of exposure to asbestos fibers emanating from products manufactured by the company.⁵⁹ In addition, Forty-Eight Insulations Inc. had several successive general liability insurance policies issued by five different insurance companies over a twenty year period.⁶⁰ In *Forty-Eight Insulations*, the court faced the task of determining which insurer or combination of insurers was obligated to defend these lawsuits and pay for any judgments against the insured.⁶¹

As developed by the *Forty-Eight Insulations* court, the exposure theory was based on medical testimony that every time a person

55. *Forty-Eight Insulations*, 633 F.2d at 1216; see also *Eagle-Picher*, 682 F.2d at 17; *Keene*, 667 F.2d at 1039.

56. See *Eagle-Picher*, 682 F.2d at 15; *Keene*, 667 F.2d at 1038; *Forty-Eight Insulations*, 633 F.2d at 1217.

57. *Forty-Eight Insulations*, 633 F.2d at 1223 ("Bodily Injury" that triggers insurer liability should be construed to include tissue damage which takes place upon inhalation of asbestos).

58. 633 F.2d 1212 (6th Cir. 1980). Accord *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981) (the court did not rephrase or paraphrase the Sixth Circuit opinion, but adopted the reasoning and result of *Forty-Eight Insulations*); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (equating exposure to asbestos with bodily injury is the superior interpretation of the insurance contract).

59. *Forty-Eight Insulations*, 633 F.2d at 1213.

60. *Id.*

61. *Id.* at 1216.

inhales asbestos fibers, microscopic tissue injury occurs to the lungs.⁶² Insurance coverage is triggered when this injury occurs.⁶³ Since each inhalation of asbestos fibers was held to be an injurious incident, each inhalation was found to be a separate trigger.⁶⁴ Thus, the court held that any insurer with a policy in effect at the time of any inhalation of asbestos was required to defend and indemnify the manufacturer against resulting liability.⁶⁵

Application of the exposure theory as articulated by the *Forty-Eight Insulations* court will hold any insurer liable if the insurer provided coverage at the time of inhalation of asbestos particles.⁶⁶ In the case of successive insurers, each insurer providing coverage at the time of inhalation of asbestos fibers will be liable for a pro rata share of the obligation to defend or indemnify the manufacturer.⁶⁷ This proration formula will only yield liability in proportion to the years that an insurer actually provides coverage.⁶⁸ The formula does not hold the insurer liable for any period after expiration of the policy.⁶⁹ Additionally, the manufacturer is liable for any uninsured period of time.⁷⁰

62. *Id.* at 1214, 1217. The court found that medical testimony was not in dispute. The testimony of the experts stated that injury, in the sense there is tissue damage, occurs shortly after initial inhalation of asbestos fibers. *Id.* Cf. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 19 (1st Cir. 1981) (medical testimony stating injury to the lungs does not occur simultaneously with inhalation of asbestos dust and may not occur at all).

63. *Forty-Eight Insulations*, 633 F.2d at 1223.

64. *Id.* at 1218. Each additional inhalation of asbestos results in build-up of more scar tissue, therefore a policy triggering bodily injury occurs whenever asbestos fibers are inhaled. *Id.*

65. *Id.* at 1224-25. See *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985). The court defended the exposure theory against medical testimony showing that not every exposure leads to asbestosis by stating:

We believe that the exposure theory is more accurately analyzed as positing not that each inhalation of asbestos fibers results in "bodily injury," but rather that every asbestos-related injury results from inhalation of asbestos fibers. Because such inhalation can occur only upon exposure to asbestos, and because it is impossible practically to determine the point at which the fibers actually imbed themselves in the victim's lungs, to equate exposure to asbestos with "bodily injury" is the "superior interpretation of the contract provisions."

Id.

66. *Forty-Eight Insulations*, 633 F.2d at 1218.

67. *Id.* at 1224. Liability is calculated by reference to the specific facts applicable to each insurer. *Id.* The proportionate share of an individual insurer is calculated by first determining the number of years the worker inhaled asbestos dust and then dividing the years of exposure into the number of years a particular insurer provided coverage. *Id.* This calculation will yield the pro rata share of the obligation of an insurer to defend or indemnify the insured. *Id.*

68. *Id.* at 1224. Under the exposure theory, insurer liability is not joint and several, but rather, is individual and proportionate. *Id.* at 1225.

69. *Id.* at 1224-25. For example, "... if insurer A provided 3 years of coverage, insurer

In *Forty-Eight Insulations*, the defendant manufacturer urged a modification of the proration formula.⁷¹ Specifically, the defendant argued that an insurer should be liable for the years an insurer had a policy in effect as well as for subsequent years prior to the manifestation of the disease.⁷² This modification sought to create different obligations on insurers who provided identical coverage for the same length of time.⁷³ These different obligations would not be based on years of exposure as the exposure theory requires, but rather on the happenstance of when an insurer provided coverage.⁷⁴ Among successive insurers, those who were the first to provide coverage to the manufacturer would be liable not only for the period of time the policy was in effect, but also for the period of time after the policy expired before manifestation of asbestosis.⁷⁵ The last insurer to provide coverage before asbestosis manifested would be liable only for the time the insurance policy was in effect.⁷⁶ Even if the first insurer and the last insurer had policies in effect for the same length of time, each insurer would be subject to different obligations.⁷⁷

In *Forty-Eight Insulations*, the court rejected the proposed formula as creating an anomalous result.⁷⁸ The court explained that the exposure theory triggered liability by finding inhalation of asbestos particles to be an injury covered by the current policy.⁷⁹ Liability was based on finding an injury rather than on the position of an insurer in a chain of successive insurers.⁸⁰ The *Forty-Eight Insulations*

B an additional 3 years, and the manufacturer was uninsured for the remaining 3 years, liability would be allocated at 1/3 for each of the three concerns." *Id.*

70. *Id.* at 1224.

71. *Id.* at 1226.

72. *Id.*

73. *Id.*

74. *Id.* If three insurance companies each provided three years of coverage over a nine year period of exposure, under the proposed formula of *Forty-Eight Insulations* the first insurer would be liable for the first three years plus the remaining six years while the disease progressed. *Id.* The second insurer would be liable for three years plus the following three years. *Id.* The final insurer would be liable only for the final three years. Thus liability would be apportioned 9/18 for the first insurer, 6/18 for the second insurer, and 3/18 for the third insurer. *Id.*

75. *See id.*

76. *Id.* at 1226 (the proposed formula would place different obligations on insurers who are in the same position).

77. *Id.* Thus, insurer liability would turn on the random factor of when an insurer provided coverage in relation to when other insurers in the chain of successive insurers provided coverage. *Id.*

78. *Id.*

79. *Id.* at 1218.

