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Julie Dameron Wright
University of Baltimore School of Law

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INSURANCE LAW—THE EXPOSURE THEORY VERSUS THE MANIFESTATION THEORY: WHICH METHOD SHOULD COURTS USE TO DETERMINE WHEN COVERAGE IS TRIGGERED UNDER A STANDARD COMPREHENSIVE FORM GENERAL LIABILITY POLICY? *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*, 324 Md. 44, 595 A.2d 469 (1991).

For insurance companies using standard form comprehensive general liability policies, asbestos-related injuries present peculiar problems.¹ Generally, under such policies, the insurer agrees to indemnify the insured for bodily injuries that occur during the policy coverage period and to defend the insured against lawsuits arising from the bodily injury.² Indemnifying companies for lawsuits arising from exposure to asbestos products, however, is particularly complex because there is usually no temporal proximity between the initial exposure to the toxic material and the manifestation of the bodily injury.³ Accordingly, courts have experienced difficulty interpreting the scope of coverage under the standard form comprehensive liability policies. In *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*,⁴ the Court of Appeals of Maryland adopted an “exposure approach” to determine that a bodily injury occurs when a person first inhales asbestos.⁵ While this approach places a great, and arguably unfair,

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1. A comprehensive general liability policy provides coverage for damages caused by bodily injury due to an occurrence. Typically, such policies state that the insurance company will pay, on behalf of its insured, all sums which the insured shall become legally obligated to pay as damages resulting from a bodily injury, to which the policy applies, caused by an occurrence. Such policies also state that the insurer will defend any suit against its insured as a result of the bodily injury. See *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1055-57, (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (listing and comparing various provisions in policies from various insurance companies).
 2. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986) (concluding that only when insurers establish as a matter of law that there is no possibility of coverage can they avoid their duty to defend and indemnify their insureds).
 3. *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1545 (11th Cir. 1985) (holding that the “exposure approach” is the superior interpretation for the contract provisions in general liability policies (citing *Keene Corp.*, 667 F.2d at 1040)).
 4. 324 Md. 44, 595 A.2d 469 (1991).
 5. *Id.* at 62, 595 A.2d at 478.

burden on the insurance industry, it allows victims of asbestos-related diseases to be justly compensated for their injuries.⁶

The *Mitchell* appeal arose from a motion for summary judgment granted in favor of the insurer, Maryland Casualty Company ("Maryland Casualty"). The court of appeals granted Mitchell's petition for a writ of certiorari prior to consideration of its appeal by the court of special appeals.⁷ Lloyd E. Mitchell, Inc., ("Mitchell") was a mechanical contractor that sold, distributed and installed products containing asbestos. For approximately twenty-two years, Maryland Casualty insured Mitchell under a series of standard form comprehensive liability policies.⁸ Owing to the expiration of those policies, a number of plaintiffs sued Mitchell for personal injury damages arising from exposure to asbestos products used in Mitchell's business.⁹ Mitchell demanded that the insurer defend it against the lawsuits.¹⁰ The insurer refused on the ground that the policies did not cover the claims.¹¹

The insurer contended that, under the series of policies, it would "provide coverage for bodily injuries caused by an occurrence and that an 'occurrence under an insurance policy is the date when the harm is first discovered.'"¹² Mitchell insisted, however, that the policies required the insurer to defend and indemnify against "all personal injury asbestos-related suits wherein the plaintiffs allegedly may have been exposed, during the policy period, to an asbestos product allegedly applied or supplied to Mitchell, regardless of when the alleged asbestos-related disease manifests itself."¹³

The Court of Appeals of Maryland interpreted the terms "bodily injury" and "occurrences" as they existed in the comprehensive

6. *Insurance Co. of N. Am. v. Forty-eight Insulations, Inc.*, 633 F.2d 1212, 1225 n.27 (6th Cir. 1980). Ordinarily the burden is on the insured to prove coverage. Under the exposure theory, however, the burden essentially shifts to the insurance company once an injured worker proves that while he was working for the insured company, he was exposed to asbestos products. *Id.* By demonstrating exposure to asbestos products, the injured worker often raises the issue of joint and several liability among various insurance companies. The insurance companies which insured the employers or manufacturers have a difficult time proving whether or not exposure took place during specific policy periods because few insureds keep records for more than fifteen years. Also, a worker may have been exposed to asbestos products manufactured by several different companies which were most likely insured by different insurance agencies. "At best there will be vague testimony that manufacturer X's products were used at a certain job site during certain years." *Id.*

7. *Mitchell*, 324 Md. at 50, 595 A.2d at 472.

8. *Id.* at 46, 595 A.2d at 470.

9. *Id.* at 47, 595 A.2d at 470.

10. *Id.*

11. *Id.*

12. *Id.* at 48, 595 A.2d at 471.

