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No. 57293-8-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

RONALD LUNSFORD AND ESTHER LUNSFORD,
Plaintiffs-Appellants,

v.

SABERHAGEN HOLDINGS, INC,
Defendant-Respondent,

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

The trial court's extreme ruling is at odds with the existing law of Washington and virtually all other states. Sellers of asbestos-containing products will no longer be strictly liable for the injury caused by their defective products, unless the injured party was exposed after asbestos was no longer widely used in consumer products. Given the choice of two parties, one of whom is blameless and the other of which marketed and profited from the sale of a dangerous product, it is not the blameless party who should bear the economic burden of that injury. Holding *Saberhagen* to a strict liability standard is not a retroactive application of the law because strict liability was the law in effect when Ronald and Esther Lunsford's (together "Lunsford's") claims accrued. To the extent that a retroactivity analysis is necessary, such analysis reveals that retroactive application of strict products liability law is appropriate in properly-filed latent personal injury cases like Lunsford's. *Saberhagen* has presented no compelling legal, equitable or public policy reason why product liability law should only be applied prospectively. The trial court's decision must be reversed and this case remanded.

B. ARGUMENT

1. Holding *Saberhagen* To A Strict Liability Standard Is

**Not A “Retroactive” Application Of The Law Because
Strict Liability Was The Law In Effect At The Time
Lunsford’s Claims Accrued.**

Section 402A of the Restatement (Second) of Torts (“402A”) defined strict product liability and was adopted and applied to manufacturers in Washington in 1969.¹ It was applied to sellers in Washington in 1975.² Lunsford was exposed to The Brower Company's (“Brower's”)/ Saberhagen Holdings, Inc.'s (“Saberhagen's”) asbestos-containing products in 1958.³ Lunsford developed mesothelioma, a terminal asbestos-related cancer, in 2000. CP 36.

It is Saberhagen’s position that it cannot be held liable to Lunsford under a strict liability theory because 402A was not the law of Washington in 1958 when Lunsford was exposed. CP 52. Saberhagen claims that “[i]t is the date on which a cause of action arises, not on which it accrues, that determines the applicable law.”⁴ But the only authority Saberhagen cites is

¹*Ulmer v. Ford Motor Co.*, 75 Wn.2d 522, 452 P.2d 729 (1969).

²*Seattle-First Nat. Bank v. Tabert*, 86 Wn. 2d 145, 542 P.2d 774. (1975).

³Lunsford was exposed to asbestos products sold by The Brower Company. Saberhagen concedes for purposes of these proceedings that it is the legal successor to The Brower Company. CP 53 n.3.

⁴Brief of Respondents (“RB”) at page 8. A plaintiff’s right to sue for strict products liability *accrues* when he or she “knew or should have known all of the essential elements of the cause of action.” *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985). An asbestos plaintiff’s cause of action *arises* when the exposure to asbestos occurred. *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. 22, 34, 935 P.2d

Mavroudis v. Pittsburgh-Corning Corp., a case that does not support Saberhagen's argument.⁵ The *Mavroudis* Court held that the Washington Product Liability Act ("WPLA") "only applies to 'claims arising on or after July 26, 1981.'"⁶ The Court held that the WPLA did not apply, since the plaintiff's claim arose prior to that date. This hardly stands for the proposition that in all asbestos cases, it is the date of exposure that determines what causes of action exist. Saberhagen also states, "the Lunsfords seem to argue that the law applicable to their claims is the Washington Products Liability Act...since that is 'The Law In Effect At The Time [Lunsford's] Claims Accrued' [sic]." RB 8, fn 9. The WPLA does not apply to Lunsford's claims against Saberhagen because his claims arose in 1958.⁷

Strict product liability was an available cause of action when Lunsford's claims accrued. Holding Saberhagen to a strict liability standard is not a retroactive application of the law. Saberhagen cites no

684 (1997) (citations omitted).

⁵*Mavroudis*, 86 Wn.App. at 22-40.

⁶*Id.* at 33-34. Citations omitted.

⁷Lunsford does agree that the WPLA applies in one sense - the RCW sections addressing contribution apply to all cases *tried* after 1981, even if the causes of action arose prior to 1981. *Zamora v. Mobil Corp.*, 104 Wn.2d 211, 214-215, 704 P.2d 591 (1985) and RCW 4.22.920(2).

authority in support of its argument that the applicable law in asbestos cases is the law in effect when the exposure occurred.⁸

2. Retroactive Application Of Strict Products Liability Law Is Appropriate In Properly-Filed Latent Personal Injury Cases Like Lunsford's.

To the extent that the Court may deem it appropriate to conduct a retroactivity analysis, such analysis demonstrates that the strict product liability doctrine should be applied in all properly-filed latent personal-injury cases.

a. Lunsford's Retroactivity Argument Is Properly Before This Court.

Saberhagen argues that because Lunsford did not advance the argument below that judicial decisions are generally applied retroactively he cannot now argue that *Ulmer* and *Tabert* should apply retroactively. RB 15-16. It is true that failure to raise an issue before the trial court generally precludes a party from raising it on appeal.⁹ But retroactivity is a question

⁸Arguments that are not supported by authority should not be considered on appeal. RAP 10.3(a)(6); *Keever & Associates, Inc. v. Randall*, 129 Wn.App. 733, 741, 119 P.3d 926 (2005). RAP 10.3 was amended effective September 1, 2006. The former RAP 10.3(a)(5) is now renumbered RAP 10.3(a)(6). Since the rule was numbered (a)(5) at the time all events in this case occurred (except the filing of this brief), Lunsford will continue to refer to the rule as 10.3(a)(5) in the remainder of this brief.

⁹RAP 2.5, *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

of law and can be raised for the first time on appeal.¹⁰ Lunsford's retroactivity analysis is properly before this Court.

b. Retroactive Application Of Judicial Decisions Is The General Rule And Should Be Applied In This Case.

"Generally decisional law is given retroactive effect although this practice is neither constitutionally nor statutorily compelled."¹¹ If a Court intended its ruling to be prospective only, it would say so in clear terms.¹² The Supreme Court in *Ulmer* and *Tabert* did not indicate any intent that its ruling be prospective only and the Courts in fact have applied the two decisions retroactively for over thirty years. Brief of Appellants ("AB") at pages 10-14.

Prospective application of the *Ulmer* and *Tabert* decisions is simply not appropriate. In *Carillo v. City of Ocean Shores*, the Court of Appeals stated that before a case could be applied prospectively, "[t]he

¹⁰*Estate of Lee v. Seattle First National Bank*, 49 Wn.2d 254, 257, 299 P.2d 1066 (1956) (Although argument, which only involved a question of law, was raised for the first time on appeal, the reviewing Court would dispose of it.); *Robinson v. City of Seattle*, 119 Wn.2d 34, 74, 830 P.2d 318 (1992); and *Oil, Chemical and Atomic Workers Union, Local 1-547 v. NLRB*, 842 F.2d 1141, 1144, fn2 (9th Cir. 1988).

¹¹*Bradbury v. Aetna Cas. & Sur. Co.*, 91 Wn.2d 504, 507-508, 589 P.2d 785 (1979).

¹²"[T]he general rule [is] that an overruling decision is to be given retroactive effect, unless it is specifically provided otherwise." *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 34, 549 P.2d 13 (1976) (Citation omitted).

threshold factor necessary...is a finding that a court's decision established a new principle of law overruling past precedent on which litigants may have relied."¹³ Saberhagen recites several other "relevant considerations" for prospective application which are cited in *Carillo* (which in turn quotes *Nat'l Can Corp v. Dep't of Revenue*, citing *Chevron Oil Co. v. Huson*).¹⁴ RB 17. But the *Carillo* Court, after discussing the *Nat'l Can* and *Chevron Oil* factors stated that it need not address those factors, since the threshold issue had not been met.¹⁵ If a case does not establish a new principle of law *that overrules past precedent on which litigants may have relied*, then the Court need not address any other factors.

Ulmer and *Tabert* do not overrule prior law and they do not impose new obligations on manufacturers and suppliers, who have always had a duty to prevent foreseeable injury from their products. Saberhagen cannot argue that it relied on the right to be free from liability when it put dangerous products into the market. And Saberhagen's argument that 402A "was the functional equivalent of a statute, albeit one 'enacted' by

¹³*Carillo v. City of Ocean Shores*, 122 Wn.App. 592, 614, 94 P.3d 961 (2004).

¹⁴*National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 881, 749 P.2d 1286, cert. denied, 486 U.S. 1040 (1988); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

¹⁵*Carillo*, 122 Wn.App. at 614.

the judicial branch.” is absurd. RB 18, fn20. The Restatement did not establish new law, it simply recorded the existing state of the law, which is the Restatement’s major purpose.¹⁶ The judicial branch does not and cannot enact statutes. To the extent that the judicial branch can legislate, it does so strictly in “nonstatutory” fields.¹⁷ Saberhagen’s argument that “statutes are ordinarily given prospective application only”¹⁸ is irrelevant since the judicial branch did not enact a statute when it adopted 402A. Even if 402A were a statute, it is remedial in nature and Washington has applied remedial statutes retroactively.¹⁹

c. *Ulmer And Tabert Did Not Establish New Principles Of Law Or New Causes Of Action That Were Not Foreseeable In 1958.*

Saberhagen claims the “*Ulmer and Tabert* Courts plainly and dramatically changed prior law” and that the adoption of 402A was “a dramatic, entirely unforeseen development in American tort law.” RB 10 and CP 54-55. This is simply not true.

¹⁶“Restatement, Second, was made possible by a grant...to assure that the Restatements would be revised periodically to keep pace with the growth of the decisions in each subject. The discharge of that continuing responsibility has been and is a major function of the institute.” RESTATEMENT (SECOND) of Torts, 1965 Introduction.

¹⁷*Windust v. Department of Labor and Industries*, 52 Wn.2d 33, 36, 323 P.2d 241 (1958).

¹⁸RB 18, fn 20.

¹⁹See, *Godfrey v. State*, 84 Wn.2d 959, 961, 963-964, 530 P.2d 630 (1975).

In 1969, the *Ulmer* Court cited numerous prior Washington court decisions, dating to as early as 1932, which were decided on a theory of warranty where the plaintiff was not required to prove fault on the part of the defendant. This included not only cases involving food and other products for intimate bodily use, but also products such as dynamite, glass windshields and glass doors, and *privity was not required*.²⁰

The *Ulmer* Court recognized that 402A strict liability was a long time coming. The Supreme Court discussed the long struggle to fit product liability without fault into traditional tort concepts:

[Strict product liability] finds much support among the legal writers as well as some criticism. The arguments pro and con are cited in two articles by Dean William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (June, 1960), and *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791 (1966). In the second of these articles, Dean Prosser lists Washington among the 18 states whose courts have imposed strict liability without negligence and without privity, as to manufacturers of all types of products...Dean Prosser discusses the fact that, when the courts came to the conclusion that strict liability should be imposed upon the manufacturer of defective products, they searched about for theories on which to justify it and came up with a number of strange ones; but the one winning the greatest number of adherents was that of implied warranty.

²⁰*Ulmer*, 75 Wn.2d at 525-528, citing *Baxter v. Ford Motor Company*, 168 Wn. 456, 462, 12 P.2d 409, 412, (1932) (glass windshield); *Dipangrazio v. Salamonson*, 64 Wn.2d 720, 725, 393 P.2d 936 (1964) (glass door); and *Brewer v. Oriard Powder Co.*, 66 Wn.2d 187, 193, 401 P.2d 844 (1965) (dynamite).

He points out the difficulties attendant upon the adoption of this theory, which boil down to the fact that it is illogical to create an implied warranty but refuse to attach to it any of the customary incidents of a warranty . . .Dean Prosser says:

...the suggestion was sufficiently obvious that all of the trouble lay with the one word 'warranty,' which had been from the outset only a rather transparent device to accomplish the desired result of strict liability...The American Law Institute approved the proposal, and adopted, in the second Restatement of Torts, a new section, which states the strict liability without using 'warranty' ...²¹

According to Prosser, 402A was simply giving an accurate name to what already existed, causes of action for product liability without fault, which had previously been called various things including tort actions under "warranty".

In 1975, the Supreme Court in *Tabert* also recognized the long history of cases leading to strict liability:

[W]e note that the courts have struggled for a long time in their efforts to fit into traditional legal concepts the potential liability of sellers or suppliers of defective, injury-producing products. The notions of privity, implied warranties, inherently dangerous defects and ordinary negligence all crossed paths in these judicial efforts. Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960), and Prosser, *Strict Liability to the Consumer*, 18 Hastings L.J. 9 (1966). Ultimately the legal fictions, traditional concepts and tortured reasoning were cast aside in Justice Traynor's landmark opinion in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 62, 64, 27 Cal.Rptr. 697,

²¹*Ulmer*, 75 Wn.2d at 528-531, quoting William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791 (1966).

700, 377 P.2d 897, 900 (1963).²²

Clearly, the assault on the citadel of privity was well under way in 1960 when Prosser wrote about it. Although the Courts had struggled for a long time, the “legal fictions, traditional concepts and tortured reasoning were cast aside” by 1963. The Restatement itself makes clear that its revision was to keep pace with the law as it developed. Both the *Ulmer* and *Tabert* cases make clear that 402A was giving a name to what had been developing for a long time. In Washington, the Court had found liability for products without fault and without privity as early as 1932. The development of strict liability was not, as Saberhagen contends, a spectacular and unforeseen development in 1958.²³

Saberhagen’s only other authority for the argument that the adoption of 402A was a dramatic and unforeseen change in the law comes from its piecemeal quotation from unsworn statements made by the drafters during the debate on that section. RB 20-21, CP 113-126.

²²*Tabert*, 86 Wn. 2d at 147.

²³Saberhagen also argues that it is clear the *Ulmer* and *Tabert* decisions “plainly and dramatically changed prior law” because both decisions were “immediately reported in the local newspapers.” RB 10, fn 11 and RB 19. Whether or not a court decision establishes new principles of law or new causes of action is a matter for the courts or legislature to determine, it is not determined by newspaper reporters, as Saberhagen alleges.

The ALI documents do not prove that strict liability was a dramatic and unforeseen change in the law. Saberhagen is wrong when it states:

[I]n 1958...*no one* - not William Prosser, not the American Law Institute, and *certainly not Brower* - could have foreseen the “spectacular” development of the law of strict liability that would ultimately lead to §402A in 1965, its adoption in *Ulmer* in 1969 as to manufacturers, and its adoption in *Tabert* in 1975 as to product sellers.

RB 21-22 (emphasis in original). For example, Saberhagen cites Prosser’s statement, “This is perhaps the most spectacular development that I have witnessed in my lifetime in the American law of Torts.” RB 20. What Saberhagen left out was where Prosser indicated that the spectacular development was from 1948 (ten years *before* Lunsford was exposed to products sold by Brower). Prosser stated:

So much for food. Actually, beginning a very short time ago, a great many jurisdictions are now applying the rule of this section to products other than food. You will find at the bottom of page 29 several cases applying it to articles for what might be called intimate bodily use which is external

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rather than internal - things like hair dye, soap, permanent wave solutions, surgical pins for setting a bone fracture, polio vaccine in California, and then, getting beyond what might be called bodily use in any sense of the word, you find very recently a quite spectacular eruption of cases which extended the rule of this section to other products not for external use at all - *animal food, grinding wheels, cinder building blocks and electric cable, airplanes, automobiles, and an automobile tire. Some 20 cases in some ten jurisdictions have carried this thing forward, most of them since 1948.* This is perhaps the most spectacular development that I have witnessed in my lifetime in the American law of torts.²⁵

Prosser went on to state:

I think anyone who has followed the sweeping progress of this thing would have no difficulty in predicting that in another ten or at the most twenty years enormous inroads will have been made on the old rule [of liability only for negligence], and that the principle of strict liability for other products will be much more generally accepted.

CP 116. Prosser made this statement in *1961* and he was exactly right. In Washington, product liability was established for manufacturers of all products nine years later and for sellers fourteen years later. That Brower might ultimately be strictly liable for the dangerous and defective products it distributed should not have been a surprise to Brower in 1958. Such liability was clearly foreshadowed.

d. Retroactive Application Of *Ulmer* And *Tabert* Is Equitable And Consistent With The Purposes Of Strict Liability.

²⁵CP 115-116 (emphasis added). Saberhagen omitted the emphasized sentences above from the block quote in its Brief of Respondent. See RB 20.

The purpose of strict products liability “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”²⁶ The economic rationale underlying the doctrine is that the cost of injuries from defective products should be internalized by the members of the enterprise who profit from their sale.²⁷ Saberhagen argues that availability of product liability insurance is critical to the validity of the cost-shifting theory underlying strict liability. RB 23. But even without insurance, retailers and suppliers have the right to seek contribution from manufacturers.²⁸ The availability of liability insurance is not the *sine qua non* of strict liability.

Saberhagen also argues that retroactive application of the *Ulmer* and *Tabert* decisions would be inequitable because “Brower could have had no inkling in 1958 that it might one day be held liable,” “Brower had a right to rely upon the state of the law and the claims and remedies then available,” and because insurance was not available in 1958. RB 31-32. As

²⁶*Greenman*, 59 Cal.2d at 63.

²⁷*Tabert*, 86 Wn. 2d at 148; *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262, 291 P.2d 168 (1964).