80. *Id.*

court also noted that liability could be limited or eliminated if an insurer could prove that no exposure took place during the years that the insurer provided coverage.⁸¹ The court explained that there can be no liability for the insurer when there is no exposure to asbestos, because without exposure there is no injury.⁸²

The exposure theory solves the difficulties associated with an extended latency period by excluding the latency period from the definition of a bodily injury. The compensable bodily injury occurs when the asbestos particles are deposited in the lungs.⁸³ Under this view of asbestosis, injury is contemporaneous with exposure. In effect, no period of latency exists. Although the person seeking compensation for an asbestos related disease cannot bring a claim until asbestosis manifests, the disease itself is not the injury which triggers insurer liability.⁸⁴ Rather, exposure to the injury-causing asbestos particles triggers liability.⁸⁵

B. Manifestation Theory

The manifestation theory, as discussed by the court in *Eagle-Picher Industries v. Liberty Mutual Insurance*,⁸⁶ triggers insurer liability when asbestosis becomes clinically evident.⁸⁷ The decision of the First Circuit Court of Appeals focuses on the language of the insurance policy.⁸⁸ The *Eagle-Picher* court found that the policy language made

81. *Id.* at 1225. The court recognizes that the burden to prove coverage is normally on the insured. *See id.* at 1225 n.27. Nevertheless, the court also acknowledged that because of the extended latency involved in asbestosis, records of when the products of a particular manufacturer were used will be vague or non-existent. *Id.* The court determined that the fair procedure was to presumptively view each manufacturer as being liable for each of the years in which a worker was exposed to asbestos and to place the burden on the insurer to show that the products of the insured were not or could not have been involved during any particular period of coverage. *Id.*

82. *Id.* at 1225. The court gives an example: if an insurer could prove that an effective respirator was used during the time a person was in an environment containing asbestos dust there would be no injury causing exposure and therefore no insurer liability. *Id.* *See also* Porter v. American Optical Corp., 641 F.2d 1128, 1145 (5th Cir. 1981) (holding the insurer not liable for any period when there was no exposure to asbestos manufactured by the insured).

83. *Forty-Eight Insulations*, 633 F.2d at 1222.

84. *Id.* at 1222-23 (the court found nothing in the policy requiring a plaintiff's underlying cause of action against a manufacturer of asbestos products to accrue within the policy period). The manufacturer paid for protection from liability resulting from bodily injury. It makes no difference when bodily injury becomes compensable. *Id.* at 1223.

85. *Id.*

86. 682 F.2d 12 (1st Cir. 1982), *modifying* 523 F. Supp. 110 (D. Mass. 1981).

87. *Eagle-Picher*, 682 F.2d at 25 (disease becomes clinically evident when the disease becomes reasonably capable of medical diagnosis).

88. *Eagle-Picher*, 682 F.2d at 17-18 (the district court found that the insurance policy language was plain and clear and therefore no extrinsic evidence tending to prove the intent of the parties was admitted).

a clear distinction between the event causing the injury and the injury itself.⁸⁹ According to the policy the resulting injury, and not the injury-causing occurrence such as exposure to asbestos particles, triggered coverage.⁹⁰ Thus, the exposure to asbestos particles was not the triggering event. Rather, the manifestation of asbestosis during the policy period triggered insurer liability.⁹¹ The court acknowledged as fact that injury to the lungs, even microscopic injury, does not occur simultaneously with inhalation of asbestos dust and may not occur at all.⁹² According to the court, since injury is not a certain consequence of exposure to asbestos dust, exposure to asbestos dust does not trigger coverage under the policy.⁹³

The *Eagle-Picher* court held that the common, ordinary meaning of the policy language dictated application of the manifestation theory.⁹⁴ The court determined the plain meaning of injury to be, "hurt, damage, or loss sustained."⁹⁵ Using this definition of injury, the court examined expert testimony which revealed that over ninety percent of all people living in cities have some asbestos related scarring.⁹⁶ Despite the asbestos related scarring, the court found that no member of this ninety percent would classify themselves as being sick or injured as those terms are commonly understood.⁹⁷ Not until there is scarring sufficient to impair a person's sense of well-being or to allow a medical determination that onset of asbestosis was inevitable, would a person be considered injured or diseased.⁹⁸

Continuing to discuss the insurance policy, the court also noted that the policy language differentiated between the term disease and the term injury.⁹⁹ The court stated that asbestosis is usually considered

89. *Eagle-Picher*, 682 F.2d at 19-21. See *supra* text accompanying note 55 (insurance policy language).

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

91. *Id.* (holding that the policy language does not support the exposure theory).

92. *Id.* But see *supra* text accompanying note 62 (exposure leads to injury). Cf. *Commercial Union Ins. Co. v. Sepco. Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985). The court found that the time between exposure to asbestos and the resulting injury and the likelihood of injury to be irrelevant to application of the exposure theory. *Id.*

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

94. *Id.*

95. *Id.* at 19 n.4. The *Eagle-Picher* court was applying Ohio law to the case at hand, and to that end noted that the Ohio courts had relied on WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966 ed.), to determine the plain meaning of language in insurance policies. *Id.*

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

97. *Id.*

98. *Id.*

99. *Id.* The court stated that if the terms are to have any distinct meaning bodily injury is most easily thought of as an injury caused by some external violence or impact whereas disease is the impairment of the normal state of a living animal. *Id.* (no clearer distinction was made in the decision).

a disease and not a bodily injury.¹⁰⁰ Presuming that every disease is preceded by sub-clinical changes in the body, the court held that the plain meaning of disease would be subverted if the court were to find that these changes constituted the occurrence of a disease.¹⁰¹ The subversion of the plain meaning of disease is particularly apparent in the case of asbestosis because the sub-clinical changes,¹⁰² microscopic scarring of the lungs upon exposure to asbestos dust, do not necessarily lead to asbestosis.¹⁰³

The court also clarified the determination of the date of manifestation that triggers coverage.¹⁰⁴ The plain meaning of the policy language required only that bodily injury come into existence during the policy period in order to trigger coverage.¹⁰⁵ Asbestosis need not be diagnosed during the policy period to trigger coverage.¹⁰⁶ For the purpose of triggering insurer liability, a disease manifests when asbestosis becomes reasonably capable of medical diagnosis.¹⁰⁷ Thus, only an insurer with a policy in effect when asbestosis manifests is liable to defend and, if necessary, indemnify the insured.¹⁰⁸

100. *Id.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defined asbestosis as a form of pneumocioniosis. *Id.* The court found that pneumocioniosis was defined as a disease of the lungs. *Id.*

101. *Eagle-Picher*, 682 F.2d at 19-20. Again the court relied on WEBSTER's and defined disease as an impairment of the normal state of a living animal or any of its components that interrupts or modifies the performance of a vital function. *Id.*

102. *Eagle-Picher*, 682 F.2d at 19-20 (referring to the initial injury to the lungs upon inhalation of asbestos as sub-clinical injury).