13. *Id.* at 47, 595 A.2d at 470.

general liability policies by reviewing decisions in other jurisdictions,¹⁴ considering the plain meaning of the terms "bodily injury" and "occurrence," and studying the medical evidence concerning the development of asbestos-related diseases.¹⁵ Ultimately, the court accorded the disputed terms the meaning given to them by "the overwhelming weight of authority in the country,"¹⁶ and concluded that, at the very least, "coverage under the policy, is triggered upon exposure to the insured's asbestos products during the policy period by a person who suffers bodily injury as a result of that exposure."¹⁷

The court reviewed the medical reports and testimony of the expert witnesses from both parties.¹⁸ According to the appellant's pathologist's testimony, an injury may be defined as "the alteration of structure and/or function of cell, tissue or organ."¹⁹ The diseases that result from exposure to asbestos all involve injuries to the cells and tissues within the lungs. Similarly, the appellee's clinician's report established that the body may sustain substantial injury from exposure to asbestos even though the injury does not necessarily progress

14. The *Mitchell* court reviewed the decisions of other jurisdictions to reach its conclusion concerning the definitions of the terms "bodily injury" and "occurrence." Cf. *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (holding injurious exposure theory properly applied in litigation arising out of asbestos-related injuries); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 764-65 (2d Cir. 1984) (holding exposure alone cannot trigger coverage but injury-in-fact does not necessarily mean an injury that is "diagnosable" or "compensable"); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981) (ruling insurance coverage should be pro-rated among all carriers for cumulative, progressive lung disease contracted as a result of asbestos exposure), *cert. denied*, 454 U.S. 1109 (1981); *Insurance Co. of N. Am. v. Forty-eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (holding exposure theory is superior interpretation of the contract provisions in an insurance policy); *Zurich Ins. Co. v. Raymark Indus.*, 514 N.E.2d 150, 161 (Ill. 1987) (adopting exposure theory and stating that bodily injury takes place at or shortly after exposure to asbestos); *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 271 (Ind. Ct. App. 1976) (property damage case concluding that "property damage" occurs to the entire structure in the policy period when the flaking of the defective bricks first becomes apparent).
15. See *Mitchell*, 324 Md. at 63, 595 A.2d at 478. Appendix A and Appendix B attached to the *Mitchell* opinion contain the reports of the expert witnesses.
16. *Id.* at 62, 595 A.2d at 478.
17. *Id.*
18. Both witnesses' reports define asbestosis as a disease which results from the inhalation of asbestos fibers. Dr. Epstein's report, however, suggests that the stages which precede the development of asbestosis do not constitute disease. Dr. Craighead's report, on the other hand, suggests that the term "bodily injury" includes the process of reaction and/or repair of injury. *Mitchell*, 324 Md. at 63-68, 595 A.2d at 478-81.
19. *Id.* at 64, 595 A.2d at 479.

to "widespread pulmonary fibrosis" and therefore may never produce disease.²⁰

Determining when asbestos-related injuries trigger coverage under standard liability policies is problematic because of the latency of the injuries that result from exposure to asbestos²¹ and the ambiguous language used in the policies.²² Asbestos-related diseases begin when particles of asbestos are inhaled into the lungs.²³ Inhalation of asbestos particles usually occurs during the installation or handling of materials containing asbestos, or during the demolition of buildings constructed with asbestos products, because asbestos particles become airborne easily.²⁴ The inhaled particles lodge in the lungs and, as more particles accumulate, fibrous tissues surround them to prevent further irritation within the lungs.²⁵ This encapsulating process is usually a beneficial bodily defense, but when the number of encapsulated particles becomes too great, ordinary pulmonary functions are inhibited, making breathing difficult.²⁶ Significant accumulation of asbestos particles is a lengthy process. Thus, asbestos-related diseases²⁷ remain latent for a long period of time, often for more than twenty years after the initial exposure.

20. *Id.* at 68, 595 A.2d at 481.

21. *Id.* at 68, 595 A.2d at 481. "It is only after a period of two decades or more of exposure to asbestos that individuals appear to lose the effectiveness of the counterbalancing anti-inflammation that asbestosis may develop." *Id.*

22. One example of standard policy language is that cited in the *Keene Corp.* opinion:

The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of *bodily injury* . . . to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury* . . . even if any of the allegations of the suit are groundless, false or fraudulent

Keene Corp., 667 F.2d at 1039. As noted by the court, "[u]nfortunately, the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases." *Id.* at 1041. The standard liability policies fail to explain when a bodily injury occurs for the purpose of coverage in situations where the disease may not manifest itself for years.

23. *Forty-eight Insulations, Inc.*, 633 F.2d at 1214.

24. *Id.*

25. *Id.*

26. *Id.*

27. Asbestosis, mesothelioma, and lung cancer are all diseases related to exposure to asbestos. Asbestosis is a fibrous condition of the lungs which is caused by asbestos fibers reaching the alveoli. *Keene Corp.*, 667 F.2d at 1038 n.3. "The seriousness of the disease in individual cases depends on the duration and intensity of inhalation and on individual idiosyncrasy." *Id.* Mesothelioma, a malignant tumor of the lining of the lungs or the lining of the peritoneum,

This latency period poses the first obstacle for courts. Inhalation, and, later, actual manifestation of disease, may occur over time and through numerous policy periods. Different insurers, therefore, are likely to be "on the risk" at different points during the development of each plaintiff's disease.²⁸ This makes it difficult to determine which insurer should bear the responsibility for indemnifying the defendant employer or manufacturer.