²⁸*Zamora*, 104 Wn.2d at 214-215; 4.22.920(2).

argued above, the development of strict liability law was not “utterly unforeseeable”. Saberhagen’s argument also ignores the fact that coverage under most commercial liability policies is based on the time the claims are made regardless of when the damage occurred.²⁹ And a policy which insures against harm “neither expected nor intended from the standpoint of the insured” would, in 1958, potentially have covered claims for product-related injuries regardless of the theory of recovery. Brower surely had liability insurance in 1958 for harm caused by its products. And Brower had no “vested interest” in or right to “rely” on an ability to injure innocent third parties with impunity.³⁰

²⁹There are generally two types of liability insurance - “occurrence” policies and “claims made” policies:

Occurrence policies generally provide coverage for damage that occurs during the policy period regardless of when the damage is discovered... [C]laims-made policies generally provide coverage for claims which the insurer receives notice of during the policy period regardless of when the damage occurred. While occurrence policies were the dominant form of insurance used in 1947... claims made policies have been more frequently used in the last two decades. Jeffrey W. Stempel, *Interpretation of Insurance Contracts: Law and Strategy for Insurers and Policyholders* § 31.3.3 (1994).

American Continental Ins. Co. v. Steen, 151 Wn.2d 512, 517, 91 P.3d 864 (2004). In California, the Court found that coverage for asbestos injuries under “occurrence” general liability policies was continuously triggered, from the plaintiff’s exposure through the latency period to the time a claim is made. *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App. 4th 1, 43-48, 52 Cal.Rptr.2d 690 (1996).

³⁰*See, Amrine v. Murray*, 28 Wn.App. 650, 653, 626 P.2d 24 (1981) (“[I]t is quite difficult to make a convincing showing of reliance upon tort law..”); *Godfrey*, 84 Wn.2d at 961-962 (“There is no vested right to a common law bar to recovery that is provided by the affirmative defense of contributory negligence...”); and *Leland v. J.T. Baker Chemical Co.*, 282 Pa.Super. 573,579-581, 423 A.2d 393 (1980) (AB 17).

Saberhagen proposes the obliteration of strict products liability causes of action for Lunsford and argues that this is either not a hardship, or one that is appropriate. RB 31. But it is exactly situations like Lunsford's that resulted in the development of strict liability as a cause of action - above and beyond the remedy available in negligence. Lunsford contracted a terminal illness as a result of his exposure to Brower's products. Lunsford was powerless to protect himself from the dangerous products that Brower profited from by selling. Given the choice of two parties, one of whom is blameless and the other of which marketed and profited from the sale of a dangerous product, it is not the blameless party who should bear the economic burden of that injury. Retroactive application of the *Ulmer* and *Tabert* decisions is equitable and consistent with the purposes of strict liability.

e. Retroactive Application Of *Ulmer* And *Tabert* Is Consistent With Public Policy.

In *Lunsford I*, this Court endorsed comment *c* to 402A, and stated that such "policy considerations are key in determining whether strict liability should extend to plaintiffs like Lunsford."³¹ Comment *c* states that

³¹*Lunsford v. Saberhagen Holdings, Inc.*, 125 Wn.App. 784, 792-793, 106 P.3d 808 (2005).

the consumer of products is entitled to the maximum of protection “and the proper person to afford it are those who market the products.” Public policy dictates that the economic burden of injury from dangerous products be borne by the marketer of products, not the injured user or consumer. Retroactive application of *Ulmer* and *Tabert* is consistent with public policy.

Saberhagen argues that as a result of *Ulmer* and *Tabert*, there was a “products liability crisis” caused by “skyrocketing” liability insurance premiums, which necessitated the passage of the WPLA.³² RB 27-28. The Federal Intragency Task Force On Product Liability “identified three principal causes of the product liability problem - product liability insurance rate making procedures, manufacturing practices, and the tort-litigation system.”³³ But the Washington Senate Select Committee On Tort and Product Liability Reform was unable to determine if the rise in premiums was due in any part to the tort/litigation system, “[b]ecause very few [insurance] companies supplied data [to the Committee regarding claims and litigation experience].”³⁴ The WPLA was not, as Saberhagen

³²RB 27.

³³Journal of the Washington State Senate, 47th Leg., Reg. Sess. at 621.

³⁴*Id.* at 623.

contends, due “in substantial part” to the Legislature's concern over existing products liability law.

Saberhagen also argues that the public policy stated in 402A has been superceded. It says, “[t]he WPLA represents current public policy, which favors a balanced approach to protect the interests of manufacturers, products sellers and insurers, while not unduly impairing the recovery rights of injured consumers.” RB 30. As argued above, the WPLA does not apply. The legislature could have included claims like Lunsford’s in the WPLA but chose not to. So, to the extent that public policy under the WPLA now favors, for example, limitation of liability for product sellers, said policy does not favor such a limitation for Saberhagen. If the legislature intended sellers such as Saberhagen to benefit from the WPLA, it would have done so when the act was passed or by amendment following any of the cases that made clear that asbestos causes of action were exempted from the act.³⁵ The 1987 Legislature also made sure joint and several liability continued to apply to asbestos claims even as it was

³⁵*Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn.App. at 34, citing *Koker v. Armstrong Cork, Inc.*, 60 Wn.App. 466, 471-72, 804 P.2d 659 (1991); *Krivanek v. Fibreboard Corp.*, 72 Wn.App. 632, 865 P.2d 527 (1993); and *Viereck v. Fibreboard Corp.*, 81 Wn.App. 579, 915 P.2d 581(1996).

generally adopting several liability for other Washington tort cases.³⁵ It seems anomalous that the Legislature would go out of its way to preserve joint and several liability if it did not intend that strict liability would be a viable cause of action in asbestos cases.

Even applying the WPLA's balanced approach, public policy still favors Lunsford's ability to maintain a strict liability cause of action against Saberhagen. The trial court's ruling means that sellers of asbestos-containing products will no longer be strictly liable for the injury caused by their defective products, unless the injured party was exposed after 1975 - when asbestos was no longer used in most consumer products. Such an approach completely impairs the recovery rights of most consumers injured by asbestos and is not so much a balanced approach to protect the interests of product sellers as it is a complete safe-harbor for them. Such an extreme position cannot be maintained with a public policy argument. Retroactive application of *Ulmer* and *Tabert* is consistent with public policy.

3. The ALI Reports Are Evidence Subject To The Rules Of Evidence.

³⁵See, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

Saberhagen's motion for summary judgment was premised on its contention that the adoption of 402A was "a dramatic, entirely unforeseen development in American tort law." CP 54-55. In support of that argument, Saberhagen cited portions of ALI proceedings. CP 57-60, 62. Lunsford moved to strike the documents on the ground that they were hearsay. CP 130-137. Saberhagen argued that the documents were not "evidence" but rather were "akin to legislative history." CP 266-270. The ALI documents are not legislative history. They are evidence subject to the rules of evidence.

a. Lunsford Supported His Motion To Strike Arguments With Authority As Required By RAP 10.3(a)(5).

Saberhagen says Lunsford failed to cite authority in support of his motion to strike. RB 35. The three cases cited by Saberhagen involve arguments where the proponents did not name a single case, statute or rule in support of the argument made. Lunsford argued that the ALI documents are hearsay and cited ER 801(c) in support. AB 20, CP 130-137. ER 801(c) is "authority".

b. This Court Should Not Consider Saberhagen's Argument That The ALI Documents Are The

Equivalent Of Legislative History And Are Not Subject To The Rules Of Evidence Because Saberhagen Cites No Authority For Its Argument.

The Court should not consider arguments that are not supported by authority.³⁷ Saberhagen argues the ALI documents are not “evidence” because they are “akin to legislative history” so they are not subject to the rules of evidence. RB 36-37. The Court should disregard this argument because Saberhagen cites no authority that supports it.

The ALI documents are not legislative history because the ALI is not a legislative body and its members are not lawmakers. Legislative history is “[t]he background and events leading to the enactment of a *statute*, including hearings, committee reports, and floor debates.”³⁸ The ALI documents are the background and events leading to the drafting of the Restatement (Second) of Torts, which is not a statute. Saberhagen has cited no authority for the proposition that something that is not legislative history can be considered so.

Even if the ALI documents can be considered “legislative history”,

³⁷RAP 10.3(a)(5); *Keever & Associates, Inc. v. Randall*, 129 Wn.App. 733, 741, 119 P.3d 926 (2005).

³⁸BLACK'S LAW DICTIONARY (8th ed. 2004)(emphasis added).

Saberhagen cites no authority for the proposition that legislative history submitted in support of summary judgment is not subject to the rules of evidence. Saberhagen says “the trial court’s consideration of legislative history does not constitute the taking of “evidence”. RB 37. Saberhagen cites *State v. Ford Motor Co.* but the case is actually *State v. Ford*.³⁹ And the case does not support Saberhagen’s argument. Saberhagen stated in its opposition to Lunsford’s motion to strike that, “[f]ollowing an examination of the applicable legislative history, the trial court [in *Ford*] concluded that the statute was not applicable to a juvenile prosecution.” CP 268, fn2. There is no indication in *Ford* that the trial court *ever examined any legislative history*. The appellate Court also did not examine any legislative history. This Court pointed only to the language of a statutory amendment and stated, “[t]he statute does not reveal the legislature’s purpose in amending the statute, and neither party points us to any legislative history that does so.”⁴⁰ The case therefore does not stand for what Saberhagen claims it does.⁴¹

³⁹*State v. Ford*, 99 Wn.App. 682, 691, 995 P.2d 93 (2000). The defendant was a minor named Mitchell Ford.

⁴⁰*Id.* at 686.

⁴¹ “[A]lthough [it is] not explicitly stated in RAP 10.3(a)(5), it is implicit in the rule that the citations to legal authority contained in the argument in support of a party’s position on appeal...should support the proposition for which such authority is cited.”

Saberhagen next cites *Brown v. State* in support of its argument that the ALI documents are not subject to the rules of evidence. RB 37. In the *Brown* case, both parties provided the Court with legislative history and there is no information on whether any objections were made to their admissibility.⁴² The Court did not hold that legislative history is not subject to the rules of evidence. In fact, the Court held that the statute at issue was not ambiguous so it did not need to turn to the legislative history to make its ruling.⁴³ The *Condon Bros.* case cited by Saberhagen also does not support Saberhagen's position. The reference in *Condon Bros.* is to an advisory committee note that is *published as part of the Federal Rules of Evidence*.⁴⁴ The fact that the Supreme Court in *Tabert* referred to the ALI materials does not mean that such materials submitted by a party in support of summary judgment are not subject to the rules of evidence.

The ALI documents are clearly evidence subject to the evidentiary

Litho Color, Inc. v. Pacific Employers Ins. Co., 98 Wn.App. 286, 305, 991 P.2d 638 (1999).

⁴²*Brown v. State*, 155 Wn.2d 254; 265-119 P.3d 341 (2005).

⁴³To the extent that the Court in *Brown* then discussed the legislative history (and if one could argue that the discussion was implicitly supportive of Saberhagen's position), it is dicta, which "is not controlling authority and need not be followed". *Gerberding v. Munro*, 134 Wn.2d 188, 224, 949 P.2d 1366 (1998), citing *State v. Potter*, 68 Wn.App. 134, 150 n. 7, 842 P.2d 481 (1992).

⁴⁴56 F.R.D. 183, 298, Advisory Committee Note.

rules against hearsay. "Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact."⁴⁵ Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact."⁴⁶

Saberhagen submitted the ALI documents in support of its summary judgment motion. CP 69-70. Saberhagen did not ask the trial court to take judicial notice of the documents. CP 51-129. Saberhagen admits that the documents are meant to prove a fact it alleges, that "the broad strict liability embodied in 402A as published in 1965 had not even been dreamed of by the ALI just five years earlier." RB 36. The documents were offered to prove the truth of the matter asserted. AB 20-21.

This Court should disregard Saberhagen's argument that the ALI materials are similar to legislative history, are not evidence and are not subject to the rules of evidence because Saberhagen has cited no authority in support of its argument. In the alternative, this Court should find that

⁴⁵BLACK'S LAW DICTIONARY (8th ed. 2004), quoting, James B. Thayer, *Presumptions and the Law of Evidence*, 3 Harv. L. Rev. 141, 142 (1889).

⁴⁶BLACK'S LAW DICTIONARY (8th ed. 2004).

the ALI materials are not legislative history and that they are subject to the rules of evidence.

C. CONCLUSION

Saberhagen has presented no compelling legal, equitable or public policy reason why this Court should affirm the decision below. The trial court made an unprecedented and unjustified departure from the prior decisions of this state, which have consistently recognized the unique attributes of latent asbestos personal injury claims and affirmed the right of those injured by unreasonably dangerous asbestos products to recover in strict liability. For the reasons discussed above, the summary judgment in favor of Saberhagen should be reversed, and the case remanded for trial on the merits.

Dated this 9 day of November, 2006.

Respectfully submitted,

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ABIGAIL J.E. ADAMS, states and declares as follows:

1. I am over the age of 18, am competent to testify, and make this declaration based on my personal knowledge and belief.

2. On November 1, 2006, I caused to be delivered as shown on below listed, a copy of Reply Brief of Appellants:

Court of Appeals, Division I
of the State of Washington
600 University Street
Seattle, WA 98101
Original and 1 copy - Via Certified US Mail

Timothy K. Thorson
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DATED this 1st day of November, 2006 at Portland, Oregon.



Abigail J.E. Adams
Legal Secretary

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV - 6 AM 11:38

**APPENDIX OF FEDERAL AND OUT OF STATE
AUTHORITIES AND LEGISLATIVE HISTORY**

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., 45
Cal.App. 4th 1, 43-48, 52 Cal.Rptr.2d 690 (1996).

Oil, Chemical and Atomic Workers Union, Local 1-547 v. NLRB, 842 F.2d
1141, 1144, fn2 (9th Cir. 1988).

Journal of the Washington State Senate, 47th Leg., Reg. Sess.

EXHIBIT 1

▷

ARMSTRONG WORLD INDUSTRIES, INC.,
Plaintiff, Cross-defendant and Respondent,

v.

AETNA CASUALTY & SURETY COMPANY et
al., Defendants and Appellants;

RELIANCE INSURANCE COMPANY, Defendant,
Cross-complainant and Appellant. FIBREBOARD
CORPORATION, Cross-complainant and
Respondent,

v.

PACIFIC INDEMNITY COMPANY et al.,
Cross-defendants and Appellants.

GAF CORPORATION, Plaintiff and Appellant,

v.

COLUMBIA CASUALTY COMPANY et al.,
Defendants and Appellants.

Nos. A049419, A049631, A049654, A049659,
A049661, A049663, A049664, A049665, A049666,
A049667, A049668, A049669, A049670, A049671,
A049672, A049808, A049875.

Court of Appeal, First District, Division 1, California.
Apr 30, 1996.

[Opinion certified for partial publication. ^{FN*}]

FN* Pursuant to California Rules of Court
rules 976(b) and 976.1, this opinion is
certified for publication with the exception of
Issue Group I (Lost Insurance Policy), and the
designated portion of part H of Issue Group
III.

SUMMARY

Separate declaratory relief actions and related cross-actions involving three asbestos manufacturers and their various insurance carriers were coordinated and tried in six separate phases in the trial court. For purposes of appeal, the issues were divided into three major issue groups, two of which were published: Issue Group II, pertaining to the bodily injury claims against

the manufacturers, including issues relating to the trigger and scope of coverage, the application of the phrase "neither expected nor intended," the liability of premerger insurers, and the effect of a settlement agreement; and Issue Group III, pertaining to the property damage claims against one of the manufacturers, including issues relating to the coverage for property damage, the trigger and scope of coverage, the duties to defend and indemnify, and the coverage of one insurer's excess policy.

Trial Court Rulings

Issue Group II. The trial court was asked to determine the trigger and scope of coverage of the comprehensive general liability (CGL) policies under which the manufacturers were insured with respect to asbestos-related bodily injuries. The trial court found, for purposes of the trigger issue, that the language contained in the various policies was functionally identical, and that the meaning of the language was plain and unambiguous in requiring indemnification and defense when any one of three distinct conditions-bodily injury, sickness, or disease-was present during the policy period. Having found that bodily injury occurs during the period of exposure to asbestos, that it continues to occur during the latency period even in the absence of further exposure, and that it continues to occur past the manifestation point, accompanied by sickness and disease, until the claimant's death from the disease or other causes, the trial court adopted a continuous trigger of coverage, under which all of a manufacturer's policies in effect from the first exposure to asbestos or asbestos-containing products until the date of death or the date of a claim, whichever occurs first, are triggered with respect to an asbestos-related bodily injury claim. The court further concluded that once a claim is filed by a living claimant, the claimant's bodily injury is no longer an unknown event and, accordingly, under the loss-in-progress rule, policies beginning after the claim is filed are not triggered.