103. *Id.*

104. *Id.* at 24. The district court that heard *Eagle-Picher* held that the date of diagnosis of asbestosis or death triggers coverage under the insurance policy. *Eagle-Picher Indus. v. Liberty Mutual Ins. Co.*, 523 F. Supp. 115, 118 (D. Mass. 1981).

105. *Eagle-Picher*, 682 F.2d at 24.

106. *Id.*

107. *Id.*

108. *Id.* This theory has been criticized because application of the manifestation theory may render coverage illusory. *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1045 (D.C. Cir. 1981). The court observed that insurance companies ceased providing adequate coverage for asbestos injuries when it became known that inhalation of asbestos fibers could lead to disease. *Id.* at 1045. Companies that produced asbestos products are still liable for diseases that manifest due to past exposure to asbestos. *Id.* at 1045-46. Even though the asbestos products manufacturer had insurance during the periods of exposure, none of the companies are liable under the manifestation theory if the policy expires before asbestosis manifests. *Id.* *See infra* notes 110-35 and accompanying text (discussion of *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), and the manifestation theory).

Eagle-Picher was not insured for liability resulting from exposure to asbestos prior to 1968. *Eagle-Picher*, 682 F.2d at 16. Under this set of facts, the manifestation theory does promote coverage. If the exposure theory had been employed *Eagle-Picher* would have been liable for its pro rata share of the cost of defense and indemnification arising out of injuries caused by exposure to asbestos prior to 1968. Under the manifestation theory, *Eagle-Picher* will not have to carry any portion of the liability for the cases that manifest after *Eagle-Picher* bought insurance.

The holding of the *Eagle-Picher* court results in a potential reduction in the number of policies which can be triggered, since a specific point in time can be established when the triggering disease occurred. Insurers that provided coverage during exposure to asbestos, or during the interim between exposure to asbestos and manifestation of asbestosis, would not be liable. Only the insurer with a policy in effect at the time the disease becomes reasonably capable of diagnosis will be liable to the manufacturer.¹⁰⁹

C. Triple Trigger Theory

In *Keene Corp. v. Insurance Company of North America*¹¹⁰ the court developed a theory of insurer liability under which all insurers that provide coverage at any time from initial asbestos exposure to manifestation of asbestosis would be liable to the insured.¹¹¹ This theory was grounded on the conclusion that when a manufacturer purchases a general liability insurance policy the manufacturer is in essence purchasing security.¹¹² For the price of a premium¹¹³ the manufacturer expects to be secure against all losses covered by the policy. Consequently, any interpretation of the policy must be consistent with the reasonable expectations of the insured.¹¹⁴ Finding that the insurance policy language did not clearly dictate the proper theory of triggering insurer liability, the *Keene* court examined both the exposure theory and manifestation theory to determine which best protected the reasonable expectations of the insured.¹¹⁵

In examining the exposure theory, the *Keene* court determined that if exposure to asbestos was the injury that triggered liability, then the subsequent development of asbestosis would be merely a consequence of that injury.¹¹⁶ Manifestation of asbestosis would not be an injury and therefore could not trigger coverage.¹¹⁷ The court found

109. *Eagle-Picher*, 682 F.2d at 25.

110. 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982).

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

112. *Id.* at 1041. By issuing a policy, the insurer agrees to assume the risk of the liability of the insured. *Id.* The heart of the transaction is the purchase of security. *Id.*

113. Premium is the price for insurance protection for a specified period of exposure. BLACK'S LAW DICTIONARY 1063 (5th ed. 1979).

114. *Keene*, 667 F.2d at 1041 (the court held in discerning the principles embodied in the insurance policy the guide must be the reasonable expectations of *Keene*).

115. *Keene*, 667 F.2d at 1042-47. The court found that the terms "bodily injury," "sickness," and "disease" are not precise enough, standing alone, to identify when coverage is triggered. *Id.* at 1043.

116. *Id.* at 1044.

117. *Id.*

that by purchasing insurance the Keene Corporation reasonably expected to be covered for latent injuries that, at the time the policy was purchased, were unknown and unknowable to Keene Corporation.¹¹⁸ If manifestation of asbestosis did not trigger coverage, the reasonable expectations of the Keene Corporation would not be realized.¹¹⁹ The court held that manifestation must trigger coverage in order to preserve the reasonable expectations of the parties and to uphold the purpose of the policy.¹²⁰ Since manifestation must necessarily be a trigger of coverage, the court rejected the exposure theory.¹²¹

When examining the manifestation theory, the *Keene* court considered whether the expectations of the insured would be fulfilled if manifestation was the sole trigger of insurer liability.¹²² The court acknowledged that Keene Corporation could reasonably expect to be covered for injuries that the corporation was not aware of prior to purchasing general liability insurance.¹²³ Since asbestosis has an extended latency period, insurers can predict with some degree of certainty who will manifest the disease.¹²⁴ An increasing number of claims based on asbestos-related injuries alert insurers to the fact that persons employed in the manufacture of asbestos products are prone to developing abestosis after some length of time.¹²⁵ An insurer of an asbestos products manufacturer can frustrate the expectations of the insured by terminating the policy or simply allowing the policy to expire and refusing to issue any future coverage when asbestosis

118. *Id.*

119. *Id.* Keene could reasonably expect coverage for a disease that manifested during the policy period of the insurer since the policy claims to provide coverage for all injuries occurring during the policy period. *Id.* See Note, *supra* note 1, at 74 (discussing concerns of court to protect the reasonable expectations of Keene).

120. *Keene Corp. v. Liberty Mutual Ins. Co.*, 667 F.2d 1034, 1044.

121. *Keene*, 667 F.2d at 1045. The manifestation of asbestosis must constitute an injury under the policy and as such any theory characterizing exposure as a discrete injury must be rejected. *Id.*

122. *Id.*

123. *Id.* The purpose of an insurance contract is defeated if the insured has to bear risk of disease that is latent at the time policy is purchased. *Id.*

124. *Id.* at 1046. Incidences of asbestosis are possible to predict because past occurrences were assumed to have set in motion injurious processes for which Keene could be held liable. *Id.* Example: Victim A is exposed to asbestos dust in 1960. Victim B is exposed to the same conditions in 1970. A manifests asbestosis in 1980, 20 years after initial exposure. The manufacturer is held liable. The insurer now knows that exposure to certain conditions can result in liability. B was exposed to the same certain conditions. The insurer can now make a prediction with some certainty that 10 years in the future B will manifest a disease for which the manufacturer will be liable.