The second obstacle for courts is the language used in the standard liability policies under which manufacturers or distributors of asbestos products are customarily insured. Under the standard policy, the insurer must indemnify the insured for all sums that "the insurer shall legally be obliged to pay as damages because of . . . bodily injury . . . caused by an occurrence."²⁹

Usually, such standard policies define the term "bodily injury" as "sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom."³⁰ "Occurrence" means "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured."³¹ As a general rule, the time of an occurrence is not the time the wrongful act was committed but the time when the com-

which surrounds the organs of the gastrointestinal tract, can develop many years after initial inhalation ceases, and can manifest itself several months after it begins to develop. *Id.* It is well established that prolonged exposure to asbestos causes mesothelioma. *Id.* Lung cancer is also thought to be caused by prolonged inhalation of asbestos fibers. It too can develop and manifest itself long after the inhalation of asbestos ceases. *Id.*

28. Here, the term "on the risk" refers to the risk of injury to the insured's employees that the insurer bears during the period of insurance coverage under the policy. In cases involving asbestos-related injuries, it is not known how little exposure is necessary to cause disease, and inhalation of asbestos fibers may occur over a long period of time. The *Keene Corp.* court considered these possibilities:

[I]nhalation may continue through numerous policy periods, the disease may develop during subsequent policy periods, and manifestation may occur in yet another policy period. For an insured such as [a large asbestos manufacturing company], different insurers are likely to be on the risk at different points in the development of each plaintiff's disease. Moreover, part of the development may occur at a time when no insurer was on the risk. . . . Unfortunately, the insurance companies failed to develop policy language that would directly address the full complexity entailed by asbestos-related diseases.

Keene Corp., 667 F.2d at 1040-41.

29. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 121 (D.C. Cir. 1986).
 30. *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1545 (11th Cir. 1985).
 31. *Abex*, 790 F.2d at 122.

plaining party was actually damaged.³² The issue of when the complaining party was actually damaged is the essence of the problem.

Traditionally, there are two approaches used to solve the problem of determining when a person suffers damage from exposure to asbestos, thereby triggering insurance coverage. Under the "exposure approach," an insurer's obligation to indemnify the insured arises when the asbestos causes real bodily injury during the policy period.³³ Under the exposure approach, a claimant does not have to prove that the bodily injury was compensable or diagnosable during the policy period. Because the exposure approach defines an asbestos-related condition as a series of continuing bodily injuries, all insurers which provide coverage from the time of the claimant's initial exposure to the time when the disease manifests itself may be liable to defend and indemnify the insured company or manufacturer.³⁴ Under the exposure approach, therefore, the claimant only needs to establish that he was exposed to asbestos during the insurance policy in question.³⁵

32. *Harford Mut. Ins. Co. v. Jacobson*, 73 Md. App. 670, 681, 536 A.2d 120, 125 (1988); see also *Porter v. American Optical Corp.*, 641 F.2d 1128, 1144 (5th Cir. 1985) (characterizing the medical evidence as indicating that each inhalation of asbestos into the lungs constitutes a "bodily injury" within the meaning of the policy). In Appendix A of the *Mitchell* opinion, Dr. John E. Craighead describes "bodily injury" as including physical or chemical damage to cells, tissues and/or organs which may be detectable only on a microscopic or subclinical level. Doctor Craighead notes that such microscopic damage is still an injury even though the harmed individual may not discover the injury until some later point in time. Taking an opposing position, in Appendix B of the *Mitchell* opinion, Dr. Paul Epstein suggests that many individuals inhale asbestos fibers without ever contracting an asbestos-related disease. Doctor Epstein submits that the inhalation of asbestos fibers into the lungs results in an inflammatory process which is potentially damaging to the alveolar walls. *Mitchell*, 324 Md. at 63-68, 595 A.2d at 478-81.

33. Cases discussing the court's adoption of the exposure approach to determine liability under standard insurance policies include *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976 (5th Cir. 1985); *Commercial Union Insurance Co. v. Sepco Corp.*, 765 F.2d 1543 (11th Cir. 1985); *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981); *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Insurance Co. of North America v. Forty-eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980).

34. *Forty-eight Insulations, Inc.*, 633 F.2d at 1217.

35. *Abex*, 790 F.2d at 121. In *Abex*, the United States Court of Appeals for the District of Columbia Circuit adopted the exposure approach to determine when coverage under a general liability policy was triggered. The *Abex* court held that "insurers have an immediate duty to defend [the asbestos manufacturer] in its asbestos cases until [the insurers] present positive proof that no coverage is possible." *Id.* at 122. The court placed the burden of proving lack of coverage on the insurers, and stated that unless the insurers prove as a matter of law that there is no possibility of coverage, they have a duty to defend in all cases in which the complaint permits proof of facts establishing coverage. *Id.*

The "manifestation approach," on the other hand, focuses on the diagnosis of the disease. Under the manifestation approach, bodily injury does not occur until the disease is diagnosed. The date of manifestation is the date when the claimant knew or should have known he or she had asbestosis or an asbestos-related disease, or the date when the disease is medically diagnosed, whichever comes first.³⁶ Under the manifestation approach, those insurance companies on the risk when the disease manifests itself must pay the resultant judgment of liability.³⁷