With respect to the scope of coverage, the trial court

ruled that each manufacturer was required to be indemnified by one insurer for the full extent of the loss up to the policy's limits, but with liability ultimately being apportioned among all insurers based on the policy limits and the years of coverage. Furthermore, the court concluded that the manufacturers did not have an obligation to share pro rata in indemnification and defense costs because of any uninsured or self-insured periods of time simultaneous with the occurrence of bodily injury pertaining to a claim. The trial court, in interpreting the phrase, "neither expected nor intended," as used in the CGL policies, providing coverage for injuries that are "neither expected nor intended," by the insured, determined that it applied to exclude coverage where the insured acted either willfully, intentionally, or maliciously for the purpose of causing injury. Applying this test, the court found that, contrary to the arguments of its insurers, one of the manufacturers had not acted for the purpose of causing injury, and, hence, the injuries from exposure to asbestos had been neither expected nor intended by the manufacturer. The court also ruled that an insurer is not required to produce express testimony or documentation as to an insured's subjective, wrongful intent to cause injury, but may show that reason mandates that by the very nature of the act undertaken, coupled with the knowledge actually in possession of the insured, harm must have been intended. The trial court also determined that the liability policies of one of the manufacturers provided coverage for asbestos-related bodily injuries attributable to the products of another company with which the manufacturer had merged after the expiration of the policies. The trial court found that a settlement agreement between two of the manufacturers and several of the insurers was reasonable and concluded that the manufacturers' settlement payments were presumptive evidence of their liability with respect to the policies of nonsettling insurers, even though, under the settlement, payments by the manufacturers went toward all claims regardless of whether they were claims for which the manufacturers were liable.

Issue Group III. The trial court was asked to determine the obligations of one manufacturer's insurers to defend and indemnify it in the so-called "building cases"-the property damage lawsuits filed against the manufacturer on account of the presence of asbestos-containing

building material (ACBM) in buildings. The trial court concluded that all claims, whether for release of asbestos fibers or for mere installation of ACBM, were for covered "property damage" under all of the manufacturer's policies. However, the trial court found that asbestos property damage, unlike bodily injury, is not necessarily continuous, and instead of a continuous trigger of coverage, it adopted a multiple trigger, pursuant to which coverage is triggered if it is shown that ACBM was installed in the buildings in question, that ACBM released fiber or material into the air or on surfaces of the buildings, or that settled releases of ACBM were disturbed and reentrained into the air, during any portion of the period that a liability policy was in effect. The trial court rejected the argument of one insurer that its accident policy did not cover the claims against the manufacturer, on the ground that such a policy requires a sudden, unexpected event, reasoning that there is no requirement of suddenness and that, in any event, the release and reentrainment of asbestos fibers qualify as sudden events. The trial court concluded that each of the triggered policies was responsible "in full" for the losses, subject to the "no stacking" qualification (only one policy's limits can apply to each claim) and subject to apportionment among the insurers based on "other insurance" clauses.

The trial court further ruled that the manufacturer had no obligation to share pro rata in indemnification or defense costs because of any uninsured or self-insured periods. The trial court ruled that the insurer under each triggered policy had an independent obligation to pay in full any indemnity costs on an asbestos building claim and that, if the policy contained a defense obligation, to also pay in full any defense costs on the claim. The trial court also concluded that none of the business risk exclusions in the liability policies-damage to the insured's own products, product recall, and design defect-applied to the asbestos building cases. (Superior Court of the City and County of San Francisco, No. 753885, Ira A. Brown, Jr., ^{FN*} Judge.)

FN* Retired judge of the San Francisco Superior Court sitting under assignment by the Chairperson of the Judicial Council.

Decision by Court of Appeal

Issue Group II. The Court of Appeal affirmed the judgment concerning the trigger and scope of coverage for bodily injury claims, but modified it to read that all of a manufacturer's policies subject to the judgment that were in effect from the date of the claimant's first exposure to the manufacturer's asbestos product until the date of death or claim, whichever occurred first, were triggered on an asbestos-related bodily injury claim, but the claimant was presumed to have been exposed to all defendant-manufacturers' asbestos products, and the burden was on the insurer to prove that the claimant was not exposed to its manufacturer-policyholder's product before or during the policy period. The court held that, because standard CGL policies cover occurrences that result in injury during the policy period, the operative event, or "trigger of coverage," that activates the insurer's defense and indemnity obligations is the injury. The trial court did not err in using an injury-in-fact analysis to apply a continuous trigger approach, and its conclusion that injury actually occurs upon exposure to asbestos, even though the injury may not be capable of detection until much later, and continues until death, was amply supported by its factual findings. Since, for purposes of determining insurance coverage, absolute precision is not required as to when the injury occurred, the trial court did not err in finding that, for individuals who had actually developed asbestos-related injuries, the evidence permitted the inference that injury took place in the past, that is, that, in retrospect, undiscovered injury existed during the asbestos exposure period and during the latency period in the absence of exposure. Further, the court held that, since the doctrine of joint and several liability is one of tort liability, not contract law, it was not applicable to the obligations of the insurers, and the trial court correctly decided that, although the doctrine may sometimes have been imposed on the manufacturers in the underlying lawsuits by the injured persons, it had no application to the obligations of successive insurers of a single manufacturer. Nevertheless, the trial court's decision with respect to the apportionment of liability among the insurers did not erroneously impose joint and several liability on them, but, rather, it ensured that each manufacturer would be indemnified by one insurer for the full extent of the loss up to the policy's limits, and apportioned liability among all insurers whose policies

were triggered by the claimant's asbestos-related bodily injury.

The court also held that, since the apportionment of the liability of multiple insurers on a single claim, pursuant to "other insurance" provisions, has no bearing on the obligations of the insurers to the insured, the trial court correctly concluded that the manufacturers were not obligated to share pro rata in indemnification and defense costs because of any uninsured or self-insured periods of time simultaneous with the occurrence of bodily injury pertaining to a claim. However, the court held that a liability insurer has no liability under a policy covering claims of asbestos-related bodily injuries if the policy expired before the claimant was exposed to the manufacturer-policyholder's products. In determining the liability insurance coverage of multiple asbestos manufacturers for a claim of an asbestos-related bodily injury, the claimant will be presumed to have been exposed to asbestos products of all of the manufacturers, but an insurer is entitled to rebut that presumption and show that its policy was not triggered because the claimant was first exposed to its manufacturer-policyholder's products after the policy period had expired. Thus, the trial court erred in ruling that all of a manufacturer's policies were triggered upon the claimant's exposure to any asbestos product, regardless of who manufactured it, since, in effect, the decision created an irrebuttable presumption that all of an asbestos manufacturer's policies are triggered by a claim of injurious exposure to any asbestos product. The court also held that, for purposes of determining whether liability may be imposed on a particular insurer who was on the risk before the claimant was exposed to the manufacturer-policyholder's product, the insurer's liability does not parallel the joint and several liability of the manufacturers.

The Court of Appeal reversed the trial court's declaration on the meaning of the "expected or intended" language, but affirmed the judgment that coverage existed for asbestos bodily injury claims under the particular policy at issue on appeal. The court held that the use of an objective standard in determining the meaning of the word "expected," as used in liability insurance policies providing coverage for injuries that are "neither expected nor intended" by the insured,

would deny coverage for mere negligence and create an exclusion swallowing the entire purpose of insurance protection for unintended consequences. Thus, the trial court correctly used a subjective standard in interpreting the word "unexpectedly" as used in one insurance policy that defined the term "occurrence" as an event that unexpectedly causes personal injury. The exclusion for injuries that were not unexpected applied only to injuries that the insured manufacturer subjectively knew or believed to be practically certain to occur even though it did not act for the purpose of causing injury. However, the court held that there is a distinction between the words "expected" and "intended," such that the insured may expect injuries—that is, believe them to be substantially certain to occur—without having the express purpose of causing damage. Thus, the trial court erred in failing to differentiate "expected" from "intended" in interpreting the word "unexpectedly," and it should have considered whether the manufacturer, though not intending to cause injury, expected the injuries because it knew of the hazards of asbestos and was aware of the substantial probability of harm from its manufacture and sale. Nevertheless, the error was harmless, since the insurer failed to meet its burden of proving that the manufacturer actually expected bodily injuries from the use of its asbestos products within the meaning of the policy provision and, thus, the evidence was insufficient to support a finding that the manufacturer knew or believed that asbestos bodily injuries were practically certain to occur.

The Court of Appeal reversed the judgment that the liability policies of one of the manufacturers provided coverage for asbestos-related injuries attributable to the products of another company with which the manufacturer had merged after the expiration of the policies. The court held that, although the insuring agreements in the policies obligated the insurers to pay for all sums that the insured manufacturer became obligated by law to pay, and the manufacturer became obligated for the liabilities of the other company upon the merger, insurance policies must be read as a whole, and, thus, the insuring agreements were required to be read in conjunction with the "named insured" provisions. The other company had not had any relationship with the insured during the policy periods,

and the fact that the companies became affiliated later was not enough to give the other company the status of a named insured under those provisions of the premerger policies. Moreover, the court held that language in the liability policies identifying the named insured as the insured and its affiliated companies as "now existing or hereafter constituted," indicated an intention to provide coverage to the manufacturer despite its assumption of new liabilities resulting from the acquisition of another company after the policies had expired. Although, in the abstract, the phrase "or hereafter constituted" could have referred to companies acquired at any time in perpetuity, as a matter of policy interpretation, the phrase had to be read in the context of the entire policy, including the policy period. Thus, the named insured definition under the policies did not include a company acquired after the policy periods ended.

The Court of Appeal affirmed the judgment on the effects of the settlement agreement. The court held that the general rule placing the burden on the policyholder to establish facts to trigger coverage of a liability insurance policy is subject to the exception that when the insurer refuses to accept a settlement that the insured proves to be reasonable, then it is presumed that the insured is liable to the claimant in the amount of the settlement. The trial court's finding that the settlement was reasonable had not been challenged on appeal. Moreover, the manufacturers had offered sufficiently substantial evidence that the settlement was reasonable and that the nonsettling insurers had declined to join the settlement despite having had the opportunity to do so.

Issue Group III. The Court of Appeal affirmed the judgment concerning the defense and indemnity obligations of the insurers on asbestos-related property damage claims against the manufacturer, concerning policy exclusions, and concerning the trigger and scope of coverage, but reversed the judgment on interpretation of the excess policy and remanded the matter for findings on the objectively reasonable expectations of the manufacturer. The court held that, in a declaratory relief action, questions of liability insurance coverage may be determined on the basis of the underlying pleadings in actions against the insured and such other evidence as is available. Thus, the trial court properly

looked to the nature of the manufacturer's potential liability, taken from the allegations in the various complaints in the underlying building cases, together with the totality of the evidence, in ruling on the meaning of "property damage," as used in the liability policies. The court held that not only contamination of a building from a release of asbestos fibers into the building's air supply and onto the building surfaces, but also the mere presence of ACBM in buildings, constitutes a physical injury and, hence, property damage covered under a liability insurance policy. Thus, the trial court properly ruled that the manufacturer's liability policies covered claims for the release of asbestos fibers into buildings, regardless of the amount of fibers that were actually released and claims alleging that the mere presence of ACBM in buildings was a health hazard, even though there had been no releases of fibers. In both cases, whether and to what extent there had been damage to the buildings were factual issues for the underlying building cases, and, for purposes of determining the insurance coverage, it had to be assumed that damage had occurred for which the manufacturer would be liable. Moreover, the court held that, with respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, even if the underlying complaints in the building cases alleged that the mere presence of ACBM in buildings was a health hazard because of the potential for future releases of asbestos fibers, and there were no releases of fibers, if the manufacturer was held liable for the mere presence of ACBM, the injury to the buildings was a physical one and, hence, property damage covered under a liability insurance policy. The court also held that, with respect to such coverage, the physical incorporation of ACBM into buildings is distinguished from cases involving hazardous waste leaks or spills from containers, that the rule that physical incorporation of a defective product into another does not constitute property damage unless there is physical harm to the whole was not applicable, and that the damages allegedly suffered by the building owners from the presence of ACBM could not be considered solely economic losses. Furthermore, the court held that evidence introduced by the insurers to show that the mere presence of ACBM is not necessarily injurious had no bearing on the insurance

coverage issue.

With respect to the trigger of coverage issue, the court held, although the rule that liability insurance coverage is triggered when the injury actually occurred applies with respect to liability insurance for both asbestos-related bodily injuries and asbestos-related property damage, it is not illogical to apply different triggers of coverage for the two types of cases. Thus, the trial court's adoption of a multiple trigger approach was proper, since the evidence indicated that, in contrast to the continuous, progressive physiological process involved in the inhalation of asbestos, asbestos property damage is episodic, with measurable intervals between episodes, so that the process of injuries cannot be deemed continuous. The court also held that the trial court did not err in concluding that property damage happens at any time asbestos fiber or material is released from asbestos-containing building material into the air or onto surfaces of buildings, and when settled releases are disturbed and reentrained into the air, no matter how small the quantity of the released fibers. Thus, it was not necessary that "sufficiently appreciable" fibers be released in order to trigger coverage under the manufacturer's liability policies. Moreover, the trial court did not err in deciding that if the manufacturer was to be held liable for contamination of a building from released asbestos fibers, each of the manufacturer's liability policies was triggered if any part of the contamination damage, no matter how small the quantity of the released fibers, took place when the policy was in effect. The court held that, with respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, if the manufacturer is held liable for the mere presence of ACBM (and the potential for releases), without evidence of contamination of a building from released asbestos fibers, coverage under a liability policy would be triggered only at the time ACBM was installed; it would not also be triggered by subsequent, incidental releases of asbestos fibers. However, if the manufacturer were held liable for contamination of a building from the release of asbestos fibers into the air, coverage would be triggered at the time of installation of ACBM as well as at the time of release. Since the loss-in-progress rule, providing that an insurer can insure only against a

contingent or unknown loss (Ins. Code. §§ 22, 250), does not apply if the damage was triggering the coverage of an asbestos manufacturer's liability insurance policy for claims of asbestos-related property damage to buildings upon reentrainment of asbestos fibers into the air, inasmuch as resuspension of settled fibers is a continuation of the loss that began when the fibers were released from the ACBM. Moreover, the rule that, for purposes of determining liability insurance coverage for property damage, property damage occurs in the policy year in which a defective product is installed, rather than the policy year in which it fails or is replaced in anticipation of failure or causes the market value of the building to diminish is applicable to asbestos products. Thus, the trial court did not err in selecting the installation of ACBM as an event triggering coverage of the manufacturer's liability policies.

The court held that the rule, applicable in first party liability insurance cases, that property damage occurs when the loss is first manifested, is not applicable in a third party liability case involving property damage from asbestos. The court also held that the trial court properly ruled that accident insurance policies covered damage to buildings from ACBM, since the release and reentrainment of asbestos fibers into the air qualified as sudden events so as to constitute accidents within the meaning of the policies. However, the court held that, contrary to the trial court's conclusion, an accident insurance policy covers only unexpected and unintended events that are also sudden. The court held that once one of the manufacturer's liability policies was triggered, the policy obligated the insurer to pay "all sums" that the manufacturer became legally obligated to pay as damages because of property damage during the policy period (up to the policy limits), not just for the part of the damage that occurred during the policy period. Moreover, the apportionment of the liability of multiple insurers on a single claim, pursuant to "other insurance" provisions, has no bearing on the obligations of the insurers to the insured. Thus, the trial court correctly concluded that the manufacturer was not obligated to share pro rata in indemnification or defense costs because of any uninsured or self-insured periods during which there was property damage. Furthermore, the scope of the liability insurance coverage of an

asbestos manufacturer for claims of asbestos-related property damage to buildings does not depend on the continuous, indivisible nature of the damage or the application of a continuous trigger of coverage, and an insurer has an obligation to respond in full when several successive policies are triggered by continual, episodic property damage.

With respect to the insurers' duty to indemnify and defend, the court held that, although in a declaratory relief action tried before an insured's liability has been established, the trial court cannot determine the insurer's indemnity obligation and must limit its declaration to whether the claim is covered by the policy, the trial court did not err in declaring the insurers' duty to indemnify, since the declaration recognized the prematurity of the manufacturer's request that it be made and was conditioned on the manufacturer being held liable for the damages alleged in the underlying complaints. Moreover, the manufacturer was not required to prove that its liability would necessarily result from covered property damage; for purposes of deciding the coverage dispute, the trial court had properly looked to the allegations of the underlying complaints and had assumed the manufacturer would be held liable for the damages alleged therein. In addition, the allegations of damages from the presence of ACBM in buildings, which were made in the underlying complaints against the manufacturer, were not conclusory and were sufficient to show a potential for coverage and to give rise to a duty on the part of the liability insurers to defend the manufacturer.

With respect to the business risk exclusions in the policies, the court held that the trial court did not err in concluding that none of the business risk exclusions in the liability policies applied to the underlying asbestos building cases, since a decision on the applicability of the exclusions did not need to await a determination of the actual basis for the manufacturer's liability. Rather, for purposes of determining whether the property damage claims were covered or excluded under the policies, it had to be assumed that the manufacturer would be held liable for the damages alleged in the complaints in the underlying cases. The court held that the exclusion for damage to the insured's own products

was not applicable, since the underlying asbestos building cases alleged damage to the remainder of the buildings, not damage to the ACBM. The exclusion for product recall was not applicable, since the exclusion applies only to the cost of withdrawing a product due to an apprehended danger but does not apply to actual damage caused by the product itself. And, the active malfunctioning exception to the exclusion for design defect was applicable so as to make the exclusion itself inapplicable. The exception was applicable not only with respect to the allegations in the underlying asbestos building cases that released asbestos fibers had contaminated buildings, but also with respect to the allegations of damages from the mere presence of ACBM. (Opinion by Dossee, J., with Newsom, J., ^{FN*} and Stein, Acting P. J., concurring.)