125. *Id.*

is likely to manifest.¹²⁶ The manufacturer will still be liable while the insurer may be able to escape liability solely because the latency period gave the insurer an opportunity to terminate coverage.¹²⁷ Thus, application of the manifestation theory would deprive the insured of the protection purchased as the insurer could terminate coverage under these circumstances.¹²⁸ Therefore, the *Keene* court rejected the manifestation theory.¹²⁹

Having found that neither the exposure theory nor the manifestation theory protected the expectations of the insured, the *Keene* court looked for a definition of bodily injury that would provide the correct trigger of insurer liability.¹³⁰ According to the *Keene* court, bodily injury means any part of a single injurious process.¹³¹ Exposure, exposure in residence,¹³² and manifestation must therefore all trigger coverage in order to protect the expectations of the insured under the policy.¹³³ By defining injury in this manner, the court provided the broadest possible coverage to the insured. All insurers who provided coverage to a manufacturer of asbestos products at any time from the moment a person was first exposed to asbestos fibers until asbestosis manifests, would have a duty to defend and possibly indemnify the insured manufacturer.¹³⁴ Only by proving that no inhalation of asbestos fibers occurred before or during the policy period can an insurer avoid liability.¹³⁵

126. See *id.* at 1045 n.21. In 1976 Liberty Mutual Insurance Company began using large deductibles and administrative fees for dealing with asbestos claims. *Id.*

127. *Id.* at 1046.

128. *Id.* (citing *Snapp v. State Farm, Fire, & Casualty Co.*, 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962)). The court declared that the theory the court developed was consistent with the law concerning insurance coverage for losses that begin when an insurance policy is in effect, but continues to develop after coverage expires. *Id.* *Snapp* involved an insurance policy which provided coverage against loss due to land slippage. *Snapp*, 206 Cal. App. 2d at 831, 24 Cal. Rptr. at 46. The land began moving during the policy period and continued to do so after the policy expired. *Id.* The *Snapp* court held the insurance company liable to the full extent of the policy for all damages caused by the land slippage from the time the movement started until the ground stabilized, even that damage occurring after the expiration of the policy. *Id.* at 833, 24 Cal. Rptr. at 48.

129. *Keene*, 667 F.2d at 1046.

130. *Id.*

131. *Id.* at 1046-47.

132. *Id.* at 1042 (the court uses the phrase exposure in residence to refer to the period of time after inhalation of asbestos when asbestos particles are trapped in the lungs and the disease is developing).

133. *Id.* at 1046.

134. See *id.* at 1047. Each insurer is liable in full to the insured subject to provisions in the policy that govern allocation of liability when more than one policy covers injury. *Id.* at 1050.

135. *Id.* at 1052.

III. CALIFORNIA LAW

A. Federal Courts and California Law

The California Supreme Court has not addressed the issue of the trigger of insurance coverage in asbestos related cases.¹³⁶ Despite this lack of precedent, the Ninth Circuit, when confronted with disputes over the trigger of insurance coverage arising from extended latency periods, has, in some cases, determined that California law governed.¹³⁷ With no precedent from the California Supreme Court, the Ninth Circuit made a prediction as to how the California Supreme Court would rule.¹³⁸

*Hancock Laboratories, Inc. v. Admiral Insurance Co.*¹³⁹ was an appeal from a diversity action involving two successive insurers of a manufacturer.¹⁴⁰ The Ninth Circuit found that California law must be applied to resolve the dispute.¹⁴¹ The first insurer, Admiral Insurance Company, provided coverage when an infected porcine aortic heart valve¹⁴² manufactured by Hancock Laboratories was implanted in a heart patient.¹⁴³ Six months later the infected valve had so deteriorated that a second operation was required to replace the diseased valve.¹⁴⁴ At the time of the second operation Hancock Laboratories had a different insurance carrier, Mutual Fire, Marine,

136. See *supra* text accompanying note 9 (stating that California appellate courts have not reviewed a latent disease case).

137. See *supra* text accompanying note 3; see also *Clemco Indus. v. Commercial Union Ins. Co.*, 665 F. Supp. 816 (N.D. Cal. 1987) (diversity action with substantive law of California applicable); *Hancock Laboratories, Inc. v. Liberty Mutual Ins. Co.*, 777 F.2d 520 (9th Cir. 1985) (diversity action with substantive law of California applicable).

138. See, e.g., L.A. Daily Journal, May 18, 1987, at 12, col. 1. United States District Court Judge William Orrick presided over *Clemco Industries v. Commercial Union Insurance Company*, 665 F. Supp. 816 (N.D. Cal. 1987), and determined that California law applied to the case. *Id.* at 818. Clemco Industries is a California manufacturer of protective equipment used when engaged in sandblasting. *Id.* at 817. The equipment manufactured by Clemco Industries is blamed in part for causing silicosis in people employed as sandblasters. *Id.* Silicosis is a lung disease caused by exposure to silica dust. *Id.* at 821-22. Judge Orrick had to decide when silicosis occurred in order to determine insurer liability. *Id.* at 821. Recognizing that the California courts have not determined when bodily injury occurs in a latent disease Judge Orrick took his best "Erie guess" as to how the California Supreme Court would rule on this issue. *Id.* See generally *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

139. 777 F.2d 520 (9th Cir. 1985).

140. *Hancock*, 777 F.2d at 521 n.1.

141. *Id.*

142. A porcine aortic heart valve is a valve taken from the heart of a pig, treated, and used as a replacement valve in humans. *Id.* at 521 n.2.

143. *Id.* at 521-22.

144. *Id.* at 522.

and Inland Insurance Company.¹⁴⁵ The *Hancock* court had to determine the trigger of insurer liability under the policies in order to decide which insurer was obligated to provide the defense for Hancock Laboratories in the resulting lawsuit.¹⁴⁶

The *Hancock* court held that the infectious disease that started with the implantation of the contaminated heart valve was similar to a progressive disease taking a substantial length of time to manifest.¹⁴⁷ The court likened exposure to the infected heart valve and subsequent progressive growth of bacteria to the inhalation of asbestos and the subsequent progressive tissue damage.¹⁴⁸ Using this analogy the *Hancock* court examined the basic theories of exposure, manifestation, and triple trigger¹⁴⁹ that arose from litigation focusing on asbestos related disease.¹⁵⁰

The *Hancock* court found that promotion of coverage for the insured, and the ability of the insurer to determine liability, were concerns to be considered when examining the theories of liability.¹⁵¹ The *Hancock* court held that the triple trigger theory articulated in *Keene Corp. v. Insurance Company of North America*¹⁵² did not meet these concerns.¹⁵³ The court in *Hancock* found that the triple trigger theory was developed because the *Keene* court had difficulty determining when injuries resulting from inhalation of asbestos occurred.¹⁵⁴ No specific trigger of insurer liability could be determined because no specific moment of injury could be found.¹⁵⁵ Therefore, according to the *Hancock* court, the triple trigger theory was developed because, by triggering an insurance policy at any time from asbestos exposure to manifestation of asbestosis, the need to determine when injury occurs is eliminated.¹⁵⁶ The *Hancock* court, however, stressed the importance of ascertaining a specific point at which

145. *Id.* at 521.

146. *Id.* at 523. Mutual agreed, under a reservation of rights, to provide the defense for Hancock. *Id.* at 522. The defense cost \$264,416.96 for three days of trial ending in settlement costing an additional \$150,000. *Id.*

147. *Id.* at 524.