Because insurance companies have failed to develop policy language that directly addresses the full complexities encompassed by asbestos-related diseases, courts have had to choose between the exposure approach and the manifestation approach in determining when coverage is triggered.³⁸ The advantages and disadvantages associated with both approaches complicate the decision-making process. Proponents of the exposure approach maintain that the manifestation of the disease has nothing to do with the occurrence of the "bodily injury,"³⁹ and emphasize medical testimony establishing that tissue damage occurs shortly after the initial inhalation of asbestos fibers.⁴⁰ Exposure approach advocates characterize asbestos-related diseases as a series of continuing injuries to the body which accumulate to cause disability or death.⁴¹ Thus, exposure approach proponents conclude that exposure to asbestos, rather than manifestation of the disease, triggers coverage, because the damage or "bodily injury" occurs upon inhalation of the fibers.⁴²

36. Cases discussing the court's adoption of the manifestation approach include *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12, 19 (1st Cir. 1982) (holding subclinical insults to the lungs caused by asbestos exposure do not cause "loss, pain, distress, or impairment," with respect to liability insurance coverage, until such "insults" are clinically diagnosed or manifest themselves as a disease or sickness), *cert. denied*, 460 U.S. 1028 (1983); *Mraz v. Canadian Universal Insurance Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986) (holding liability coverage for property damage resulting from toxic waste leakage is triggered when damage is discovered, not when the leakage first begins); *Harford Mutual Insurance Co. v. Jacobson*, 73 Md. App. 670, 684, 536 A.2d 120, 127 (1988) (concluding lead paint poisoning did not trigger coverage when exposure to lead paint and diagnosis of poisoning occurred before policy coverage was obtained).

37. *Forty-eight Insulations, Inc.*, 633 F.2d at 1216.

38. *Id.* at 1223.

39. *Id.* at 1217.

40. *Id.* The tissue damage worsens as the victim breathes in more and more fibers.
Id.

41. *Id.*

42. In *Forty-eight Insulations, Inc.*, the district court relied on the medical testimony to support its position to adopt the exposure approach. The medical testimony showed that when an individual inhales asbestos, "each tiny deposit of scar-

On the other hand, advocates of the manifestation approach argue that a manifestation interpretation best serves the intent of the parties to treat cumulative disease cases the same as ordinary accident cases.⁴³ Any other interpretation would make meaningless the limits and deductibles contained in the various insurance policies.⁴⁴ Proponents of the manifestation approach argue that, unlike the exposure approach, the manifestation approach reasonably allows the proper operation of the insurance industry's claims machinery and administration of lawsuits.⁴⁵

like tissue causes "injury" to a lung.'" *Id.* (quoting *Insurance Co. of N. Am. v. Forty-eight Insulations, Inc.*, 451 F. Supp. 1230, 1239 (E.D. Mich. 1978)). The court reasoned that each such injury is an "occurrence" for determining which coverage applies. Upholding the decision of the district court, the appellate court in *Forty-eight Insulations, Inc.*, also held that it was bound to interpret ambiguities in insurance contracts strictly against the insurer and construe insurance policies broadly in order to promote coverage. *Id.* at 1219.

43. *Id.* at 1218.

44. *Id.* Those who advocate using a "manifestation approach" argue that an "exposure approach" allows an insured to stack liability coverage so that the insured ends up with more coverage than it actually purchased. *Id.* at 1226 n.28. For example, usually companies hold several different insurance policies over time. Under the "exposure approach," each inhalation of asbestos is deemed to be a separate bodily injury or occurrence under the policy, and therefore, the insured may stack the various liability policies to produce coverage in excess of the aggregate limits of each actual individual policy. In *Forty-eight Insulations, Inc.*, the district court recognized this problem and limited the liability of each insurer to "the maximum amount 'per occurrence' provided by each policy." *Id.* Therefore, each insurer faced only liability for the maximum limit written during any applicable year of coverage. *Id.*

45. *Id.* at 1218-19. Proponents of the manifestation approach also rely on health insurance cases in which courts have held that there is no coverage until a disease is diagnosable as such. *Eagle-Picher Indus.*, 682 F.2d at 20 n.5. Manifestation approach advocates note that determining statute of limitations issues present additional problems for those jurisdictions that use the exposure approach. *Forty-eight Insulations, Inc.*, 633 F.2d at 1220. For example, if bodily injury occurs shortly after inhalation of asbestos fibers, then there is an issue of when the statutory time period begins to run. Fairness suggests that the statute of limitations should run from the date the disease manifests itself; however, this confuses the exposure approach rationale that bodily injury occurs upon initial exposure to asbestos. The manifestation approach avoids problems concerning statutory time periods by suggesting that bodily injury occurs when the accumulation of asbestos in the lungs results in a diagnosable disease. *Id.* Several courts adopted a manifestation approach to determine liability coverage in other "disease" cases because problems with statutory time periods could be avoided. *Cf. Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 570, 574-75 (3d Cir. 1976) (statutory time period began to run when claimant knew or reasonably should have known she had thrombophlebitis), *cert. denied*, 429 U.S. 1038 (1977); *Roman v. A.H. Robbins Co.*, 518 F.2d 970, 972 (5th Cir. 1975) (medical malpractice action by claimant, whose use of prescription drug caused allergic reaction resulting in blindness, was time-