FN* Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Insurance Contracts and Coverage § 10--Interpretation of Contracts--As Judicial Function. Interpretation of an insurance *11 policy is primarily a judicial function, and when the trial court's interpretation did not depend on conflicting extrinsic evidence, the reviewing court makes its own independent determination of the policy's meaning. In interpreting an insurance contract, the court's fundamental goal is to give effect to the mutual intention of the parties, which is inferred, if possible, solely from the written provisions of the contract. If contractual language is clear and explicit, it governs. Words in an insurance policy must be interpreted as a layperson would interpret them, in their ordinary and popular sense unless the parties intended a special or technical sense, and a policy should not be read as it might be analyzed by an attorney or an insurance expert, even if the policyholder is a sophisticated insured. Ambiguous policy language must be resolved

by interpreting it in accordance with the insured's objectively reasonable expectations, and only if this method fails to resolve the ambiguity will the policy provision be construed in favor of the insured.

(2) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage.

Because standard comprehensive general liability insurance policies cover occurrences that result in injury during the policy period, the operative event, or "trigger of coverage," that activates the insurer's defense and indemnity obligations is the injury; that is, occurrence policies (as distinguished from claims-made policies) are invoked, or "triggered," when the injury takes place.

[Event triggering liability insurance coverage as occurring within period of time covered by liability insurance policy where injury or damage is delayed--modern cases, note, 14 A.L.R.5th 695.]

(3) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Continuous Trigger--Injury-in-fact Analysis--Asbestos-related Bodily Injuries.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court did not err in using an injury-in-fact analysis to apply a continuous trigger approach in determining when injury occurred from exposure to the manufacturers' asbestos within the meaning of the manufacturers' comprehensive general liability insurance policies. Since claims involving asbestos-related diseases involve unique facts, the injury-in-fact trigger may be appropriate. In the context of continuous or progressively deteriorating injuries, the injury-in-fact trigger, like the continuous injury trigger, affords coverage for continuing or progressive injuries occurring during successive policy periods subsequent to the established date of the *12 initial injury-in-fact. Thus, the continuous trigger pertains to the duration of coverage, providing coverage throughout successive policy periods. The injury-in-fact trigger establishes the onset of injury, to determine when coverage begins.

(4a, 4b) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Bodily Injuries.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court did not err in adopting a continuous trigger approach, in determining when injury occurred from exposure to the manufacturers' general liability (CGL) insurance policies. The trial court's conclusion that injury actually occurs upon exposure to asbestos, even though the injury may not be capable of detection until much later, and continues until death, was amply supported by its factual findings with respect to the medical evidence and those findings were binding on the appellate court. Moreover, there was nothing in the language of the policies to require as a condition of coverage that the injury be discovered at any point in time. To read the CGL occurrence policies to provide coverage only when the injury became apparent during the policy period would unfairly transform the policies into "claims made" policies.

(5) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Bodily Injuries--Validity of Retrospective Analysis.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court's finding that, for individuals who had actually developed asbestos-related injuries, the evidence permitted the inference that injury took place in the past, that is, that, in retrospect, undiscovered injury existed during the asbestos exposure period and during the latency period in the absence of exposure, was not in error. For purposes of determining insurance coverage, absolute precision is not required as to when the injury occurred; all that is necessary is reasonably reliable evidence that the injury, sickness, or disease more likely than not occurred during a period of coverage.

(6a, 6b, 6c) Insurance Contracts and Coverage § 106--Extent of Liability of Insurer--Liability Insurance--Multiple Insurers--Asbestos-related Bodily Injuries--Apportionment of Liability.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, each of the multiple insurers was required to bear potential liability for an entire *13 claim, subject to allocation based on the

"other insurance" provisions of their policies. Thus, the trial court did not err in ruling that each manufacturer was to be indemnified by one of the various insurers for the full extent of the loss up to the policy's limits, but with liability ultimately being apportioned among all insurers based on the policy limits and the years of coverage. The trial court's decision did not erroneously impose joint and several liability on the insurers, but rather it ensured that each manufacturer would be indemnified by one insurer for the full extent of the loss up to the policy's limits, and apportioned liability among all insurers whose policies were triggered by the claimant's asbestos-related bodily injury.

(7) Insurance Contracts and Coverage § 118--Apportionment of Risk--Other Insurance Clauses. When multiple insurance policies share the same risk but have inconsistent "other insurance" clauses, the general rule is to prorate according to the policy limits.

(8a, 8b) Insurance Contracts and Coverage § 118--Apportionment of Liability--Applicability of Doctrine of Joint and Several Liability.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the contractual obligations of the insurers to a single manufacturer-policyholder were separate and distinct from the tort liability of multiple asbestos manufacturers to an asbestos claimant. Thus, since the doctrine of joint and several liability is one of tort liability, not contract law, it was not applicable to the obligations of the insurers, and the trial court correctly decided that, although the doctrine may sometimes have been imposed on the manufacturers in the underlying lawsuits by the injured persons, it had no application to the obligations of successive insurers of a single manufacturer-policyholder.

(9a, 9b) Insurance Contracts and Coverage § 117--Liability Insurance--Apportionment of Liability--Asbestos-related Bodily Injuries--Obligation of Policyholder to Share Pro Rata in Costs for Uninsured or Self-insured Periods.

In an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court correctly

concluded that the manufacturers were not obligated to share pro rata in indemnification and defense costs because of any uninsured or self-insured periods of time simultaneous with the occurrence of bodily injury pertaining to a claim. The apportionment of the liability of multiple insurers on a single claim, pursuant to "other insurance" provisions, *14 had no bearing on the obligations of the insurers to the insured. The insurance policies obligated the insurers to pay "all sums" that the manufacturers became legally obligated to pay as damages because of bodily injury during the policy periods, which means that once coverage was triggered, an insurer's obligation to a manufacturer was to cover its liability "in full" up to the policy limits. It was irrelevant that only part of the asbestos-related disease developed during any single policy period or during a period in which the manufacturer had no insurance.

[Self-insurance against liability as other insurance within meaning of liability insurance policy, note, 46 A.L.R.4th 707.]

(10) Insurance Contracts and Coverage § 117--Liability Insurance-- Apportionment of Liability--Distinction Between Apportionment Among Multiple Insurers and Apportionment Between Insurer and Insured.

In suits between an insured and an insurer to determine coverage, interpretation of the policy language will typically take precedence. In contrast, where two or more comprehensive general liability insurance carriers turn to the courts to allocate the costs of indemnity for a paid loss, different contractual and policy considerations may come into play in the effort to apportion such costs among the insurers. The task may require allocation of contribution amongst all insurers on the risk in proportion to their respective policies' liability limits (such as deductibles and ceilings) or the time periods covered under each such policy.

(11a, 11b) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Asbestos-related Bodily Injuries--Multiple Manufacturers and Insurance Policies--Claimant Not Exposed to Product Until After Expiration of Insurer's Policy.

A liability insurer has no liability under a policy covering claims of asbestos-related bodily injuries if the policy expired before the claimant was exposed to the policyholder's products and, even though coverage of

such a policy is triggered continuously, upon exposure, upon manifestation, and upon exposure-in-residence, it is not enough to trigger coverage that the claimant experienced some asbestos-related injury during a policy period; the injury must have resulted from exposure to the policyholder's products. Thus, in an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court erred in ruling that all of a manufacturer's policies were triggered upon the claimant's exposure to *15 any asbestos product, regardless of who manufactured it. The effect of this decision was to trigger an insurer's indemnity obligations even if the claimant had not been exposed to the manufacturer's product until after the insurer's policy period had expired.

(12a, 12b) Insurance Contracts and Coverage § 128--Liability Insurance-- Actions--Presumptions and Burden of Proof-- Trigger of Coverage--Asbestos-related Bodily Injuries--Multiple Manufacturers and Insurance Policies--Time of Exposure.

In determining the liability insurance coverage of multiple asbestos manufacturers for a claim of an asbestos-related bodily injury, the claimant will be presumed to have been exposed to asbestos products of all of the manufacturers, but an insurer is entitled to rebut that presumption and show that its policy was not triggered because the claimant was first exposed to its manufacturer-policyholder's products after the policy period had expired. Thus, in an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court erred in ruling that all of a manufacturer's policies were triggered upon the claimant's exposure to any asbestos product, regardless of who manufactured it. In effect, the decision created an irrebuttable presumption that all of an asbestos manufacturer's policies are triggered by a claim of injurious exposure to any asbestos product.

(13) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Bodily Injuries--Multiple Manufacturers and Insurance Policies--Claimant Not Exposed to Product Until After Expiration of Insurer's Policy--Joint and Several

Liability.

In a case involving the liability insurance coverage of multiple asbestos manufacturers for a claim of an asbestos-related bodily injury, for purposes of determining whether liability may be imposed on a particular insurer who was on the risk before the claimant was exposed to the manufacturer-policyholder's product, the insurer's liability does not parallel the joint and several liability of the manufacturers. The liability of the manufacturers is not necessarily joint and several and, in any event, this is an issue concerning the trigger of coverage, not apportionment of liability. Whether the liability of the manufacturers is joint and several, proportionate to market share, the contractual obligation of an insurer to indemnify the manufacturer-policyholder, that is, to pay all sums that its manufacturer-policyholder becomes legally obligated to pay, arises only if coverage is triggered. Further, coverage is triggered only if the claimant was exposed to the manufacturer's product either before or during the policy period. *16

(14a, 14b, 14c) Insurance Contracts and Coverage § 80--Liability Insurance--Exclusions and Limitations--Injury Not Unexpected--Subjective Awareness as Test of "Expected" Injury.

The use of an objective standard in determining the meaning of the word "expected," as used in liability insurance policies providing coverage for injuries that are "neither expected nor intended" by the insured such that coverage is excluded if the policyholder should have known of the dangers of its conduct, would deny coverage for mere negligence and create an exclusion swallowing the entire purpose of insurance protection for unintended consequences. Thus, in an action to determine the liability insurance coverage of asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court correctly used a subjective standard in interpreting the word "unexpectedly" as used in one insurance policy that defined the term "occurrence" as an event that unexpectedly causes personal injury. The exclusion for injuries that were not unexpected applied only to injuries that the manufacturer subjectively knew or believed to be practically certain to occur even though it did not act for the purpose of causing injury.

[Construction and application of provision of liability

insurance policy expressly excluding injuries intended or expected by insured, note, 31 A.L.R.4th 957.]

(15a, 15b, 15c, 15d) Insurance Contracts and Coverage § 80-- Liability Insurance--Exclusions and Limitations--Injury Not Unexpected-- "Expected" and "Intended" Distinguished.

There is a distinction between the words "expected" and "intended," as used in liability insurance policies providing coverage for injuries that are "neither expected nor intended" by the insured: the insured may expect injuries-that is, believe them to be substantially certain to occur-without having the express purpose of causing damage. Thus, in an action to determine the liability insurance coverage of asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court erred in failing to differentiate "expected" from "intended" in interpreting the word "unexpectedly" as used in one insurance policy that defined the term "occurrence" as an event that unexpectedly causes personal injury. The trial court should have considered whether the insured manufacturer, though not intending to cause injury, expected the injuries because it knew of the hazards of asbestos and was aware of the substantial probability of harm from its manufacture and sale. Moreover, the trial court was sufficiently aware of this issue despite any failure of the insurer to alert it to the distinct language of the policy. *17

(16) Insurance Contracts and Coverage § 78--Liability Insurance-- Definitions--"Expect": Words, Phrases, and Maxims--Expect.

The plain and ordinary meaning of "expect" is to anticipate, to consider probable or certain. Thus, the term "expected," as used in the language of insurance policies, means anticipation with a high degree of probability, no matter whether the degree of that probability is expressed as substantially certain, practically certain, highly likely, or highly probable.

(17) Insurance Contracts and Coverage § 77--Liability and Indemnity Insurance--Costs of Doing Business or Calculated Risks as Insurable.

Ordinarily insurance does not provide indemnification for the type of economic detriments that occur so regularly that they are commonly regarded as a cost, rather than as an insurable risk, of an enterprise or activity. Closely associated with this basic principle is

the view that it is fundamentally inconsistent with the legitimate purpose of an insurance arrangement for one to seek to use it as protection against calculated risks. If the insured is allowed through intentional or reckless acts to consciously control the risks covered by the policy, a central concept of insurance is violated.

(18a, 18b) Appellate Review § 184--Harmless Error--Failure to Make Finding of Fact--Evidence Insufficient to Sustain Finding.

In an action to determine the liability insurance coverage of asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court's error in failing to differentiate "expected" from "intended" in interpreting the word "unexpectedly" as used in one insurance policy that defined the term "occurrence" as an event that unexpectedly causes personal injury, was harmless. When a trial court fails to make a finding on a material issue, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party, and the evidence was insufficient to support a finding that the insured manufacturer knew or believed that asbestos-related bodily injuries were practically certain to occur.

(19) Insurance Contracts and Coverage § 128--Liability Insurance--Actions-- Burden of Proof--Expectation by Insured of Bodily Injury From Asbestos.

In an action to determine the liability insurance coverage of asbestos manufacturers for claims of asbestos-related bodily injuries, an insurer whose policy excluded coverage for injuries that were not unexpected failed to meet its burden of proving that its insured manufacturer actually expected bodily injuries from the use of *18 the manufacturer's asbestos products within the meaning of that provision. Although there was evidence of the manufacturer's general knowledge of asbestos dangers that might have supported a finding that it should have expected the asbestos bodily injuries, general knowledge of the hazards of asbestos is not equivalent to knowledge that such injuries were practically certain to occur. The record indicated that the manufacturer's officials believed that the company's asbestos products were not dangerous, that they were taking every precaution to protect their workers from any dangers from breathing asbestos dust, and that the workers would not be harmed as long as the dust levels

were controlled.

(20a, 20b, 20c) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Liability of Insured for Claims Against Another Company With Which Insured Merged After Policy Expired.

In an action to determine the liability insurance coverage of asbestos manufacturers for claims of asbestos-related bodily injuries, the trial court erred in determining that the liability policies of one of the manufacturers provided coverage for asbestos-related injuries attributable to the products of another company with which the manufacturer had merged after the expiration of the policies. Although the insuring agreements in the policies obligated the insurers to pay for all sums that the insured manufacturer became obligated by law to pay, and the manufacturer became obligated for the liabilities of the other company upon the merger, insurance policies must be read as a whole and, thus, the insuring agreements were required to be read in conjunction with the "named insured" provisions. The other company had not had any relationship with the manufacturer during the policy periods, and the fact that the companies became affiliated later was not enough to give the other company the status of a named insured under those provisions of the premerger policies.

(21) Insurance Contracts and Coverage § 10--Interpretation of Contracts-- Effect of Availability of Other Insurance.

Generally, insurance policies should be interpreted as if no other insurance is available. Thus, in construing the liability policies of an asbestos manufacturer to determine whether they covered the liability for claims of asbestos-related bodily injuries of another company with which the manufacturer had merged after the policies had expired, the availability of coverage under the other company's own liability policies was not a valid consideration.

(22a, 22b) Insurance Contracts and Coverage § 79--Liability Insurance-- Named Insured as Including Company as "Hereafter Constituted"--Interpretation in Context of Policy Period.

In an action *19 to determine the liability insurance coverage of asbestos manufacturers for claims of

asbestos-related bodily injuries, the trial court erred in determining that the plain meaning of "hereafter constituted," as used in two liability policies to identify the named insured manufacturer as the insured and its affiliated companies as "now existing or hereafter constituted," indicated an intention to provide coverage to the manufacturer despite its assumption of new liabilities resulting from the acquisition of another company after the policies had expired. Although, in the abstract, the phrase "or hereafter constituted" could have referred to companies acquired at any time in perpetuity, as a matter of policy interpretation, the phrase had to be read in the context of the entire policy, including the policy period. Thus, the named insured definition under the policies did not include a company acquired after the policy periods ended. This conclusion was applicable as well to another policy, which expressly limited the named insured to those companies owned or acquired by the insured during the policy term.

(23) Insurance Contracts and Coverage § 79--Liability Insurance--Duration.

A liability insurance policy has a finite duration. Pursuant to Ins. Code, § 381, subd. (e), the period of time during which the insurance policy is effective is an essential element of a liability insurance contract. The insurer's obligation to indemnify is limited to insurable events occurring during the coverage period and, unless coverage has been triggered during the policy period, there is no coverage once the policy period has ended. Logically, then, neither is there a named insured once the policy period has ended. Thus, a corporate acquisition taking place after the policy has expired can have no retroactive effect on the identity of the named insured during the policy period.

(24a, 24b) Insurance Contracts and Coverage § 128--Liability Insurance-- Actions--Refusal of Insurer to Accept Settlement--Presumption of Insured's Liability.