148. *Id.*

149. *Id.* at 523. The court refers to the theory espoused in *Keene Corp. v. Insurance Co. of North America*, 662 F.2d 1034 (D.C. Cir. 1981), as the continuous exposure theory. *Id.*

150. *Id.* See *supra* text accompanying notes 57-135 (discussion of the three theories).

151. *Hancock*, 777 F.2d at 524.

152. 667 F.2d 1034.

153. *Hancock*, 777 F.2d at 524.

154. *Id.* at 524. The court states that the basic reasoning in *Keene* was a perceived difficulty in determining medically how or when injury occurs. *Id.*

155. *Id.*

156. *Id.*

liability is triggered.¹⁵⁷ Since the *Hancock* court felt constrained to establish a single trigger of insurer liability, the court rejected the triple trigger theory.¹⁵⁸

After rejecting the triple trigger theory developed by the *Keene* court, the *Hancock* court examined the manifestation theory articulated in *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*¹⁵⁹ Under the manifestation theory only actual occurrence of asbestosis triggers insurer liability.¹⁶⁰ Under this theory, however, the *Hancock* court found that coverage could become illusory.¹⁶¹ Insurers could terminate coverage and as a result persons already exposed to asbestos dust may have only an uninsured manufacturer to look to for compensation when asbestosis develops.¹⁶² Since the requirement that an interpretation of insurance contracts should promote coverage would not be met, the court found that the California Supreme Court would reject the manifestation theory.¹⁶³

Having rejected the manifestation theory and the triple trigger theory, the *Hancock* court concluded that the California Supreme Court would adopt the exposure theory¹⁶⁴ as expressed by the court in *Insurance Company of North America v. Forty-Eight Insulations*.¹⁶⁵ The *Hancock* court held that a court would have no difficulty determining when a person was exposed to an injury-producing agent.¹⁶⁶ The exposure theory enables the court to find a single trigger of an insurance policy, thereby allowing an insurer to determine liability.¹⁶⁷ Additionally, application of the exposure theory satisfied the concern of the court for promoting coverage.¹⁶⁸

B. California Cases

Although the Ninth Circuit employed the exposure theory developed in a federal asbestos case to predict California law, no Cali-

157. *Id.*

158. *Id.* The court found that, unlike the exposure theory, the theory applied in *Keene* would not allow insurers to determine their liabilities. *Id.*

159. *Id.* at 524-25. See *Eagle-Picher Indus. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 25 (1st Cir. 1982). See *supra*, notes 86-109 and accompanying text (discussion of manifestation theory).

160. See *Eagle-Picher*, 682 F.2d at 25.

161. See *Hancock*, 777 F.2d at 524.

162. *Id.*

163. *Id.* at 524-25.

164. The California Supreme Court would probably find the reasoning and result of *Forty-Eight Insulations* to be correct. *Id.* at 525.

165. 633 F.2d 1212 (6th Cir. 1980). See *supra* text accompanying notes 57-85 (discussion of exposure theory).

166. *Hancock*, 777 F.2d at 524.

167. *Id.*

168. *Id.*

fornia appellate court has reviewed any case concerning asbestosis and the trigger of insurer liability.¹⁶⁹ Cases involving extended delays between an act and the resulting injury, however, have been reviewed.¹⁷⁰ The court of appeal in *California Union Insurance Co. v. Landmark Insurance Co.*¹⁷¹ examined insurer liability in a latency situation. The plaintiff, California Union Insurance Company (Union), brought a declaratory relief action against defendant, Landmark Insurance Co. (Landmark), to determine their respective obligations to a claimant who had suffered property damage from a leaky swimming pool.¹⁷² The pool leaked for eighteen months during which time the Landmark policy expired and the policy issued by Union became effective.¹⁷³ In distinguishing several other cases¹⁷⁴ the *California Union* court described the damage to the pool as involving not merely a delay between a wrongful act and some resultant damage, but as involving a continuous active force causing progressively worsening damage.¹⁷⁵ The damage began with the installation of the pool and grew progressively worse over the eighteen month period.¹⁷⁶ The court found this progressive damage, which began when one policy was in effect and continued after the second insurer began to provide coverage, presented a question that had been addressed in the federal cases involving the progression of asbestosis.¹⁷⁷ Both asbestosis and the leaking pool involve an initial exposure to a damage producing agent and in each case the damage worsens over a period of time before the injury becomes manifest.¹⁷⁸ According to the *California Union* court, there was little to distinguish the

169. Review of California Appellate cases revealed no appeal from decision of trigger of insurer liability in asbestosis case. See also *supra* note 9 and accompanying text.

170. E.g., *Remmer v. Glen Falls Indem. Co.*, 140 Cal. App. 2d 84, 295 P.2d 19 (1956) (landowner engaged in extensive landscaping which caused landslide five years later); *Tijsseling v. General Acc. Fire & Life Assur. Corp.*, 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976) (discovered encroachment on property "some years" after negligent misrepresentation).

171. 145 Cal. App. 3d 462, 193 Cal. Rptr. 461 (1983).

172. *Id.* at 464, 193 Cal. Rptr. at 462.

173. *Id.* at 466-67, 193 Cal. Rptr. 461, 462-64.

174. *Employer Casualty Co. v. Northwestern Nat. Ins. Group*, 109 Cal. App. 3d 462, 167 Cal. Rptr. 296 (1980); *Maples v. Aetna Casualty*, 83 Cal. App. 3d 641, 148 Cal. Rptr. 80 (1978); *Remmer v. Glen Falls Indem. Co.*, 140 Cal. App. 2d 84 (1956); *Tijsseling v. General Acc. Fire & Life Assur. Corp.*, 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976).

175. *California Union Ins. Co. v. Landmark Ins. Co.*, 145 Cal. App. 3d 462, 470-73, 193 Cal. Rptr. 461, 465-67 (1983).

176. *Id.* at 473, 193 Cal. Rptr. 461, 467.

177. *Id.* at 477-78, 193 Cal. Rptr. at 470.