Although neither approach is flawless, most jurisdictions in the United States have adopted the exposure approach.⁴⁶ In *Commercial Union Insurance Co. v. Sepco Corp.*,⁴⁷ the United States Court of Appeals for the Eleventh Circuit reasoned that asbestos-related injuries result from the inhalation of asbestos fibers.⁴⁸ Further, the court stated that because the inhalation of asbestos fibers may only occur upon exposure to asbestos, equating exposure with bodily injury is the superior interpretation of the insurance policy provisions.⁴⁹

Similarly, in *Insurance Co. of North America v. Forty-eight Insulations, Inc.*,⁵⁰ the United States Court of Appeals for the Sixth Circuit held that all insurers of Forty-eight Insulations, Inc., during the time plaintiffs contracted the cumulative asbestos-related diseases, would be required to bear a pro-rated share of the costs of defending the manufacturer against the lawsuits.⁵¹ The court of appeals construed the insurance policies in favor of the insured and stated that "it would be unfair to the insured — and contrary to his expectations when he bought the insurance — to allow a hidden condition to defeat the coverage which he bought."⁵² The court further stated that the exposure theory was preferable because bodily injury should be construed to include tissue damage which takes place upon inhalation of asbestos.⁵³ According to the court, that interpretation of bodily injury was "both a literal construction of the policy language and the language which maximizes coverage," and "the construction which . . . best represents what the contracting parties intended."⁵⁴

barred because action accrued when claimant first learned of injurious condition); *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776, 786 (5th Cir. 1963) (statutory time period for claim for cancerous injury resulting from lifetime of cigarette smoking begins to run at the time the cancer manifests itself).

46. See *Ducre v. Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 994 (5th Cir. 1985) (exposure theory used to determine liability for employee's injury resulting from silica dust); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (exposure theory used to determine liability for asbestos-related disease); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981) (exposure theory used to determine liability for cumulative, progressive lung disease); *Insurance Co. of N. Am. v. Forty-eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (exposure theory used to determine liability for asbestos-related disease).

47. 765 F.2d 1543 (11th Cir. 1985).

48. *Id.* at 1546.

49. *Id.* (citing *Forty-eight Insulations, Inc.*, 633 F.2d at 1223).

50. 633 F.2d 1212 (6th Cir. 1980).

51. *Id.* at 1224-25.

52. *Id.* at 1221-22.

53. *Id.* at 1223.

54. *Id.*

Interestingly, the court in *Keene Corp. v. Insurance Co. of North America*⁵⁵ rejected both the exposure and manifestation theories as inadequate. There, the court stated that the allocation of rights and obligations established by the insurance policies would be undermined if the court were to adopt either a manifestation or exposure approach as the sole trigger of coverage.⁵⁶ The court concluded that the initial inhalation of asbestos, the continued accumulation of asbestos within the victim's lungs, and the manifestation of the disease all trigger coverage under the policies.⁵⁷ The court construed "bodily injury" to mean any part of the injurious process involving the manifestation of the asbestos-related disease.⁵⁸ The court held that each of Keene's insurers whose coverage was triggered was liable to indemnify Keene in subsequent lawsuits and it was up to Keene to choose which insurer would defend and indemnify it against the lawsuits.⁵⁹

Although many jurisdictions use the exposure theory to determine when coverage is triggered, the United States Court of Appeals for the Fourth Circuit, in 1986, and the Court of Special Appeals of Maryland, in 1988, in cases that did not involve asbestos-related injury, both adopted a manifestation approach to determine when coverage was triggered under a standard form general liability policy.⁶⁰ Both courts considered the manifestation approach to be superior to the exposure approach.⁶¹

55. 667 F.2d 1034 (D.C. Cir. 1981).

56. *Id.* at 1044-45. The court explained that if exposure to asbestos constituted a "bodily injury" under the policy and was the sole trigger for coverage, the "subsequent development of a disease would be characterized best as a consequence of the injury" and no further coverage could be triggered. *Id.* For example, assume Company A had no insurance coverage in 1980, and in 1980, its employee was exposed to asbestos. In 1990, Company A purchases insurance from Insurer B, and in 1993, the employee exposed in 1980 is diagnosed with asbestosis. If exposure constitutes an injury and is the sole trigger for coverage, the injury would have occurred when Company A was uninsured. Thus, Company A would be directly liable to the employee. In *Keene Corp.*, the court thought this would create inequities and, therefore, decided both exposure and manifestation of the disease triggers coverage. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1050.

60. In *Mraz v. Canadian Universal Insurance Co.*, 804 F.2d 1325 (4th Cir. 1986), the United States Court of Appeals for the Fourth Circuit held that the insurance company had no duty to defend or indemnify the chemical company in a government action following discovery of leakage of toxic waste and property damage because the discovery of the leakage occurred after the termination of coverage. The court rejected the argument that because the leakage occurred during the policy period the insurer should be liable to defend and indemnify the chemical company. *Id.* at 1328.