The general rule placing the burden on the policyholder to establish facts to trigger coverage of a liability insurance policy is subject to the exception that when the insurer refuses to accept a settlement that the insured proves to be reasonable, it is presumed that the insured is liable to the claimant in the amount of the

settlement. Thus, in an action to determine the liability insurance coverage of three asbestos manufacturers for claims of asbestos-related bodily injuries, once the trial court found that a settlement between two of the manufacturers and some of the insurers was reasonable, it correctly found that the manufacturers' settlement payments were presumptive evidence of their liability with respect to the policies of *20 nonsettling insurers. This was so even though, under the settlement, payments by the manufacturers went toward all claims regardless of whether they were claims for which the manufacturers were liable. The manufacturers had offered sufficiently substantial evidence that the settlement was reasonable and that the nonsettling insurers had declined to join the settlement despite having had the opportunity to do so.

(25a, 25b) Insurance Contracts and Coverage § 110--Adjustment of Loss and Liability--Insurer's Breach of Duty to Act in Good Faith--Right of Insured to Settle and Sue Insurer for Reimbursement.

If an insurance carrier breaches its contract with the insured and erroneously denies coverage or refuses to defend, then the insured is entitled to make a reasonable settlement with the claimant and to sue the carrier to recover the amount of the settlement. Even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement.

(26a, 26b) Insurance Contracts and Coverage § 128--Reimbursement Action Following Insurer's Breach of Contract or Refusal to Settle--Presumption of Insured's Liability.

In an action by an insured against its insurer for reimbursement of a settlement following the insurer's breach of contract by erroneously denying coverage or refusing to defend the insured, the settlement is presumptive evidence of the insured's legal liability on the third party's claim and the amount of the insured's liability. In an action for reimbursement of a settlement following the insurer's breach of its duty to accept a reasonable settlement, the insured has the burden of showing the settlement was reasonable and, if he or she meets that burden, then the act of settlement raises the presumptions that the claim was legitimate and the

amount of the settlement was the amount of the insured's liability.

(27) Insurance Contracts and Coverage § 122--Liability Insurance-- Declaratory Relief Action to Determine Coverage--Assumption of Injury Based on Underlying Pleadings.

In a declaratory relief action, questions of liability insurance coverage may be determined on the basis of the underlying pleadings in actions against the insured and such other evidence as is available. Thus, in an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court properly looked to the nature of the manufacturer's *21 potential liability, taken from the allegations in the various complaints in the underlying building cases, together with the totality of the evidence, in ruling on the meaning of "property damage," as used in the liability policies. The trial court's conclusion that the claims of injury were covered "property damage" as defined by the policies was necessarily based on the assumption that there had been legally compensable injuries to the buildings for which the manufacturer would be held liable, for if it were ultimately determined that there had been no such injuries, there would be no need for insurance coverage.

(28) Insurance Contracts and Coverage § 127--Liability Insurance-- Declaratory Relief Action to Determine Coverage--Evidence--Admissibility.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court did not err in admitting the deposition testimony of experts, which the trial court had initially excluded from the manufacturer's case-in-chief, but which the trial court eventually admitted after various insurers had moved for judgment on the ground that the manufacturer had failed to prove property damage. Although the testimony supported the manufacturer's position that buildings are injured by the presence of asbestos-containing building material, that position was founded in the allegations of the complaints in the underlying building cases against the manufacturer, and the trial court properly relied primarily on those allegations and assumed, for

purposes of the declaratory relief action, that the buildings suffered damage for which the manufacturer would be held liable. Thus, admission of the testimony was not prejudicial to the insurers.

(29) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Property Damage--Asbestos Contamination of Buildings as Physical Injury--Release of Asbestos Fibers.

The contamination of a building from the release of asbestos fibers into the building's air supply and onto the building surfaces constitutes a physical injury and, hence, property damage covered under a liability insurance policy. Thus, in an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court properly ruled that the manufacturer's liability policies covered claims for the release of asbestos fibers into buildings, regardless of the amount of fibers that were actually released. Whether and to what extent a release of asbestos fibers had damaged the buildings were factual issues for the *22 underlying building cases and, for purposes of determining the insurance coverage for the property damage claims, it had to be assumed that damage had occurred for which the manufacturer would be liable. As long as it was to be held liable for the release of asbestos fibers, whatever the level of contamination, the injury was a physical injury covered by the insurance policies.

(30a, 30b) Insurance Contracts and Coverage § 79--Liability Insurance-- Risks Covered--Property Damage--Asbestos Contamination of Buildings as Physical Injury--Presence of Asbestos-containing Building Material.

The mere presence of asbestos-containing building material (ACBM) in a building constitutes a physical injury to the building and, hence, property damage covered under a liability insurance policy. Thus, in an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court properly ruled that the manufacturer's liability policies covered claims alleging that the mere presence of ACBM in buildings was a health hazard, even though there had been no releases

of fibers. If the manufacturer was to be held liable for the mere presence of ACBM, the injury to the buildings was a physical one and, hence, property damage covered by the policies. Whether ACBM had actually caused harm was a question for the underlying building cases and, for purposes of determining insurance coverage, it had to be assumed that the presence of ACBM constituted an injury to the buildings for which the manufacturer would be liable.

(31) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Property Damage--Asbestos Contamination of Buildings as Physical Injury--Presence of Asbestos-containing Building Material--As Physically Incorporated Into Building.

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, even if the underlying complaints in the building cases allege that the mere presence of asbestos-containing building material (ACBM) in buildings is a health hazard because of the potential for future releases of asbestos fibers, and there have been no releases of fibers, if the manufacturer is held liable for the mere presence of ACBM, the injury to the buildings is a physical one and, hence, property damage covered under a liability insurance policy. Once installed, the ACBM is physically linked with or physically incorporated into the building and, therefore, physically affects tangible property. The term "physical injury" covers a loss that results from physical contact, as when a *23 potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained, must be removed, at some cost, in order to prevent the danger from materializing.

(32) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Property Damage--Asbestos Contamination of Buildings as Physical Injury--Presence of Asbestos-containing Building Material--As Distinguished From Hazardous Waste Leaks.

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the physical incorporation of asbestos-containing building material into the buildings is distinguished from those cases

involving hazardous waste leaks or spills from containers. In those cases, the remedial costs incurred in cleaning up contaminated waste sites are covered by comprehensive general liability policies, but "prophylactic" costs--costs incurred in advance of any release of hazardous waste, to prevent threatened future pollution--are not incurred because of property damage. In contrast, in an asbestos case, because the potentially hazardous material is physically touching and linked with the building, and not merely contained within it, the injury is physical even without a release of toxic substances into the building's air supply.

(33) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Property Damage--Asbestos Contamination of Buildings as Physical Injury--Presence of Asbestos-containing Building Material--Rule That Physical Incorporation of Defective Product Into Another Constitutes Physical Harm to Whole--Applicability.

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage from the physical incorporation of asbestos-containing building material (ACBM) into buildings, the rule that physical incorporation of a defective product into another does not constitute property damage unless there is physical harm to the whole is not applicable. That rule is designed to limit the liability coverage of contractors against claims of defective materials or poor workmanship, for such claims are a commercial risk that is not passed on to the liability insurer. In an asbestos case, however, the manufacturer is facing liability not as a contractor but as a manufacturer or supplier of ACBM. The claims against the manufacturer go beyond allegations of defective work or materials and allege injury to other property.

(34) Insurance Contracts and Coverage § 79--Liability Insurance--Risks Covered--Property Damage--Asbestos Contamination of *24 Buildings as Physical Injury--Presence of Asbestos-containing Building Material--As Resulting Only in Economic Loss

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage from the physical incorporation of asbestos-containing building material (ACBM) into

buildings, the damages allegedly suffered by the building owners from the presence of ACBM cannot be considered solely economic losses. Diminished market value or abatement costs or costs of inspecting, assessing, and maintaining the in-place ACBM are not the "property damage." They are damages because of property damage, that is, they are the alternative measures of the physical injury to the building. The fact that the measure of damages is economic does not preclude a physical injury.

(35a, 35b) Insurance Contracts and Coverage § 127--Liability Insurance-- Declaratory Relief Action to Determine Coverage for Property Damage--Asbestos Contamination of Buildings as Physical Injury--Presence of Asbestos-containing Building Material--Evidence of Injuriousness--Relevancy.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, in which action some of the underlying claims against the manufacturer alleged that the mere presence of asbestos-containing building material (ACBM) in buildings was a health hazard, evidence introduced by the insurers to show that the mere presence of ACBM is not necessarily injurious had no bearing on the insurance coverage issue. That issue was separate and distinct from the question of the manufacturer's liability; whether ACBM had actually caused harm was a question for the underlying building cases and, for purposes of determining insurance coverage, it had to be assumed that the presence of ACBM constituted an injury to the buildings for which the manufacturer would be liable.

(36a, 36b) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Asbestos-related Property Damage.

In an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court properly adopted a multiple trigger approach in determining when damage occurred from asbestos-containing building material (ACBM) within the meaning of the manufacturer's liability insurance policies. The evidence indicated that, unlike bodily injuries caused by asbestos exposure, asbestos property

damage is not necessarily continuous. Rather, releases of asbestos fibers in buildings, if they occur at all, occur sporadically, as a result of episodic disturbances such as accidental striking, vandalism, water damage, and the like. Thus, under the multiple trigger approach, the insurer's indemnity obligations are triggered if it is shown that ACBM was installed in the buildings in question, that ACBM released fiber or material into the air or on surfaces of the buildings, or that settled releases of ACBM were disturbed and reentrained into the air, during any portion of the period that a liability policy was in effect.

(37a, 37b) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Distinction Between Asbestos-related Bodily Injuries and Asbestos-related Property Damage. Although the rule that liability insurance coverage is triggered when the injury actually occurred applies with respect to liability insurance for both asbestos-related bodily injuries and asbestos-related property damage, it is not illogical to apply different triggers of coverage for the two types of cases. The triggers are different because the injury to the human body upon inhalation of asbestos fibers is not the same as the injury to a building from the presence of asbestos-containing building material. In contrast to the continuous, progressive physiological process involved in the inhalation of asbestos, asbestos property damage is episodic, with measurable intervals between episodes, so that the process of injury cannot be deemed continuous.

(38) Insurance Contracts and Coverage § 132--Liability Insurance-- Declaratory Relief Action to Determine Coverage for Property Damage--Trial-- Questions of Law and Fact--Asbestos-related Property Damage as Occurring Continuously.

Whether asbestos-related property damage occurs continuously is a question of fact. Thus, in an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, in light of the trial court's factual finding that asbestos property damage is not always continuous, good reason existed for adopting a coverage trigger different from the continuous trigger adopted for asbestos-related bodily injuries.

(39a, 39b) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Asbestos-related Property DamageRelease and Reentrainment of Asbestos Fibers--Quantity of Fibers Released.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court did not err in *26 concluding that property damage happens at any time asbestos fiber or material is released from asbestos-containing building material into the air or onto surfaces of buildings, and when settled releases are disturbed and reentrained into the air, no matter how small the quantity of the released fibers. Thus, it was not necessary that "sufficiently appreciable" fibers be released in order to trigger coverage under the manufacturer's liability policies. For purposes of determining the insurance coverage for the property damage claims, it had to be assumed that damage had occurred for which the manufacturer would be liable. As long as it was to be held liable for contamination from the release of asbestos fibers, no matter what the level of contamination, the insurance policies provided coverage.

(40a,) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Asbestos-related Property DamageRelease and Reentrainment of Asbestos Fibers--Release of Fibers During Policy Period.

In an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court did not err in deciding that if the manufacturer was to be held liable for contamination of a building from released asbestos fibers, each of the manufacturer's liability policies was triggered if any part of the contamination damage, no matter how small the quantity of the released fibers, took place when the policy was in effect. Each release or reentrainment of asbestos fibers into the air contributes to the state of contamination of a building, and the total property damage may take place across several policy periods. Moreover, there was nothing in the manufacturer's policies to preclude coverage from being triggered simply because only a part of the total damage occurred

during any particular policy period. Thus, since property damage took place during several policy periods, the insurance coverage was triggered when any part of the damage-any release or reentrainment-took place.

(, 41b) Insurance Contracts and Coverage § 77--Liability Insurance-- Trigger of Coverage--Asbestos-related Property DamagePresence of Asbestos-containing Building Material--Installation as Only Trigger.

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, if the manufacturer is held liable for the mere presence of asbestos-containing building material (ACBM), and the potential for releases, without evidence of contamination of a building from released asbestos fibers, coverage under a liability policy would be triggered *27 only at the time ACBM was installed; it would not also be triggered by subsequent, incidental releases of asbestos fibers. This is so because any incidental releases that may have occurred during subsequent policy periods would not constitute damage for which the manufacturer could be held liable. Releases or reentrainments of asbestos fibers into the air during a policy period will trigger coverage only if the basis of the manufacturer's liability is contamination from released asbestos fibers.

(42) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Property Damage--Release and Reentrainment of Asbestos Fibers--Effect of Loss-in-progress Rule.

Triggering the coverage of an asbestos manufacturer's liability insurance policy for claims of asbestos-related property damage to buildings upon reentrainment of asbestos fibers into the air does not violate the loss-in-progress rule, since resuspension of settled fibers is a continuation of the loss that began when the fibers were released from the asbestos-containing building material. The loss-in-progress rule provides that an insurer can insure only against a contingent or unknown loss (*Ins. Code. §§ 22, 250*), and it does not apply if the damage was unknown or contingent at the time the policy was issued, even if the damage was inevitable. As long as the reentrainments were

contingent or unknown when the policy was issued, the loss-in-progress rule does not preclude coverage.

(43) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Property Damage--Installation of Asbestos-containing Building Material--As Event Causing Actual Injury.

The rule that, for purposes of determining liability insurance coverage for property damage, property damage occurs in the policy year in which a defective product is installed, rather than the policy year in which it fails or is replaced in anticipation of failure or causes the market value of the building to diminish, is applicable to asbestos products. Thus, in an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court did not err in selecting the installation of asbestos-containing building material (ACBM) as an event triggering coverage of the manufacturer's liability policies. Its decision fully conformed to the requirement that coverage must be triggered by the event causing the actual injury and not an earlier event that created the potential for future injury, since damage to the buildings was done as soon as the ACBM was installed, even *28 though the health hazards created by the asbestos did not come to light until a later date.

(44) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Property Damage--Release and Reentrainment of Asbestos Fibers--Installation as Proper Trigger.

With respect to the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, if the manufacturer is held liable for contamination of a building from the release of asbestos fibers into the air, coverage is triggered at the time of installation of asbestos-containing building material (ACBM) as well as at the time of release. The fact that the mere presence of ACBM, by itself, might not give rise to liability for property damage is of no consequence if the insured has, in fact, been held liable for property damage. The installation of ACBM obviously contributes to the state of contamination of the building; it is a part of the overall property damage for which the insured is liable.

(45) Insurance Contracts and Coverage § 77--Liability Insurance--Trigger of Coverage--Asbestos-related Property Damage--Manifestation of Loss.

The rule, applicable in first party liability insurance cases, that property damage occurs when the loss is first manifested, is not applicable in a third party liability case involving property damage from asbestos. There is nothing in the language of comprehensive general liability policies to require as a condition of coverage that the damage be discovered at any point in time. Also, to apply the manifestation rule to third party liability policies would unfairly transform them into "claims made" policies and would raise the problem of who must discover the damage, since the insured's discovery may not occur until long after the injured party's discovery. The injury to a building from asbestos first occurs when asbestos-containing building material (ACBM) is installed and, since that date is ascertainable, there is no need for a fictional date of injury. Moreover, a manifestation trigger would place the entire burden for property damage claims on those insurers who were on the risk in later years, when the dangers from ACBM were perceived.

(46a, 46b) Insurance Contracts and Coverage § 70--Accident Insurance--Risks Covered--Asbestos-related Property Damage--Release of Asbestos Fibers as Sudden Event and as Trigger of Coverage.

In an action to determine the insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings, the trial court properly ruled that accident insurance policies *29 covered such damage from asbestos-containing building material. The release and reentrainment of asbestos fibers into the air qualified as sudden events so as to constitute accidents within the meaning of the policies and such releases and reentrainments, not the manifestation of loss, triggered coverage under the policies. The property damage was the contamination of the buildings from the introduction of asbestos fibers into the air supplies and onto building surfaces, and each release or reentrainment contributed to the state of contamination and formed a part of the overall property damage. Thus, insofar as the manufacturer was to be held liable for contamination of a building from released asbestos fibers, the policies were triggered if any part of the

contamination damage took place when the policies were in effect.

(47) Insurance Contracts and Coverage § 70--Accident Insurance--Risks--What Constitutes "Accident"--Necessity for Suddenness.

Although in ordinary language the word "accident" carries the meaning of unexpected and unintended, an insurance policy providing coverage for property damage caused by accident covers only unexpected and unintended events that are also sudden.

(48) Insurance Contracts and Coverage § 117--Liability Insurance--Apportionment of Liability--Asbestos-related Property Damage--Obligation of Policyholder to Share Pro Rata in Costs for Uninsured or Self-insured Periods.

In an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, the trial court correctly concluded that the manufacturer was not obligated to share pro rata in indemnification or defense costs because of any uninsured or self-insured periods during which there was property damage. Once one of the manufacturer's liability policies was triggered, the policy obligated the insurer to pay "all sums" that the manufacturer became legally obligated to pay as damages because of property damage during the policy period (up to the policy limits), not just for the part of the damage that occurred during the policy period. Moreover, the apportionment of the liability of multiple insurers on a single claim, pursuant to "other insurance" provisions, has no bearing on the obligations of the insurers to the insured.