178. See generally *id.* at 476-78. The court describes the damage involved in the leaking pool as involving, "continuous, progressive, and deteriorating damage." *Id.* at 476. The court then addresses the issues raised by such damage by stating that the same issues had been analyzed in *Forty-Eight Insulations* and *Keene*. *Id.* at 477-78.

issues raised by the leaking swimming pool and the asbestos cases of *Forty-Eight Insulations* and *Keene*.¹⁷⁹

In *California Union* the court held that from the time the pool was installed, until there was a discovery that the pool was leaking and causing property damage, there was a continuous destructive force at work.¹⁸⁰ The court held that the progressive damage constituted one occurrence.¹⁸¹ This occurrence was set in motion when the Landmark policy was in effect and continued after the policy expired. The court held that the liability of an insurer for a continuing event that becomes apparent during a policy period is not limited by the expiration of the policy.¹⁸² The *California Union* court held that Landmark was liable for damage arising from the leaking pool even after expiration of the Landmark policy.¹⁸³

Acknowledging that the destructive force was already in motion when the Union insurance policy took effect, the court explored the potential liability of the Union Insurance Company.¹⁸⁴ The *California Union* court found that the question of successive insurer liability had been addressed by the federal courts.¹⁸⁵ The court examined the theories expressed in *Forty-Eight Insulations* and *Keene*.¹⁸⁶ The *California Union* court stated that under the exposure theory as expressed in *Forty-Eight Insulations*, every insurer providing coverage at any time, from the moment a person was first exposed to asbestos to the

179. *Id.* at 478, 193 Cal. Rptr. at 471. The court stated:

We are fully mindful of the fact that *Forty-Eight Insulations* and *Keene* are products liability cases. But, as in the case at bench, the policies cover single accident/occurrence, continuing damage claims. Additionally, the policies involved are ones of general comprehensive liability, and, in our view, any distinction is more imaginary than real.

Id.

180. *Id.* at 473, 193 Cal. Rptr. at 467.

181. *Id.* at 473, 193 Cal. Rptr. at 468. Quoting policy language the court defined "one occurrence"; "... all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 474, 193 Cal. Rptr. at 468.

182. *California Union*, 145 Cal. App. 3d 462, 475, 193 Cal. Rptr. 461, 469 (citing *Snapp v. State Farm Fire and Casualty Co.*, 206 Cal. App. 2d 827, 24 Cal. Rptr. 44 (1962), as standing for the proposition that the liability of an insurer for a continuing event is not terminated by the expiration of the policy).

183. *California Union*, 145 Cal. App. 3d at 478, 193 Cal. Rptr. at 469-70 (Landmark is liable even though policy purported to limit coverage to within the policy period).

184. *Id.* at 476-77, 193 Cal. Rptr. at 470.

185. *Id.* at 477-78, 193 Cal. Rptr. at 469-71 (court refers to *Forty-Eight Insulations* and *Keene*).

186. *Id.* See *supra* text accompanying notes 58-82 (discussion of *Forty-Eight Insulations*); see *supra* notes 110-35 (discussion of *Keene*).

time the disease was diagnosed, was jointly and severally liable.¹⁸⁷ The *California Union* court found that the *Keene* decision also imposed joint and several liability on all insurers who provided coverage at any time from initial exposure to asbestos through to manifestation of asbestosis.¹⁸⁸ Having determined that the present case contained the same fundamental issues present in *Forty-Eight Insulations* and *Keene*, the *California Union* court held both Union and Landmark jointly and severally liable.¹⁸⁹

The brief expression of the exposure theory by the court in *California Union* is not in accord with the theory as developed in *Forty-Eight Insulations*.¹⁹⁰ In *Forty-Eight Insulations* the court expressly stated that liability among successive insurers was not joint and several.¹⁹¹ Application of the exposure theory triggered only those policies that were in effect when a person inhaled asbestos fibers¹⁹² and liability was prorated among the insurers.¹⁹³ Joint and several liability is not part of the exposure theory developed in *Forty-Eight Insulations*.¹⁹⁴ Rather, by finding joint and several liability, the decision of the *California Union* court more closely approximated the triple trigger theory.¹⁹⁵ By finding that the damage was a process rather than a discrete event the *California Union* court articulated the same reasoning as the *Keene* court when applying the triple trigger theory.¹⁹⁶ A policy triggering event occurred at all times during the damaging process.

Although *California Union* attempted to apply the federal theories of insurer liability in a situation of latent injury, direct questions of the trigger of insurer liability in an asbestos case have yet to reach the California Court of Appeals.¹⁹⁷ The first case likely to be reviewed at the appellate level is the *Asbestos Insurance Coverage Cases*,¹⁹⁸

187. *California Union*, 145 Cal. App. 3d at 477-78, 193 Cal. Rptr. at 470. *But see infra* notes 190-94 and accompanying text (liability is not joint and several under the exposure theory); *see Hancock Laboratories, Inc. v. Admiral Ins. Co.*, 777 F.2d 520, 525 n.10 (stating that *California Union* incorrectly applied holding of *Forty-Eight Insulations*).

188. *California Union*, 145 Cal. App. 3d 462, 477-78, 193 Cal. Rptr. at 470.

189. *Id.* at 478, 193 Cal. Rptr. at 470-71.

190. *See supra* text accompanying notes 57-85 (discussion of exposure theory).

191. *See Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1225 (6th Cir. 1980) (allocating cost of indemnification).

192. *Id.*

193. *Id.*

194. *Id.*

195. *See supra* text accompanying notes 110-35 (discussion of the triple trigger theory).

196. *See Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1046 (D.C. Cir. 1981) (bodily injury involved in asbestosis is a process).

197. *See supra* text accompanying note 169.

198. *See supra* note 8 and accompanying text.

presently being litigated in the San Francisco Superior Court. The *Asbestos Insurance Coverage Cases* are a consolidation of several lawsuits between manufacturers of asbestos products and the various companies that provided general liability coverage to these manufacturers.¹⁹⁹ Proceedings in this case have continued for more than two years and are not completed.²⁰⁰ Nevertheless, the superior court has issued a tentative decision regarding the trigger of insurer liability.²⁰¹

According to the San Francisco Superior Court, the language in the insurance policies purchased by the asbestos manufacturers was clear and unambiguous.²⁰² The court found that the language of the policy required that every insurance policy in effect at any time from first exposure to asbestos until the date of death, was triggered.²⁰³ Each insurer was held independently liable to respond in full to claims against the insured.²⁰⁴ In reaching this conclusion, the court held that the insurance policies involved in the consolidated asbestos case were triggered by bodily injury.²⁰⁵ The court found the bodily injury involved in asbestosis to be a continuous process.²⁰⁶ According to the court, bodily injury occurred shortly after inhalation of asbestos dust, continued during the latency period even without further exposure, and continued to occur past manifestation until death.²⁰⁷

In keeping with the finding that injury was a continuing process, the superior court held that the plain policy language did not indicate that manifestation was to be the sole trigger.²⁰⁸ Therefore, the man-

199. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 1. This case is a consolidation of the following suits: *Armstrong v. Aetna*, Los Angeles Superior Court No. C 315367; *Fireman's Fund v. Fibreboard*, San Francisco Superior Court No. 753885; *GAF v. INA*, Los Angeles Superior Court No. 286217; *Nicolet v. INA*, Los Angeles Superior Court No. C 398943. *Id.* at 1. See Levit, *Insurance Law*, UNDERWRITER'S REP., 14 (June 11, 1987) (this consolidated action is a dispute between insurers and the insured; no person injured by asbestos is a party to the lawsuit).