In *Harford Mutual Insurance Co. v. Jacobson*, 73 Md. App. 670, 536

In *Mraz v. Canadian Universal Insurance Co.*,⁶² the United States Court of Appeals for the Fourth Circuit held that, in hazardous waste burial cases, an "occurrence" is determined by the time at which property damage first manifests itself, and not the time when leakage first occurs.⁶³ Thus, the term "occurrence" as it exists in the liability policy means the date of discovery, which may or may not be the date when the buried waste initially contaminates the property.⁶⁴

Similarly in *Harford Mutual Insurance Co. v. Jacobson*,⁶⁵ the Court of Special Appeals of Maryland adopted the manifestation theory, stating that "[t]he Courts consistently hold that the party was 'damaged' when the injuries first manifested themselves."⁶⁶ The court of special appeals relied on the Fourth Circuit's decision in *Mraz* and emphasized the Fourth Circuit's opinion that "the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves."⁶⁷ The facts in *Jacobson*, however, distinguish it from *Mraz* and other cases involving exposure to toxic materials. In *Jacobson*, the victim's lead poisoning manifested itself in 1982, which was prior to the date when Jacobson, the insured landlord, obtained the liability insurance policy.⁶⁸ Thus, regardless of which theory the court decided to adopt, Harford Mutual Insurance could never have been liable to Jacobson because both the exposure and the manifestation occurred before it was on the risk.

A.2d 120 (1988), the Court of Special Appeals of Maryland held that the insurer was not liable for the tenant's lead paint poisoning because the disease first manifested itself prior to the policy period. *Id.* at 680, 536 A.2d at 124-25. The court rejected the argument that the insurer should be liable because the tenant's exposure to lead paint poisoning and her injuries persisted through the policy period. *Id.* at 677, 536 A.2d at 125.

61. The *Jacobson* court stated that the general rule is that an injury occurs within the meaning of a liability policy, not when the wrongful act was committed, but when the party was actually damaged. According to the *Jacobson* court, other courts have traditionally interpreted the word "damaged" to mean when the injury manifests itself. 73 Md. App. at 681, 536 A.2d at 125 (citing *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 270 (Ind. Ct. App. 1976)); *see also Jacobson*, 73 Md. App. at 681 n.5, 536 A.2d at 125 n.5.

In *Mraz*, the court held that under the liability policy therein, an "occurrence" has taken place not when the leakage occurs but when the damage is discovered. 804 F.2d at 1328.

62. 804 F.2d 1325 (4th Cir. 1986).
 63. *Id.* at 1328.
 64. *Id.* at 1325.
 65. 73 Md. App. 670, 536 A.2d 120 (1988).
 66. *Id.* at 681, 536 A.2d at 125.
 67. *Id.* at 682, 536 A.2d at 126.
 68. *Id.* at 684, 536 at 127.

Despite the prior decisions of the Fourth Circuit and the Court of Special Appeals of Maryland, in *Lloyd E. Mitchell, Inc. v. Maryland Casualty Co.*⁶⁹ the Court of Appeals of Maryland granted Mitchell's petition for certiorari prior to consideration of the appeal by the intermediate appellate court. In *Mitchell*, the court addressed the issue of whether, under a comprehensive general liability insurance policy, coverage is triggered when the injured party is first exposed to asbestos materials or when the disease first manifests itself as clinically diagnosable. In reaching its decision that the trial court erred when it applied the manifestation theory of insurance coverage, the court relied on the medical testimony which demonstrated that, pathologically, damage to the injured part occurs upon exposure, even though the damage is not clinically diagnosable and the resulting disease may not manifest itself for many years thereafter.⁷⁰

The court of appeals' decision in *Mitchell* departs from the findings in *Mraz* and *Jacobson* that the manifestation approach is superior to the exposure approach for interpreting the terms "bodily injury" and "occurrence" in a standard comprehensive general liability policy. The *Mitchell* decision, however, conforms with the decisions of the majority of jurisdictions in the country,⁷¹ and is not necessarily inconsistent with prior Maryland law.⁷²

In *Mitchell*, the court gave substantial weight to the medical testimony, and to the fact that "with one exception, all courts which have decided the issue in the context of asbestos-related personal injuries" have adopted the exposure approach.⁷³ With respect to the medical evidence and the overwhelming authority in other jurisdictions,⁷⁴ the court's adoption of the exposure approach regarding asbestos injuries is the more logical and more equitable choice.

It is important to note that in *Mitchell*, even though the clinician's report was introduced by Maryland Casualty and the pathol-

69. *Mitchell*, 324 Md. 44, 595 A.2d 469 (1991).

70. *Id.* at 50-51, 595 A.2d at 472.

71. *See infra* note 78.