(49) Insurance Contracts and Coverage § 106--Extent of Liability of Insurer--Liability Insurance--Asbestos-related Property Damage--Scope of Coverage as Dependent on Continuous Nature of Damage or Continuous Trigger.

The scope of the liability insurance *30 coverage of an asbestos manufacturer for claims of asbestos-related property damage to buildings does not depend on the continuous, indivisible nature of the damage or the application of a continuous trigger of coverage, and an insurer has an obligation to respond in full when several successive policies are triggered by continual, episodic

property damage. Thus, in an action to determine such liability, each release or reentrainment of asbestos fibers into the air, along with the installation of the asbestos-containing building material (ACBM), formed a part of the unitary property damage for which the manufacturer was alleged to be liable, and as long as there was property damage to a building during a policy period, whether from installation of ACBM or from releases or reentrainments of asbestos fibers from existing ACBM, and as long as the manufacturer would have to pay damages as a result of that property damage, the policies provided coverage (up to the policy limits) for whatever damages it would have to pay.

(50a, 50b) Insurance Contracts and Coverage § 106--Extent of Liability of Insurer--Duty to Indemnify--As Determinable in Advance of Insured's Underlying Liability--Conditional Declaration of Duty. In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, the trial court did not err in declaring the insurers' duty to indemnify, since the declaration recognized the prematurity of the manufacturer's request that it be made and was conditioned on the manufacturer being held liable for the damages alleged in the underlying complaints. Moreover, the manufacturer was not required to prove that its liability would necessarily result from covered property damage. For purposes of deciding the coverage dispute, the trial court had properly looked to the allegations of the underlying complaints and had assumed the manufacturer would be held liable for the damages alleged therein. The underlying complaints alleged liability arising either from the release of asbestos fibers or from the mere installation of asbestos-containing building material, and the manufacturer was not required to prove more.

(51) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Duty to Defend Insured--As Distinguished From Duty to Indemnify.

The duty of a liability insurer to indemnify the insured is different from the duty to defend the insured. The duty to defend arises when there is a potential for indemnity, and it may exist even when coverage is in doubt and ultimately does not develop. The duty to *31

indemnify, on the other hand, arises when the insured's underlying liability is established (Civ. Code. § 2778, subd. (1)), and the duty to indemnify on a particular claim is determined by the actual basis of liability imposed on the insured. Although an insurer may have a duty to defend, it may ultimately have no duty to indemnify-either because no damages were awarded or because the actual judgment was for damages not covered by the policy.

(52) Insurance Contracts and Coverage § 106--Extent of Liability of Insurer--Duty to Indemnify--As Determinable in Advance of Insured's Underlying Liability--Authority of Court in Declaratory Relief Action.

The question whether a liability insurer has a duty to indemnify the insured on a particular claim is ripe for consideration only if the insured has already incurred liability in the underlying action. Thus, in a declaratory relief action held before the insured's liability has been established, the trial court cannot determine the insurer's indemnity obligation; it must limit its declaration to whether the claim is covered by the policy.

(53) Insurance Contracts and Coverage § 107--Extent of Liability of Insurer--Duty to Defend Insured--As Based on Conclusory Allegations in Underlying Complaint--Asbestos-related Property Damage.

In an action to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, allegations of damages from the presence of asbestos-containing building material (ACBM) in buildings, which were made in the underlying complaints against the manufacturer, were sufficient to show a potential for coverage and to give rise to a duty on the part of the liability insurers to defend the manufacturer. As a general rule, conclusory allegations in an underlying complaint against an insured do not give rise to a duty on the part of its liability insurer to defend, but, since the mere presence of ACBM in a building constitutes physical injury to tangible property, even though there have not yet been any releases of asbestos fibers, the allegations against the manufacturer were not conclusory.

(54) Insurance Contracts and Coverage § 80--Liability Insurance--Risks Covered--Exclusions--Business Risk--Time for Determining Applicability--Asbestos-related Property Damage.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, the trial court did not err in concluding that none of the *32 business risk exclusions in the liability policies applied to the underlying asbestos building cases. A decision on the applicability of the exclusions did not need to await a determination of the actual basis for the manufacturer's liability, since, for purposes of determining whether the property damage claims were covered or excluded under the policies, it had to be assumed that the manufacturer would be held liable for the damages alleged in the complaints in the underlying cases.

(55) Insurance Contracts and Coverage § 80--Liability Insurance--Risks Covered--Exclusions--Business Risk--Damage to Insured's Own Products--Asbestos-related Property Damage.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, the trial court did not err in concluding that the exclusion in the liability policies for damage to the insured's own products was not applicable. The underlying asbestos building cases alleged damage to the remainder of the buildings, not damage to the asbestos-containing building material (ACBM), and, for purposes of interpreting the language of the policies, it had to be assumed that the buildings themselves had been injured by the ACBM. Thus, insofar as the manufacturer was to be held liable for the claimed damage to the buildings, the "own products" exclusion did not bar coverage.

[Products liability insurance coverage as extending only to product-caused injury to person or other property, as distinguished from mere product failure, note, 91 A.L.R.3d 921.]

(56) Insurance Contracts and Coverage § 80--Liability Insurance--Risks Covered--Exclusions--Business Risk--Product Recall--Asbestos-related Property Damage.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer

for claims of asbestos-related property damage, the trial court did not err in concluding that the exclusion in the liability policies for product recall was not applicable. The exclusion applies only to the cost of withdrawing a product due to an apprehended danger but does not apply to actual damage caused by the product itself. Even though the complaints in the underlying asbestos building cases alleged that the mere presence of asbestos-containing building material (ACBM) posed a potential health risk, the removal of ACBM from the buildings was not based merely on an apprehension of danger. The complaints also alleged damage to the buildings from the release of asbestos fibers. Moreover, it had to be assumed that actual damage to the buildings had *33 resulted from the mere presence of ACBM for which the manufacturer would be held liable. Thus, insofar as the manufacturer was ultimately to be held liable for such damage, the exclusion did not bar coverage.

[Validity and construction of "sistership" clause of products liability insurance policy excepting from coverage cost of product recall or withdrawal of product from market, note, 32 A.L.R.4th 630.]

(57a, 57b) Insurance Contracts and Coverage § 80--Liability Insurance--Risks Covered--Exclusions--Business Risk--Design Defect--Active Malfunctioning Exception--Asbestos-related Property Damage.

In an action for declaratory relief to determine the liability insurance coverage of an asbestos manufacturer for claims of asbestos-related property damage, the trial court did not err in concluding that the active malfunctioning exception to the exclusion in the liability policies for design defect was applicable so as to make the exclusion itself inapplicable. The exception was applicable not only with respect to the allegations in the underlying asbestos building cases that released asbestos fibers had contaminated buildings, but also with respect to the allegations of damages from the mere presence of asbestos-containing building material (ACBM). It had to be assumed for purposes of deciding coverage that the presence of ACBM was injurious and would be the basis of the manufacturer's liability to the building owners. And, since injury from the presence of ACBM qualified as a physical injury under the policies, insofar as the manufacturer was to be held liable for injuries from the presence of ACBM, the design defect

exclusion was inapplicable.

(58) Insurance Contracts and Coverage § 80--Liability Insurance--Risks Covered--Exclusions--Business Risk--Design Defect--Active Malfunctioning Exception--Nature.

Under the "active malfunctioning" exception to the exclusion in liability insurance policies for design defect, design errors resulting in mere passive failure to discharge an intended function are regarded as the insured's normal business risk and are excluded from coverage, while design errors themselves causing some positive² or active harm deemed extraordinary in the insured's business are covered. Thus, the policy is not intended to cover liability resulting from the faulty design of an insecticide that fails to kill insects, a hair tonic that fails to prevent baldness, or a rust inhibitor that fails to inhibit rust. On the other hand, the active malfunctioning exception would apply to provide coverage for liability resulting from an insecticide that harms crops to which it is applied, a *34 hair tonic that causes a scalp rash, or a rust inhibitor that corrodes a radiator to which it is added.

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DOSSEE, J.

This appeal raises a number of complex questions concerning insurance coverage for claims of asbestos-related bodily injuries and property damage. In the proceedings below, separate declaratory relief actions *35 and related cross-actions involving three asbestos manufacturers—Armstrong World Industries, Inc., Fibreboard Corporation, and GAF Corporation—and their various insurance carriers were coordinated and tried in six separate phases over a five-year period. ^{FN1}

FN1 Phase I involved the existence and terms of missing insurance policies. Phase II concerned the application of exclusions for “asbestosis.” Phase III involved the trigger and scope of coverage for bodily injury claims, the meaning of the “neither expected nor intended” language contained in some of the policies, and the defense obligations of various insurers under their policies. Phase IV involved various coverage issues not resolved in phase III. Phase V concerned coverage for property damage claims, and phase VI involved issues of damages, bad faith, and contribution claims.

No issues have been raised on appeal concerning phase II. The appeals pertaining to phase VI have been dismissed.

On appeal, the parties submitted briefs on three major “Issue Groups,” and our opinion follows that

organization. First, in the unpublished portion of the opinion, we discuss the issues of Issue Group I pertaining to a lost insurance policy. In Issue Group II we discuss the issues concerning the bodily injury claims: trigger and scope of coverage; the application of the phrase “neither expected nor intended”; the liability of premerger insurers; the effect of the Wellington Agreement. In Issue Group III, we discuss the issues surrounding the property damage claims: coverage for property damage; trigger and scope of coverage; the duties to defend and indemnify; and, in the unpublished portion of the opinion, the “drop-down” obligation of an INA-Armstrong excess policy.

After this appeal was submitted for decision, we granted a motion of certain parties to sever issues unique to them in order to facilitate a pending settlement. Accordingly, we have deferred decision upon issues pertaining to a lost Fibreboard-Pacific Indemnity insurance policy; the number of occurrences; the effect of the Fibreboard-Continental manuscript policy; and the application of the pollution exclusion clause.

Our previous opinion, filed on November 15, 1993, was vacated by the Supreme Court, and the matter was remanded to us for reconsideration in light of *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645 [42 Cal.Rptr.2d 324, 897 P.2d 1].

Guiding Principles

At the outset, we set forth the principles guiding our review. (1a) Interpretation of an insurance policy is primarily a judicial function. When the trial court's interpretation did not depend upon conflicting extrinsic evidence, the reviewing court makes its own independent determination of the *36 policy's meaning. (*Masonite Corp. v. Great American Surplus Lines Ins. Co.* (1990) 224 Cal.App.3d 912, 916 [274 Cal.Rptr. 206].)

In interpreting an insurance contract, the court's fundamental goal is to give effect to the mutual intention of the parties. Such intent is inferred, if possible, solely from the written provisions of the

contract. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822 [274 Cal.Rptr. 820, 799 P.2d 1253].) "If contractual language is clear and explicit, it governs." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal.Rptr.2d 538, 833 P.2d 545].) Words in an insurance policy are to be interpreted as a layperson would interpret them, in their "ordinary and popular sense." (*AIU, supra*, 51 Cal.3d at p. 822; *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 807 [180 Cal.Rptr. 628, 640 P.2d 764].) A policy should not be read as it might be analyzed by an attorney or an insurance expert. (*Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 271 [203 Cal.Rptr. 672].) This is so even if the policyholder is a sophisticated insured. (*AIU, supra*, 51 Cal.3d at p. 823.)

If particular policy language is ambiguous, it is to be resolved by interpreting the ambiguous provisions in accordance with the insured's objectively reasonable expectations. (*Bank of the West v. Superior Court, supra*, 2 Cal.4th at pp. 1264-1265.) Only if application of this rule does not resolve the ambiguity will the policy provision be construed in favor of the insured. (*Id.* at p. 1265.)

Issue Group I: Lost Insurance Policy ^{FN*}

FN* See footnote, *ante*, page 1.

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Issue Group II: Bodily Injury Claims

A. Trigger and Scope of Coverage

Phase III of the coordinated proceedings below concerned the rights and obligations of insurers to indemnify and defend the manufacturers or distributors of asbestos or asbestos products that are, or have been, defendants in tens of thousands of lawsuits brought by persons who claim to have developed disabling and often fatal asbestos-related diseases as a result of exposure to asbestos products many years ago. It bears

emphasizing that the issues do not pertain to the legal rights of those suffering from asbestos-related diseases to recover damages from asbestos manufacturers. *37

The principal issues before the trial court concerned the trigger and scope of coverage under the comprehensive general liability policies for asbestos-related bodily injury claims: What event triggers an insurer's indemnification and defense obligations? And to what extent must policyholders share in the indemnity and defense costs?

In order to resolve these issues, the trial court heard extensive medical testimony and took documentary evidence concerning the pathogenesis of asbestos-related conditions. The trial court artfully described the insidious nature of asbestos: "Asbestos is a naturally occurring mineral which has long been known to man. Its principal use has been as an insulator against heat because it is incombustible in air. It has been used to insulate against heat since approximately 1866 and has been commercially produced since at least 1874. [Citation.] The health problem caused by asbestos is that when it is mined or used in the manufacturing process it produces quantities of asbestos dust composed of millions of tiny fibers which may be inhaled into the body by those working in and around it. Those fibers that avoid the body's initial natural defense mechanisms are deposited in the human lung and remain there. The very quality that has made asbestos useful for so long, its indestructibility, also accounts for the problems that result in asbestos-related disease."

The Medical Evidence

We adopt the trial court's summary of the medical evidence: "Several diseases may result from exposure to asbestos. The most prevalent are asbestosis, bronchogenic carcinoma, and mesothelioma. Asbestosis is a form of lung disease characterized by the permanent deposition of asbestos fibers in the lungs and the resultant scarring of the lungs' alveoli (air sacs) and interstitium (the membrane through which gas exchange occurs between the alveoli and the blood). In the context of asbestos inhalation, bronchogenic carcinoma

(lung cancer) refers to a malignant condition of cells which arises as the result of tissue scarring caused by asbestos. Mesothelioma is, similarly, a cancerous condition. It arises at the site of asbestos-caused scarring within the visceral pleura (the lining which covers the outer aspect of the lung) or the peritoneum (the lining of the abdominal cavity).

“While the disease processes are distinct, they share at least one characteristic which makes this Court's interpretation of the policy language universally applicable to these diseases, as well as to other conditions which may arise from inhaling asbestos. That common element is that the diseases and the associated pathological processes occur because of the fibrosis induced by the inhaled asbestos. *38

“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.

“Fibrosis within the lungs occurs as part of the body's reaction to the inhalation of foreign particulate matter. The indestructible nature of asbestos fibers which helped make asbestos such an attractive construction material makes it equally as detrimental to the body once inhaled. Once deposited in the lungs, the fibers tend to remain in the alveolar region and the lungs' normal clearance mechanisms are ineffective.

“One clearance mechanism-and a key to the fibrotic process-involves a specialized form of white blood cell known as a macrophage. These cells naturally respond to foreign matter within the body and attempt to eliminate this matter from the body by engulfing (i.e., phagocytosing) and digesting the matter with their own secretions and enzymes. This process occurs on the

cellular level, but is frustrated and unsuccessful in the context of asbestos fibers because of the macrophages' inability effectively to engulf and digest the fibers.

“This, in turn, leads to a further and sustained inflammatory process. The inflammation becomes chronic as more macrophages and other white blood cells are attracted to the site of the asbestos fibers caused by the release of certain chemical substances by the macrophages which responded initially to the fibers. More macrophages are summoned, further frustrated phagocytosis occurs, and the cycle continues.

“Another result of the inflammation is that other cells, called fibroblasts, are summoned to the site of inflammation by a different chemical secretion (fibronectin) from the macrophages. Fibronectin not only attracts these fibroblasts, but also causes them to proliferate. The fibroblasts, once summoned, produce the collagen in the alveolar walls and the interstitium which constitutes fibrosis.

“This process-inhalation of asbestos fibers, the inflammatory reaction, and the resulting fibrosis-characterizes the disease asbestosis. When the fibrosis is extensive enough, i.e., when enough alveolar/capillary units have *39 become fibrosed, clinical symptoms of asbestosis become apparent. 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.

“Bronchogenic carcinoma and mesothelioma arise from a malignant transformation of cells. The asbestos fibers and related fibrosis do not directly cause the malignant transformation but, rather, enhance the potential of other cancerous agents to cause such a transformation. The transformation occurs at the site of the fibrosis and the cancer develops therefrom.”

1. *Trigger of Coverage*

The relevant language of the standard form comprehensive general liability (CGL) policy reads as

follows: "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 ... caused by an occurrence [¶] 'Bodily injury' means bodily injury, sickness, or disease sustained by any person. [¶] 'Occurrence' means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury ... neither expected nor intended from the standpoint of the insured." ^{FN8}

FN8 The trial court found that for purposes of this trigger issue the language contained in the various policies at issue is functionally identical. The trial court also found the meaning of the policy language to be plain and unambiguous in requiring indemnification and defense when any one of three distinct conditions-bodily injury, sickness or disease-is present during the policy period.