200. See Levit, *supra* note 199, at 14 "And the trial is a long way from over, despite [the] 100-page tentative decision" *Id.*

201. *Asbestos Insurance Coverage Cases*, *supra* note 8.

202. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 21 (meaning is unambiguous when policy language is examined by itself).

203. *Id.* at 43 (any policy coming into effect after date of death or date of claim, whichever is first, is not triggered).

204. *Id.* at 61-62 (insurer must pay all sums for which insured is liable).

205. *Id.* at 21 (pertinent language in policy requires bodily injury to trigger liability).

206. *Id.* at 29-30 (process is the inhalation of asbestos fibers, the reaction of the lungs, the resulting progressive scarring).

207. *Id.* at 30.

208. *Id.* at 45 (the plain language of the insurance policy does not mention manifestation or indicate that manifestation was to be the sole criterion).

ifestation theory was expressly rejected by the court.²⁰⁹ Even though a claim for compensation would not accrue until the injured person became aware of the injury, the court found that this did not mean that an injury triggering coverage had not already occurred.²¹⁰ The San Francisco Superior Court found that the manufacturer paid for protection from liability resulting from bodily injury.²¹¹ Thus, the manufacturer should be covered even if the bodily injury did not become compensable until after the policy expired.²¹²

Having dispensed with the manifestation theory, the court proceeded to dismiss the exposure theory.²¹³ The superior court found that bodily injury occurred nearly simultaneously with exposure to asbestos and that new and additional bodily injury continued to occur even when exposure ceased.²¹⁴ This finding prevented the court from making any distinction between an injury occurring shortly after inhalation of asbestos, and an injury which continued to occur in the tissues of the lung after exposure ceased.²¹⁵ Moreover, the superior court stated that the Ninth Circuit cases which tried to determine California law, all of which adopted the exposure theory, were unpersuasive because of distinguishing elements in each particular case.²¹⁶ Therefore, the San Francisco Superior Court rejected the exposure theory.²¹⁷

209. *Id.* at 47.

210. *Id.* at 46-47 (bodily injury occurs at times other than manifestation).

211. *Id.* at 45-46. See *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1222-23 (6th Cir. 1980):

We do not find persuasive appellants' contention that "bodily injury" means "compensable bodily injury." The manufacturer here paid for protection from bodily injury resulting in liability. It should make no difference *when* the bodily injury happens to become compensable. Put another way, we see nothing in the policy which requires that the underlying plaintiff's cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable.

Id.

212. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 46-47.

213. *Id.* at 47.

214. *Id.*

215. *Id.* at 47-48 (asbestos related damage is qualitatively different from an encroachment on real estate or a landslide). See, e.g., *Tijsseling v. General Acc. Fire & Life Assurance Corp.*, 55 Cal. App. 3d 623, 127 Cal. Rptr. 681 (1976) (encroachment on real estate), *Remmer v. Glen Falls Indem. Co.*, 140 Cal. App. 2d 84 (1956) (landslide).

216. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 48-51. The court found *Hancock* unpersuasive because it was "based on such a dearth of authority." *Id.* at 50. (*Hancock* cited only one California case). When considering *Clemco Industries v. Commercial Union Ins. Co.*, 665 F. Supp. 816 (N.D. Cal. 1987), the San Francisco Superior Court found that no party advocated the continuous trigger theory, but rather the court had only the choice of the manifestation or exposure theory. *Id.* at 50-51. The superior court wrote that if given such a limited choice the superior court may also have chosen the exposure theory. *Id.* The court

Although the theory that the San Francisco Superior Court employed is virtually identical to the triple trigger theory as expressed in *Keene Corp. v. Insurance Company of North America*,²¹⁸ the San Francisco Superior Court stated that the reasoning of the court was different from the reasoning of the court in *Keene*.²¹⁹ The superior court held that the *Keene* court found the insurance policy language ambiguous.²²⁰ Based on this interpretation of the policy language, the *Keene* court devised the triple trigger theory.²²¹ The superior court, however, found the policy language in issue to be clear and unambiguous.²²² According to the decision of the superior court, the language of the policies stated that the insurer agreed to provide coverage if that insurer had a policy in effect at any time during the period from exposure to asbestos dust through manifestation of asbestosis.²²³ Ambiguity was not a prerequisite to finding the insurance policy was triggered in accord with the triple trigger theory.²²⁴

PROPOSAL

When attempting to determine what theory the courts in California should adopt regarding the trigger of insurer liability in latent disease situations, the policy considerations underlying contract interpretation should be applied. Normally, when parties enter into a contract each party has some understanding as to what is intended by the contract. Under California law any attempt to interpret a contract must give effect to the mutual intent of the parties to the contract.²²⁵ If possible, the intent of the parties to the contract should be derived

also found that in *Endo Laboratories, Inc. v. Hartford Insurance Group*, 747 F. Supp. 1264 (9th Cir. 1984), no party proffered the continuous exposure theory. *Id.* at 49.

217. *Id.* at 47.

218. 667 F.2d 1034 (D.C. Cir. 1981).

219. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 51 (decision should not be misconstrued as one of the progeny of *Keene*). See also, Levit, *supra* note 199, at 32 (notes that court distinguishes *Keene* as not being based on plain meaning of the policy).

220. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 52.

221. *Id.*

222. *Id.* at 21 (intended meaning of the policy language is plain and unambiguous when examined by itself). All parties agreed that the policy language was unambiguous, but notwithstanding this agreement, the parties still disagreed as to what trigger was dictated by this plain language. *Id.*

223. *Id.* at 43.

224. See Levit, *supra* note 199, at 31. The court in the *Asbestos Insurance Coverage Cases* does not attempt to find ambiguity, as other courts seem to, before applying rules of construction to the insurance contract. *Id.*

225. CAL. CIV. CODE § 1636 (West 1985) ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.").

solely from the plain meaning of the language found in the contract.²²⁶ Thus, the trigger of insurer liability should be one that will give effect to the mutual intent of the parties as expressed in the plain meaning of the policy language.

In order to avoid being held liable to defend or indemnify asbestos manufacturers, latent injuries can be specifically provided for in insurance policies to limit or exclude coverage for asbestosis.²²⁷ Nevertheless, as indicated by the existence of the consolidated asbestos cases, there are a significant number of conflicts involving insurance policies which use language making no particular provision for asbestosis or latent injuries, but rather employ a more generalized terminology.²²⁸ Both "bodily injury" and "disease" are terms used in the comprehensive general liability insurance policies discussed above as triggers of insurer liability.²²⁹ During the progression of asbestosis, a policy is triggered when disease or injury occurs.

To determine when a policy is triggered by bodily injury, a definition of bodily injury is needed. Bodily injury can be commonly understood as damage of or concerning the body.²³⁰ A person exposed to asbestos dust is injured once the dust avoids the defenses of the body and is lodged in the lungs. Once in the lungs, a process of scarring begins.²³¹ This scarring is a bodily injury which, according to the express language of the policies, triggers coverage.²³² Due to the properties of asbestos this scarring can continue even though no additional asbestos dust reaches the lungs.²³³ This continued scarring also constitutes damage to the body and thus must also be a trigger of the insurance policies.