72. The court of special appeals stated in *Jacobson* that "the time of occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time the complaining party was actually damaged." *Jacobson*, 73 Md. App. at 681, 536 A.2d at 125 (quoting *United States Fidelity & Guar. Co. v. American Ins. Co.*, 345 N.E.2d 267, 270 (Ind. Ct. App. 1976)). After hearing the testimony of the expert witnesses in the *Mitchell* case, the court of appeals concluded that an occurrence happens with exposure to asbestos products because every exposure results in some sort of injury to the lungs. 324 Md. at 62, 595 A.2d at 478.

73. *Mitchell*, 324 Md. at 51, 595 A.2d 472. The one exception is alleged to be *Eagle-Picher Industries v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982).

74. *See infra* note 78.

ogist's report was introduced by Mitchell, the two reports are not antithetical. Although both reports differ as to when asbestos-related injuries culminate into disease, they agree that initial inhalation of asbestos causes bodily injury.⁷⁵ Moreover, according to the court in *Keene*, regardless of whether exposure to asbestos causes an immediate and discrete injury, the fact that it is part of the injurious process is enough for it to constitute "injury" under the policies.⁷⁶

In addition, when determining whether injury resulting from exposure to lead triggered insurance coverage under the defendant's standard policy, the *Jacobson* court relied on the general rule that the time of occurrence of an accident, within the meaning of an indemnity policy, is not the time the wrongful act was committed, but the time when the complaining party was actually damaged.⁷⁷ The *Mitchell* court properly followed this rule, because the medical testimony introduced by the parties and the medical testimony in other asbestos cases in other jurisdictions establish that a person exposed to asbestos suffers injury shortly after inhalation of asbestos fibers.⁷⁸

Not only is the exposure approach logical in terms of the medical evidence and principles of insurance law, but it is also a more equitable decision for the victim of asbestos exposure and for the insured manufacturers and distributors of asbestos products. The insured companies purchased liability policies with the expectation that coverage under the policies would be triggered for lawsuits involving asbestos-related diseases.⁷⁹ Additionally, most insured man-

75. 324 Md. at 61, 595 A.2d at 477.

76. *Keene Corp.*, 667 F.2d at 1043.

77. *Jacobson*, 73 Md. App. at 684, 536 A.2d at 125.

78. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 127-29 (D.C. Cir. 1986) (injury need not be diagnosable or compensable to trigger coverage if the injury is proven to have existed within the policy period); *Commercial Union Ins. Co. v. Sepco Corp.*, 765 F.2d 1543, 1546 (11th Cir. 1985) (injury occurs upon initial exposure); *American Home Prods. Corp. v. Liberty Mut. Ins.*, 748 F.2d 760, 764-65 (2d Cir. 1984) (injury-in-fact can occur through exposure to asbestos); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir. 1981) (inhalation of asbestos fibers does cause injury), *cert. denied*, 455 U.S. 1007 (1982); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.) (bodily injury results from exposure to asbestos), *cert. denied*, 454 U.S. 1109 (1981).

79. The suggestion has been made that because an insurance contract is a contract of adhesion, the following principle should apply to the construction of insurance policies: "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970). This principle was followed by the court in *Keene Corp.* See *Keene Corp.*, 667 F.2d at 1042 n.12.

ufacturers cannot afford to defend themselves against numerous lawsuits, nor can they afford to compensate the numerous plaintiffs bringing the lawsuits. Under a manifestation approach, many victims of asbestos-related injuries would not be fairly compensated because manufacturers and distributors of asbestos products, without insurance coverage, would be forced into bankruptcy.⁸⁰ Similarly, the ambiguities in the contracts are the fault of the insurer and not the insured. If the insurance companies had appreciated fully the extent of potential liability for injuries caused by exposure to asbestos, the terms in the insurance policy would reflect the added risk, thereby rendering moot the issue of when asbestos-related diseases trigger coverage.⁸¹

The court of appeals' adoption of the exposure theory will obviously affect the way in which lower courts decide future cases involving asbestos-related injuries. The *Mitchell* decision will also, no doubt, influence future decisions concerning latent injuries resulting from exposure to other, similar toxic materials. Although the court of appeals in *Mitchell* expressed no view as to the correctness of the *Mraz* and *Jacobson* decisions in the context of the subject matter therein,⁸² but its adoption of the exposure approach has already motivated the adoption of the same approach when dealing with cases involving property damage resulting from the burial of toxic waste.⁸³

80. Asbestos litigation has cost the U.S. economy at least \$12 billion. Seventeen otherwise productive American companies have gone bankrupt defending and settling asbestos lawsuits. Thousands of jobs have been lost because asbestos litigation quickly exhausts financial resources and forces many companies into bankruptcy. For example, Keene Corporation received \$400 million to pay claims arising from asbestos-related conditions. Currently, Keene has already paid out more than \$450 million to settle and defend nearly 100,000 claims. "Keene does not have enough money to continue resolving its 98,000 pending claims one at a time, nor the new cases being filed at the rate of 2,000 per month." *Asbestos Litigation: The Road to Bankruptcy*, THE BALTIMORE SUN, Sept. 7, 1993, at 8A (letter to the editor from Stuart E. Rickerson, Vice President General Counsel, Keene Corporation).