(2) A recurring problem in interpreting standard CGL policies that provide coverage for injuries "caused by an occurrence" is determining what has come to be called the "trigger of coverage"-that is, the operative event which activates the insurer's defense and indemnity obligations. As the Supreme Court recently explained, the word "trigger" is not found in the CGL policies themselves, nor does the Insurance Code define "trigger of coverage." Instead, "trigger of coverage" is a term of convenience used to describe what must happen in the policy period to give rise to insurance coverage. (*Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal.4th 645, 655, fn. 2.)

Case law has long established that the operative event triggering coverage is the injury. Because occurrence policies (as distinguished from claims-made policies) cover occurrences that result in injury "during the policy period," the courts in California and elsewhere have concluded that the *40 policies are invoked, or "triggered," when the injury takes place. (*American Cyanamid Co. v. American Home Assurance Co.* (1994) 30 Cal.App.4th 969, 979 [35 Cal.Rptr.2d 920]; *Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1017 [247 Cal.Rptr. 638]; *State Farm Mut. Auto. Ins. Co. v. Longden* (1987) 197

Cal.App.3d 226, 231 [242 Cal.Rptr. 726]; *Schrillo Co. v. Hartford Accident & Indemnity Co.* (1986) 181 Cal.App.3d 766, 773 [226 Cal.Rptr. 717]; *Atlantic Mutual Ins. Co. v. Travelers Ins. Co.* (1983) 147 Cal.App.3d 1054, 1056 [195 Cal.Rptr. 476]; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, 647 [148 Cal.Rptr. 80]; *Remmer v. Glens Falls Indem. Co.* (1956) 140 Cal.App.2d 84, 88 [295 P.2d 19]; see also *Employers Casualty Co. v. Northwestern Nat. Ins. Group* (1980) 109 Cal.App.3d 462, 468-469 [167 Cal.Rptr. 296] disapproved on other grounds in *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1137 [275 Cal.Rptr. 797, 800 P.2d 1227]; *Chamberlin v. Smith* (1977) 72 Cal.App.3d 835 [140 Cal.Rptr. 493]; 7A Appleman, Insurance Law & Practice (rev. ed. 1979) § 4501.03, p. 256; 11 Couch on Insurance (2d ed. 1982) § 44:8, p. 193; 43 Am.Jur.2d (1982 rev.) Insurance, § 243, pp. 323-324; Annot. (1985) 37 A.L.R.4th 382.) ^{FN9}

FN9 This general rule has not been followed where the policy language was substantially distinguishable. (*Insurance Co. of North America v. Sam Harris Constr. Co.* (1978) 22 Cal.3d 409, 412 [149 Cal.Rptr. 292, 583 P.2d 1335] ["occurrence" not defined in policy; coverage held triggered by act of negligence committed within policy period]; *Harbor Ins. Co. v. Central National Ins. Co.* (1985) 165 Cal.App.3d 1029, 1035 [211 Cal.Rptr. 902] [policy covered offenses committed during policy period; held, no coverage when offense committed before policy took effect].)

In *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal.4th 645, 669-670, the Supreme Court reaffirmed this rule and applied it for the first time to a case of continuous or progressively deteriorating injury. The court held that when the bodily injury or property damage continues throughout successive policy periods, all of the insured's policies in effect during those periods are triggered. (*Id.* at pp. 685-689.) Coverage is not limited to the policy in effect at the time of the precipitating event or conditions. (*Id.* at pp. 669, 686.) Nor is coverage cut off once the injury or damage begins or becomes manifest. (See 10 Cal.4th at p. 677.

fn. 17; *id.*, at pp. 680, 686.)

Montrose involved property damage and human deaths resulting from the insured's disposal of toxic or hazardous wastes. The time of the onset of the damage and injury was not in dispute; the underlying complaints specified, in one set of lawsuits, that the bodily injury and property damage commenced in 1956 and extended to the present, and in a second set of lawsuits, that the property contamination began in 1947 and continued throughout periods (1982-1986) when the policies of the insurer (Admiral) were in *41 effect. (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at pp. 656-657, 659.)

In contrast, the timing of the commencement of the injuries here is not so definite. As the trial court explained, asbestos-related diseases are "insidious diseases with delayed manifestations. The original cause of each disease is the inhalation of asbestos fibers, but a victim is generally unaware of the development of such a disease until the victim or a physician detects signs or symptoms many years after the causative exposure." Thus, the key question before the trial court in phase III with regard to the trigger of coverage was the point in time at which the injury takes place.

a. Precedent Cases

The courts have developed several different approaches to determine when bodily injury occurs in asbestos-related bodily injury cases.^{FN10} (See *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th 645, 673-685; Annot. (1993) 14 A.L.R.5th 695.)

FN10 Throughout the briefs in this appeal-in Issue Group II no less than in other issue groups-certain parties have cited and relied upon unpublished opinions, in violation of rule 977 of the California Rules of Court. We emphasize that such citations are inappropriate, and we have paid them no heed. (*Casella v. City of Morgan Hill* (1991) 230 Cal.App.3d 43, 58 [280 Cal.Rptr. 876], cert.

den. 503 U.S. 983 [118 L.Ed.2d 387, 112 S.Ct. 1665].)

1. Under the *exposure theory*, bodily injury is deemed to commence upon the claimant's first exposure to asbestos, upon the claimant's initial inhalation of asbestos fibers. (E.g., *Ins. Co. North America v. Forty-Eight Insulations* (6th Cir. 1980) 633 F.2d 1212, 1218-1220, clarified 657 F.2d 814, cert. den. (1981) 454 U.S. 1109 [70 L.Ed.2d 650, 102 S.Ct. 686]; *Commercial Union Ins. Co. v. Sepco Corp.* (11th Cir. 1985) 765 F.2d 1543; *Porter v. American Optical Corp.* (5th Cir. 1981) 641 F.2d 1128, cert. den. *sub nom. Aetna Cas. & Surety Co. v. Porter* (1981) 454 U.S. 1109 [70 L.Ed.2d 650, 102 S.Ct. 686]; *Cole v. Celotex Corp.* (La. 1992) 599 So.2d 1058, 1076-1077.)

2. Pursuant to the *manifestation theory*, no bodily injury occurs, and thus no insurance coverage is triggered, until the "asbestos-related disease became reasonably capable of medical diagnosis." (*Eagle-Picher Industries, Inc. v. Liberty Mut. Ins.* (1st Cir. 1982) 682 F.2d 12, 25, cert. den. (1983) 460 U.S. 1028 [75 L.Ed.2d 500, 103 S.Ct. 1279].) In adopting the manifestation theory, the *Eagle-Picher* court reasoned that the language of the policies distinguishes between the event which causes injury-the accident or exposure-and the resulting injury or disease. "[I]t is the resulting injury, not the *42 exposure, which must take place 'during the policy period' in order to trigger coverage" (682 F.2d at p. 19.)

3. In *Keene Corp. v. Ins. Co. of North America* (D.C. Cir. 1981) 667 F.2d 1034 [215 App.D.C. 156], certiorari denied (1982) 455 U.S. 1007 [71 L.Ed.2d 875, 102 S.Ct. 1644], the court adopted a theory of *continuous trigger* or "triple triggers" whereby the asbestos injury is deemed a continuous process and all policies are triggered on a claim if they were in effect either during the exposure period, or at the time of manifestation, or at any time in between (the latency or "exposure-in-residence" period).^{FN11} (See also *ACandS, Inc. v. Aetna Cas. and Sur. Co.* (3d Cir. 1985) 764 F.2d 968.)

FN11 Yet another approach-a theory of

“double triggers”-was taken by the Illinois Supreme Court in Zurich Ins. Co. v. Raymark Industries (1987) 118 Ill.2d 23 [112 Ill.Dec. 684, 514 N.E.2d 150]. There, the trial court found that “injury” occurs when asbestos fibers are inhaled and retained in the lung, i.e., when the claimant is exposed to asbestos; “disease” occurs when an asbestos-related disease has progressed to the point that it significantly impairs the lungs’ function and is thereby capable of clinical detection and diagnosis, but between those two points, after exposure to asbestos ceases and before an asbestos-related disease becomes diagnosable, there is no continuous injury. The court based this conclusion on the expert testimony that asbestos-related disease may or may not progress during periods of nonexposure. (514 N.E.2d at pp. 160-161.) In addition, the court found that “sickness” may take place in the period before clinical manifestation of the disease; whether and when a claimant suffered sickness must be determined on a case-by-case basis. The Illinois Supreme Court upheld this approach as consistent with the plain and unambiguous language of the policies.

4. Under the *injury-in-fact* rule, coverage is triggered when the actual injury is shown, retroactively, to have occurred. (*Abex Corp. v. Maryland Cas. Co.* (D.C. Cir. 1986) 790 F.2d 119 [252 App.D.C. 297] [asbestos]; *American Home Products Corp. v. Liberty Mut. Ins.* (2d Cir. 1984) 748 F.2d 760 [pharmaceuticals]; *Maryland Cas. Co. v. W.R. Grace & Co.* (S.D.N.Y. 1991) 794 F.Supp. 1206, 1215 [asbestos]; *Aetna Cas. & Sur. Co. v. Abbott Lab., Inc.* (D.Conn. 1986) 636 F.Supp. 546, 548-550 [DES].)

Like the manifestation theory, the *injury-in-fact* approach holds that mere exposure to asbestos during the policy period is not enough to trigger coverage: “The plain language of the definition of ‘occurrence’ used in the CGL policy requires exposure that ‘results, during the policy period, in bodily injury’ in order for an insurer to be obligated to indemnify the insured. The unambiguous meaning of these words is that an *injury*-and not mere exposure-must result *during the*

policy period. The CGL policies expressly distinguish exposure from injury; to equate the two ... is to ignore this distinction. Any argument that mere exposure-without injury-triggers liability is simply unsound linguistically.” (*Abex Corp. v. Maryland Cas. Co.*, *supra*, 790 F.2d at p. 127, italics in original; see also *American Home Products Corp. v. Liberty Mut. Ins.*, *supra*, 748 F.2d at p. 764.) *43

But in contrast to the manifestation trigger, the *injury-in-fact* approach acknowledges that injury may occur before the injury has become apparent. Under this approach, coverage is triggered by “ ‘a real but undiscovered injury, proved in retrospect to have existed at the relevant time ... irrespective of the time the injury became [diagnosable].’ ” (*American Home Products Corp. v. Liberty Mut. Ins.*, *supra*, 748 F.2d at p. 766.) That is, after an injury has been diagnosed, it may be inferred, from the nature of the gestation period and from the stage of the illness, that the harm actually began sometime earlier. (*Id.* at p. 765.)

(3) As mentioned above, the California Supreme Court, after reviewing the various judicially recognized triggers, has concluded that a continuous trigger should be applied to claims of continuous or progressively deteriorating damage or injury. (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th 645.) Yet, the *Montrose* court explicitly recognized that an *injury-in-fact* analysis is not inconsistent with a continuous trigger: “In the context of continuous or progressively deteriorating injuries, the *injury-in-fact* trigger, like the continuous injury trigger, affords coverage for continuing or progressive injuries occurring during successive policy periods subsequent to the established date of the initial *injury-in-fact*.” (*Id.* at p. 676.) That is, the continuous trigger pertains to the duration of coverage, providing coverage throughout successive policy periods. The *injury-in-fact* trigger establishes the onset of the injury, to determine when coverage begins. (See *Stonewall Ins. Co. v. Asbestos Claims Management* (2d Cir. 1995) 73 F.3d 1178, 1194-1197.)

b. *The Trial Court's Decision*

Based upon the extensive medical evidence, the trial court found "that bodily injury occurs during the exposure period, that it continues to occur during the latency period, even in the absence of further exposure, and that it continues to occur past the manifestation point, accompanied by sickness and disease, until the claimant's death from the disease or other causes." Accordingly, the court adopted a continuous trigger: "[A]ll of a policyholder's policies in effect from first exposure to asbestos or asbestos-containing products until date of death or date of claim, whichever occurs first, are triggered with respect to an asbestos-related bodily injury claim." ^{FN12}

FN12 The trial court further concluded that once a claim is filed by a living claimant the claimant's bodily injury is no longer an unknown event and, accordingly, under the loss-in-progress rule (Ins. Code, §§ 22, 250) policies beginning after the claim is filed are not triggered. This aspect of the trial court's decision is erroneous, as the Supreme Court has now clarified that as long as the insured's liability remains uncertain the loss-in-progress rule will not bar coverage. (Montrose Chemical Corp. v. Admiral Ins. Co., supra, 10 Cal.4th at pp. 689-693.) However, because the policyholders have not challenged the trial court's trigger decision, the error is waived.

Yet, although the trial court concluded that a continuous trigger should apply, the court reached that conclusion through an injury-in-fact analysis. *44 Unlike the court in *Keene, supra*, which deemed asbestos injury to be continuous, the trial court here relied upon medical evidence to make factual findings on the physiological processes that actually occur upon inhalation of asbestos fibers and continue until death. ^{FN13}

FN13 The trial court found as follows: "The Court determines that regardless of which terms the medical experts use to describe the physiological processes associated with the inhalation of asbestos, the medical evidence establishes that these processes impair the gas

exchange function of the lung cells and tissue. The Court finds that these processes begin almost immediately upon the inhalation and deposition of asbestos fibers into the lung, and slowly and continuously impair new portions of lung tissue throughout one's life, even after exposure to asbestos ceases. This continuing process could properly be termed 'progression,' with the understanding that this refers to progressive involvement of new cells and tissue and constitutes new injury to the cells, tissue and body.

"The issue concerning progressive involvement of new tissue during the latency period was one of the most vigorously contested at trial. Admittedly, it was not conclusively established that every person exposed to asbestos experiences such progression. However, the case before this Court concerns coverage for only those individuals who present asbestos-related claims against the manufacturers for which the manufacturers seek indemnity from their insurers. Even within this group of individuals, it is impossible to say with absolute certainty whether all or any particular percentage of these individuals continued to develop asbestos-related injury in each and every policy period following cessation of exposure and preceding manifestation.

"Such certainty and universality are not required, however, for the Court to make the foregoing determinations. More than sufficient evidence was presented to enable the Court to determine that among individuals who present claims for asbestos-related injury and/or disease, the injurious physiological processes associated with the inhalation of asbestos continue to occur from initial exposure, after cessation of exposure, and throughout those individuals' lives.

"This determination is amply and convincingly supported by the record. The non-biodegradable nature of the fibers and their continued retention in the lungs elicit a sustained response by the body's cellular defense mechanisms. Animal studies demonstrate such progression in more detail than is possible by medically ethical studies of humans and can be extrapolated to the human experience. Clinical diagnostic tools such as serial x-rays and lung function tests, though relatively crude in their ability to measure progression, have also confirmed such progression."

In contrasting its decision with the decision in *Zurich Ins. Co. v. Raymark Industries*, *supra*, 118 Ill.2d 23 [514 N.E.2d 150], the trial court noted that the *Zurich* trial court had “concluded from the medical evidence that injury does not always occur in the absence of exposure. (See *id.*, 514 N.E.2d at pp. 160-161.) This conclusion differs from that reached by this Court.”

In rejecting the “exposure theory,” the trial court found as follows: “[A]lthough this Court agrees with the exposure theorists that ‘bodily injury’ occurs nearly simultaneously with inhalation, and therefore throughout the *45 exposure period, this Court finds that new and additional ‘bodily injury’ continues to occur even past the cessation of exposure”

Further, in comparing its decision with that of *American Home Prod. v. Liberty Mut. Ins. Co* (S.D.N.Y. 1983) 565 F.Supp. 1485 affirmed as modified (2d Cir. 1984) 748 F.2d 760 (*AHP*), the trial court noted that the *AHP* court had declined to make a general declaration that every exposure to any of the drugs at issue causes injury and therefore triggers coverage. But the trial court found it could do so with respect to asbestos: “This Court, however, has received evidence which supports such a ‘general declaration’ as to when injury occurs, and has applied it generally to all claimants who suffer from asbestos-related ‘bodily injury.’” The trial court explained that “[t]he *AHP* decision, as modified, provides that coverage is triggered by ‘a real but undiscovered injury, proved in retrospect to have existed at the relevant time.’ (*Supra*, 748 F.2d at p. 766.) This Court simply proceeds one step further in its analysis, and applies the ‘injury in fact’ concept to the asbestos medical evidence, thereby establishing in retrospect that undiscovered injury existed during the asbestos exposure period and during the latency period in the absence of exposure.”

We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger. (*Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at pp. 1195-1196.) Indeed, we note that in *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at pp. 676-677, fn. 16, the Supreme Court acknowledged that claims involving asbestos-related diseases involve “unique facts” and the injury-in-fact

trigger may be appropriate. Moreover, the court referred to our earlier (now vacated) opinion and observed that our affirmance of the trial court’s decision “appears largely consistent with [the *Montrose*] analysis of the applicable principles of third party CGL coverage” (*Ibid.*)

c. Arguments of Insurers

The insurers raise two principal arguments against the trial court’s trigger decision. First, the insurers dispute the trial court’s interpretation of “bodily injury.” Second, the insurers argue that the trial court’s continuous trigger decision improperly holds insurers liable even though the claimant had no contact with the policyholder’s products during the policy period. We disagree with the first argument but find some merit in the second, as we will explain below.