226. See *id.* § 1639 (West 1985) (intention of parties is to be ascertained from the writing alone if possible), see *id.* § 1644 (West 1985) (words of contract are to be understood in their ordinary and popular sense).

227. See *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, 182 Cal. App. 3d 462, 227 Cal. Rptr. 203 (1986) (summary judgment granted in favor of insurer affirmed). The court found that the insurance policy expressly precluded coverage for injury, sickness, disease, or death arising from exposure to asbestos dust created during use of products manufactured by the insured. *Id.* at 470, 227 Cal. Rptr. at 208.

228. See *supra* note 199 (list of parties involved in the *Asbestos Insurance Coverage Cases*).

229. See *supra* text accompanying note 55 (insurance policy language).

230. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 22. Using WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981 ed.), the court found the following definitions. Bodily is defined as "of or concerning the body." *Id.* Injury is defined as "hurt, damage, or loss sustained." *Id.* Combination of the above terms creates a reasonable definition of bodily injury as damage of or concerning the body.

231. *Id.* at 27-29. See *supra* note 43 (detailed discussion of scarring process).

232. See *supra* text accompanying note 55 (policy language).

233. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 30.

Disease is also a trigger of coverage specifically mentioned in the policy language.²³⁴ Disease can be defined as the impairment of the normal state of the body or any of the components of the body that modifies performance of a vital function.²³⁵ At some point, the scarring of the lungs will accumulate enough to impair the normal state of the body and detrimentally affect the performance of the lungs.²³⁶ The bodily injury can be classified as a disease at that point, and as such the policy continues to be triggered. Regardless of the stage of progression of asbestosis, there is either some injury to the lungs, though the damage may go unnoticed for years, or the presence of a disease.²³⁷ Bodily injury and disease are both triggers specifically mentioned in the policies.²³⁸ Therefore, the plain language of the policy indicates that coverage for the insured is triggered continuously from initial asbestos exposure to manifestation of asbestosis. This is the triple trigger theory as applied in the *Asbestos Insurance Coverage Cases*.²³⁹

Even if less explicit insurance language was the subject of inquiry in asbestosis litigation, the triple trigger theory could still satisfy the policies underlying California law. California courts recognize a policy that ambiguity in insurance contracts should be interpreted to promote coverage of the insured.²⁴⁰ The triple trigger theory can consistently provide the greatest number of potentially liable insurers. Since the triple trigger theory incorporates the triggers of insurance coverage found in both the exposure and the manifestation theories, the triple trigger will always provide at least as many potentially liable insurers as would application of either of the other theories.²⁴¹ In addition, unlike the exposure or manifestation theories, application of the triple trigger can impose liability on the insurer for a period when there is neither exposure to asbestos nor manifestation of asbestosis. An insurer that had a policy in effect after exposure to

234. See *supra* note 55 and accompanying text. Insurer will pay for liability resulting in bodily injury; bodily injury is defined so as to include disease. *Id.*

235. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1986).

236. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 29. "Although there is no universal threshold for when such symptoms will become apparent, it is estimated that at least 100 million of the 300 million alveolar/capillary units in the human body must be affected for a clinical diagnosis to occur." *Id.*

237. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 43-45.

238. See *supra* note 55 and accompanying text.

239. *Asbestos Insurance Coverage Cases*, *supra* note 8, at 43-45.

240. *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 807, 640 P.2d 764, 767, 180 Cal. Rptr. 628, 632 (1982).

241. See *supra* notes 110-35 and accompanying text (discussion of triple trigger theory).

asbestos had already taken place, but terminated coverage before asbestosis manifested, could be found liable.²⁴² Since a policy triggering event occurs during the latency period, an insurer cannot avoid liability by terminating coverage, as is possible under the manifestation theory.²⁴³ Even if the insurer does terminate coverage, the policy would already have been triggered and the manufacturer will have coverage. Thus, the triple trigger theory eliminates the concern of the courts that coverage would become illusory while resolving the ambiguity of the policy language against the insurer.²⁴⁴

Finally, the triple trigger theory also eliminates a potential weakness in the exposure theory. This weakness is found by reference to the development of the manifestation theory in *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*²⁴⁵ In the *Eagle-Picher* case the manufacturer was not insured during much of the time that exposure to asbestos was taking place.²⁴⁶ Only after extended periods of exposure to asbestos dust did Eagle-Picher Industries procure any insurance. The court could find insurance coverage only by employing the manifestation theory. Had the court employed the exposure theory, Eagle-Picher Industries would have been responsible for a pro rata share of the liability.²⁴⁷ Since Eagle-Picher had no insurance for an extended length of time, the pro rata share to be borne by Eagle-Picher could have been substantial. By using the triple trigger theory, the court could have found all insurers liable if their policy was in effect when asbestosis manifested, as did the manifestation theory employed by the court. Additionally, applying the triple trigger could also have held liable those insurers with policies in effect during the latency period.

In overcoming the deficiencies of the manifestation theory and the exposure theory another facet of the triple trigger theory becomes evident. A court will not have to create a new theory each time a different fact pattern arises under which application of the other theories will not provide adequate coverage.²⁴⁸ The only circumstances

242. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1046 (D.C. Cir. 1981) (exposure in residence triggers insurer liability).

243. *Keene*, 667 F.2d at 1046.

244. *Id.*

245. 682 F.2d 12 (1st Cir. 1982).

246. *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co.*, 682 F.2d 12, 16 (1st Cir. 1982) (no insurance prior to 1965).

247. *See Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1225 (6th Cir. 1980) (pro rata allocation of liability).

248. *See Note, supra* note 1, at 77. The triple trigger theory, "assures maximum coverage regardless of an individual manufacturer's pattern of insurance coverage." *Id.*

under which the tripple trigger theory could not provide coverage would be a situation in which a manufacturer of asbestos never had an insurance policy that provided coverage for such liability at any time during or after exposure to asbestos dust.²⁴⁹

CONCLUSION

California law requires that insurance policy language be read so as to give effect to the intentions of the parties to the contract. If the language is not clear the contract must be interpreted to promote coverage of the insured. Asbestosis presents the problem of an extended latency period. The courts all hold that asbestosis should trigger insurer liability under a comprehensive general liability policy, but there is disagreement as to when the progression of asbestosis will trigger coverage. Several theories have been developed to determine an appropriate trigger. Both the exposure theory and the manifestation theory examined individually fall short of the requirements of California law. Only by triggering insurer liability by exposure, manifestation, and during the interim latency period, can the court give full effect to the intent of the parties and promote coverage of the insured.

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249. *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1052 (D.C. Cir. 1981).