81. The exposure approach is consistent with the law involving insurance coverage of losses that begin during one policy period and continue to develop and manifest themselves in another policy period. For example, in *Snapp v. State Farm Fire & Casualty Co.*, 388 P.2d 884 (Cal. 1964), the policy was issued on the plaintiff's house, which had been damaged due to movement of the land under the house. While the land was still unstable, the insurer tried to limit its liability to the amount of damages that had occurred prior to the date when the policy terminated. The court held that the insurer's liability was not limited in this manner, and that the insurer had to indemnify the policy holder until the movement of the land stopped. *Id.* at 885; see also *Harman v. American Casualty Co.*, 155 F. Supp. 612 (S.D. Cal. 1957) (insurer cannot terminate property loss or fire protection while land remains unstable).

82. See *supra* notes 62-68 and accompanying discussion.

83. See *Harford County v. Harford Mut. Ins. Co.*, 327 Md. 418, 610 A.2d 286 (1992).

In *Harford County v. Harford Mutual Insurance Co.*,⁸⁴ the Court of Appeals of Maryland held “that ‘manifestation’ is not the sole trigger of coverage in environmental pollution cases[,] . . . [and] that coverage under the policies may be triggered during the policy period at a time earlier than the discovery or manifestation of the damage.”⁸⁵ Significantly, while remanding the case to the lower court, the court of appeals emphasized that the burden to show actual property damage occurred within the coverage of the policies still remained with the insured.⁸⁶

In addition, although the court of appeals has yet to address whether exposure to lead paint triggers coverage under standard liability policies, the United States District Court for the District of Maryland concluded in *Scottsdale Insurance Co. v. American Empire Surplus Lines Insurance Co.*,⁸⁷ that in lead poisoning cases “the transition from *Mraz* to *Harford County* demonstrates that exposure plus bodily injury (even if unmanifested) is now sufficient under Maryland law to trigger coverage.”⁸⁸

With respect to injuries involving exposure to asbestos, the insurance industry obviously should modify its standard liability policy in order to avoid future problems. As for the numerous asbestos lawsuits already pending or yet to be filed, perhaps there is a more equitable and logical approach with regard to determining coverage under the language of the standard liability insurance policy. As suggested in the dissenting opinion in *Forty-eight Insulations, Inc.*,⁸⁹ perhaps a rule which arbitrarily draws the line for the time when an asbestos-related disease occurs under a standard liability policy should be employed. According to the dissent, this line should be drawn at ten years from the date of the initial exposure to asbestos and each additional exposure would be viewed as an additional compensable injury. Under this proposed solution, liability would be divided by length of the policy term among all the insurers whose policies were “(1) in force ten years beyond the initial exposure to any manufacturer’s product and (2) also in force during a specific interval in which the victim was exposed to the insured’s product.”⁹⁰

84. *Id.*

85. *Id.* at 294-95.

86. *Id.* at 295. The court specifically stated the following:

We decide nothing more in this case than that Judge Fader was in error in limiting trigger of coverage to the time of manifestation or discovery of the property damage. It is for this reason, and no other, that we shall vacate the summary judgment in the insurer’s favor and remand the matter for further proceedings.

Id.

87. 811 F.2d 210 (D. Md. 1993).

88. *Id.* at 215.

89. See *Forty-eight Insulations, Inc.*, 633 F.2d at 1230 (Merritt, J., dissenting).

90. 633 F.2d at 1231.

Accordingly, this ten year rule would likely relieve the insurance companies from liability for periods during which the disease is latent, as well as prevent insurance companies from defeating coverage entirely or shifting losses unjustly to other insurance companies. At the very least, this rule represents a fairer compromise and better spreads losses arguably unforeseen by the insurance industry as a whole.⁹¹

With respect to medical evidence, principles of insurance law, and the clear weight of authority in other jurisdictions, the court of appeals' decision to adopt the exposure approach is both logical and equitable. The potential impact the decision will have in other areas of the law is uncertain, but the decision's impact on asbestos-related injuries in Maryland will be socially beneficial. Under the exposure approach, the expectations of the insureds are fulfilled and victims of asbestos injuries may be compensated more completely. Also, the decision provides an incentive for the insurance industry to modify its standard comprehensive general liability policies rather than to allow insurance companies to hide behind the self-created ambiguities in the policies.

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91. *Id.* at 1230. Other suggestions for coping with the unyielding flood of asbestos lawsuits include deferred trial dockets for those claimants who have been exposed to asbestos but who are not now sick, and court supervised attorney fees. *Asbestos Litigation: The Road to Bankruptcy*, THE BALTIMORE SUN, Sept. 7, 1993, at 8A (letter to the editor from Stuart E. Rickerson, Vice President General Counsel, Keene Corporation). Deferring less urgent claims would help alleviate the overwhelming drain on the funds available for compensating victims of asbestos exposure. Similarly, supervising the amount of money that lawyers make from asbestos litigation would also result in more equitable compensation for asbestos victims. "Studies show that asbestos contingent-fee lawyers routinely make \$1,000 to \$5,000 per hour by taking 30 percent to 50 percent of the recovery that is intended to compensate sick people." *Id.* Still, another approach to the problem may be for Congress to pass asbestos compensation legislation to regulate asbestos litigation. *Id.*