(1) Subclinical Changes

(4a) The insurers contend the trial court’s interpretation of bodily injury is contrary to the plain meaning of the words in that it equates bodily injury *46 with “imperceptible subclinical cellular changes.” Although the insurers have now disavowed the manifestation theory, the lone support for the insurers’ argument is *Eagle-Picher Industries, Inc. v. Liberty Mut. Ins.*, *supra*, 682 F.2d 12, where the court held that “sub-clinical insults to the lungs” do not constitute an injury “until, if ever, they accumulate to become clinically evident or manifest.” ^{FN14}

FN14 In the trial court, the insurers took various positions on the trigger of coverage: some advocated the exposure theory; others the manifestation theory, and still others took no position. On appeal, the joint briefs of the insurers which remain in the action do not clearly articulate what events should trigger coverage, but their arguments imply an advocacy for the manifestation theory. We were advised at oral argument, however, that the insurers accept the injury-in-fact approach.

In *Eagle-Picher*, the court refused to adopt the exposure theory, noting that “it is uncontested that even sub-clinical injury to the lung does not occur simultaneously with the inhalation of asbestos. Nor is the existence of sub-clinical injury an inevitable by-product of exposure, since the body’s natural mechanisms may remove the fibers before they become embedded in the lungs.” (682 F.2d at p. 19, fn. omitted.) Likewise, in the present case, the insurers emphasize the medical evidence and the trial court’s finding that not every exposure to asbestos results in an asbestos-related injury.

Yet, while it may be that not every inhalation of asbestos fibers results in bodily injury, it can be said that every manifested asbestos-related injury resulted from inhalation of asbestos fibers. (See *Commercial Union Ins. Co. v. Sepco Corp.*, *supra*, 765 F.2d at pp. 1545-1546.) (5) In the present case, the trial court necessarily took a retrospective point of view. In resolving the insurance coverage questions, the court was concerned only with individuals who have actually developed asbestos-related diseases, and for such claimants the court found that the evidence permitted the inference that injury took place in the past: “[T]he asbestos medical evidence [establishes] *in retrospect* that undiscovered injury existed during the asbestos exposure period and during the latency period in the absence of exposure.” (Italics added.)

The trial court’s continuous trigger decision, then, is based upon factual findings that for asbestos claimants an injury-in-fact took place during each triggered policy period, even though the injury was not diagnosable and compensable during the policy period. The trial court found it “sufficient that such injuries eventually became compensable, and this is, of course, true with respect to all claims for which insurers are called upon to indemnify policyholders.” We find no error in this retrospective approach. For purposes of determining insurance coverage, absolute precision is not required as to *47 when the injury occurred. “[A]ll that is necessary is reasonably reliable evidence that the injury, sickness, or disease more likely than not occurred during a period of coverage” (*AHP*, *supra*, 565 F.Supp. at p. 1509; accord, *Abex Corp. v. Maryland*

Cas. Co., *supra*, 790 F.2d at p. 128.)

() The insurers’ argument assumes that an injury does not occur until there is an impairment capable of detection. In the present case, however, the medical evidence established and the trial court found that impairment actually occurs even earlier: “[T]he physiological processes associated with the inhalation of asbestos ... impair the gas exchange function of the lung cells and tissue.... almost immediately upon the inhalation and deposition of asbestos fibers into the lung, and slowly and continuously impair new portions of lung tissue throughout one’s life, even after exposure to asbestos ceases, ... [involving] new injury to the cells, tissue and body.” Those factual findings, of course, are binding on this court.

It bears emphasizing that whether there is coverage for “bodily injury” is not the question here; it is undisputed that the CGL policies provide coverage for the asbestos-related injuries suffered by the claimants. The question before this court is when the injuries occurred. In contrast to the situation in *Eagle-Picher*, *supra*, where the court found no factual basis for the conclusion that bodily injury occurs upon exposure (*Eagle-Picher*, *supra*, 682 F.2d at p. 19, fn. 3), the trial court’s factual findings here, made after consideration of extensive medical testimony, amply support the conclusion that injury actually occurs upon exposure and continues until death. We therefore find no error in the trial court’s adoption of a continuous trigger. (See also *Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d 1178, 1196-1197; *Owens-Illinois, Inc. v. United Ins. Co.* (1994) 138 N.J. 437 [650 A.2d 974, 995]; *J.H. France Refractories v. Allstate* (1993) 534 Pa. 29, 626 A.2d 502, 506-507.)

In any event, the insurers’ approach would essentially render the asbestos manufacturers’ insurance coverage illusory, for by the time asbestos diseases caused detectable impairments (in the 1970’s), insurance companies ceased issuing policies that adequately covered asbestos-related disease. Hence, the insurers’ theory would deprive the manufacturers of coverage for product liability injuries of which they were unaware during the policy periods. (E.g., *Hancock Laboratories, Inc. v. Admiral Ins.* (9th Cir. 1985) 777

F.2d 520, 525; Keene Corp. v. Ins. Co. of North America, supra, 667 F.2d at pp. 1045-1046; Ins. Co. North America v. Forty-Eight Insulations, supra, 633 F.2d at p. 1219.)

Moreover, there is nothing in the language of the policies to require as a condition of coverage that the injury be discovered at any point in time. As *48 the Supreme Court recognized in Montrose Chemical Corp. v. Admiral Ins. Co., supra, 10 Cal.4th at pp. 688-689, to read the CGL occurrence policies to provide coverage only when the injury becomes apparent during the policy period would unfairly transform the policies into "claims-made" policies. (See also American Home Products Corp. v. Liberty Mut. Ins., supra, 748 F.2d at p. 764; Ins. Co. North America v. Forty-Eight Insulations, supra, 633 F.2d at p. 1219; Hartford County v. Hartford Mut. Ins. (1992) 327 Md. 418 [610 A.2d 286, 294-295].)

In short, we find the trial court's continuous trigger decision well supported both by the unique facts of asbestos-related bodily injuries and by the existing case law. We uphold that decision.

(2) Contact With Policyholder's Product

The trial court's judgment states that all of a policyholder's policies are triggered from the claimant's first exposure to *any* asbestos product until the date of death or claim. We agree with the insurers that this aspect of the trigger decision is overbroad. Our analysis of this point is intertwined with the analysis of scope of coverage and will be presented in part 2.b below.

2. Scope of Coverage

Under the trial court's continuous trigger decision, multiple, successive policies of a policyholder are likely to be triggered on any single bodily injury claim. Two questions emerge concerning the extent or "scope" of coverage of these multiple insurers: Should the responsibility for indemnification be apportioned among the insurers? And should the policyholder be required to share in the indemnification and defense

costs if the policyholder was uninsured or self-insured for certain periods? To facilitate analysis of these issues, we draw a distinction between (1) the obligations of successive insurance carriers toward a single manufacturer-policyholder, and (2) the obligations of successive carriers when multiple asbestos manufacturers are held liable on a single claim.

a. Obligations of Successive Insurers of a Single Asbestos Manufacturer-Policyholder

(1) Apportionment Among Insurers

The standard CGL insurance policies require the insurers to indemnify the policyholder only if bodily injury occurs during the policy period: "The company will pay on behalf of the insured all sums which the insured shall *49 become legally obligated to pay as damages because of bodily injury ... caused by an occurrence [¶] 'Occurrence' means an accident, including injurious exposure to conditions, which results during the policy period in bodily injury"

Thus, the question raised by the insurance companies is whether liability should be apportioned among the insurers based on their periods of coverage. As will be seen in the discussion below, the trial court ruled that the policyholder must be indemnified by one insurer for the full extent of the loss up to the policy's limits, but with liability ultimately being apportioned among all insurers based upon the policy limits and the years of coverage. We affirm that decision.

Liable "in Full"

(6a) In phase III, the trial court concluded that each policy triggered by an asbestos-related bodily injury claim has an independent obligation to respond "in full" to a claim. In reaching that conclusion, the trial court relied primarily upon the insurers' obligations under the CGL policies to pay for "all sums which the insured shall become liable to pay as damages."

The trial court's decision follows several out-of-state asbestos cases. In Keene Corp. v. Ins. Co. of North

America, supra, 667 F.2d 1034, the court held as follows: "The policies at issue in this case provide that the insurance company will pay on behalf of Keene 'all sums' that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period.... As a result [of our continuous trigger decision], when Keene is held liable for an asbestos-related disease, only part of that disease will have developed during any single policy period. The rest of the development may have occurred during another policy period or during a period in which Keene had no insurance. The issue that arises is whether an insurer is liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the insurer is liable in full, subject to the 'other insurance' provisions" (Id. at p. 1047.) "Once triggered, each policy covers Keene's liability. There is *nothing* in the policies for a reduction of the insurer's liability if an injury occurs only in part during a policy period. As we interpret the policies, they cover Keene's entire liability once they are triggered." (Id. at p. 1048; see also ACandS, Inc. v. Aetna Cas. and Sur. Co., supra, 764 F.2d at p. 974; Zurich Ins. Co. v. Raymark Industries, supra, 514 N.E.2d at p. 165; Monsanto Co. v. C.E. Heath Comp. & Liability (Del. 1994) *50 652 A.2d 30, 34-35; J.H. France Refractories v. Allstate, supra, 626 A.2d 502, 507-508.)^{FN15}

FN15 In phase IV, the trial court qualified its "in full" ruling by concluding that only one policy's limits can apply to each claim, and the policyholder may select the policy under which it is to be indemnified. That decision, too, is supported by Keene: "The principle of indemnity implicit in the policies requires that successive policies cover single asbestos-related injuries. That principle, however, does not require that Keene be entitled to 'stack' applicable policies' limits of liability.... Therefore, we hold that only one policy's limits can apply to each injury. Keene may select the policy under which it is to be indemnified." (Keene Corp. v. Ins. Co. of North America, supra, 667 F.2d at pp. 1049-1050; see also Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co. (D.D.C. 1984) 597

F.Supp. 1515, 1524; contra, Cole v. Celotex Corp., supra, 599 So.2d 1058, 1074-1080; J.H. France Refractories v. Allstate, supra, 626 A.2d 502, 510.) The policyholders have not challenged this ruling.

We believe the California Supreme Court's decision in Montrose Chemical Corp. v. Admiral Ins. Co., supra, 10 Cal.4th 645, supports this reasoning. In distinguishing third party liability policies from first party liability policies, the court observed that under third party liability policies, if coverage is ultimately established, the insurer must indemnify the insured for "all sums" which the insured becomes obligated to pay. (10 Cal.4th at p. 665.) Moreover, in concluding that a continuous trigger should be applied, the court on two occasions cited with approval the opinion in Gruol Construction Co. v. Insurance Co. of No. America (1974) 11 Wn.App. 632 [524 P.2d 427], in which the Washington Court of Appeal applied a continuous trigger in a case involving progressive property damage. (10 Cal.4th at pp. 677-678, 681.) In both references to the Gruol case, the Montrose court observed that under a continuing injury theory, an insurer may become liable for the entire loss up to the policy limits even though the continuing injury may extend over several policy periods. (Id. at pp. 678, 681.)

Furthermore, in support of its conclusion that a continuous trigger should be applied, the Montrose court relied upon existing case law holding that coverage for a manifested loss is not terminated by the expiration of the policy; coverage continues until the damage is complete. (Montrose Chemical Corp. v. Admiral Ins. Co., supra, 10 Cal.4th at pp. 680, 686, citing California Union Ins. Co. v. Landmark Ins. Co. (1983) 145 Cal.App.3d 462, 475 [193 Cal.Rptr. 461]; Snapp v. State Farm Fire & Cas. Co. (1962) 206 Cal.App.2d 827, 831-832 [24 Cal.Rptr. 44]; and Harman v. American Casualty Co. of Reading, Pa. (S.D.Cal. 1957) 155 F.Supp. 612.) As the Montrose court put it, "an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury." (10 Cal.4th at p. 686, italics added.) *51

Apportionment

At the same time that the trial court ruled each insurer must respond “in full,” the court also ruled that “the obligation to respond in full is subject to the operation of policy limits, deductibles, applicable exclusions, applicable ‘other insurance’ clauses, provisions which make certain policies’ coverage ‘excess’ to that of other policies, and any rights to equitable contribution from the issuers of other policies triggered by the same claim.”

That decision, too, is consistent with language in the *Montrose* case: “Allocation of the cost of indemnification once several insurers have been found liable to indemnify the insured for all or some portion of a continuing injury or progressively deteriorating property damage requires application of principles of contract law to the express terms and limitations of the various policies of insurance on the risk. [Citing *Keene* and *Forty-Eight Insulations*.]” (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at p. 681, fn. 19.)

In *Keene*, the court held that liability among insurers must be allocated pursuant to the “other insurance” clauses: “In any suit against Keene for an asbestos-related disease, it is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because Keene cannot collect more than it owes in damages, the issue of dividing insurance obligations arises. The only logical resolution of this issue is for Keene to be able to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury.... Our holding each insurer fully liable to Keene [] does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the ‘other insurance’ provisions of each policy provide a scheme by which the insurers’ liability is to be apportioned.... These provisions of the policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or

manifestation is to ensure that Keene is indemnified in full.” (667 F.2d at p. 1050, fn. omitted.)

The *Keene* court did not specify how the “other insurance” clauses would serve to allocate liability among the insurers. In the present case, however, in phase IV, the trial court concluded that the presence of “other insurance” clauses in the policies had the effect of requiring a pro rata apportionment among multiple insurers whose policies were triggered successively on the *52 same claim. The court employed an apportionment method based on the respective policy limits multiplied by the years of coverage: “When more than one policy is triggered by a claim, defense and indemnity costs shall be allocated among all triggered policies according to applicable ‘per occurrence’ policy limits, multiplied by years of coverage. When a policy does not contain a ‘per occurrence’ limit, the ‘per person’ limit shall be used in this calculation.

“This Court finds that the most equitable method of allocation is proration on the basis of policy limits, multiplied by years of coverage. This method is consistent with the policy language in that it takes policy limits into consideration. Typically, a pro rata ‘other insurance’ clause provides for proration according to ‘the applicable limit of liability.’ This method also reflects the fact that higher premiums are generally paid for higher ‘per person’ or ‘per occurrence’ limits. Since some policies are in effect for more than one year, and injury occurs during every year from first exposure to asbestos until death (phase III Decision at p. 42), multiplying the policy limits by years of coverage results in a more equitable allocation than proration based on policy limits alone. Thus, when a particular claim triggers more than one policy, each insurer’s share of liability shall be determined by the proportion that each policy’s applicable ‘per occurrence’ limits multiplied by years the policy was in effect bears to the sum total of the applicable ‘per occurrence’ limits of all triggered policies multiplied by the years each policy was in effect. When a policy does not contain a ‘per occurrence’ limit, the ‘per person’ limit shall be used in this calculation.”

This allocation procedure does not affect the obligation of the insurers to respond in full: “a policyholder may

obtain full indemnification and defense from one insurer, leaving the targeted insurer to seek contribution from other insurers covering the same loss.”

The trial court's ruling on the method of apportionment is not challenged on appeal. We note that although the method is nontraditional, it is nonetheless sound. (7) The general rule, when multiple policies share the same risk but have inconsistent “other insurance” clauses, is to prorate according to the policy limits. (See *Argonaut Ins. Co. v. Transport Indem. Co.* (1972) 6 Cal.3d 496, 507 [99 Cal.Rptr. 617, 492 P.2d 673]; *Employers Reinsurance Corp. v. Phoenix Ins. Co.* (1986) 186 Cal.App.3d 545, 557 [230 Cal.Rptr. 792]; *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 620 [222 Cal.Rptr. 276].) Courts in other jurisdictions have taken different approaches. Most prominent among the alternatives is an allocation based upon time on the risk-i.e., the number of years an insurer *53 covered the continuous loss. (E.g., *Ins. Co. North America v. Forty-Eight Insulations, supra*, 633 F.2d 1212.)^{FN16}

FN16 Other approaches include apportionment (1) based on the premiums paid (*Insurance Co. of Tex. v. Employers Liability Assur. Corp.* (S.D.Cal. 1958) 163 F.Supp. 143, 147, 151); (2) in equal shares (*Reliance Ins. Co. v. St. Paul Surplus Lines Ins.* (4th Cir. 1985) 753 F.2d 1288, 1292); and (3) using a “maximum loss” method (*Mission Ins. Co. v. Allendale Mut. Ins. Co.* (1981) 95 Wn.2d 464 [626 P.2d 505]; and see *Uniroyal, Inc. v. Home Ins. Co.* (E.D.N.Y. 1988) 707 F.Supp. 1368, 1392-1393 [agent orange]). (See generally, Ostrager & Newman, Handbook on Insurance Coverage Disputes (4th ed. 1991) § 9.04, p. 338.)

() The apportionment formula used by the trial court in the present case-combining the policy limit formula with the time on the risk approach-was advocated by some insurers in *CNA Casualty of California v. Seaboard Surety Co., supra*, 176 Cal.App.3d at pages 619-620, with respect to defense costs. The court rejected the argument and used a straight policy limit

approach. But in doing so the court noted that the Supreme Court had declined to formulate a definitive rule “in light of varying equitable considerations which may arise” in particular cases. (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369 [165 Cal.Rptr. 799, 612 P.2d 889, 19 A.L.R.4th 75].) Quoting from an earlier case, the Supreme Court explained the need for “equitable” considerations: “The reciprocal rights and duties of several insurers who have covered the same event do not arise out of contract, for their agreements are not with each other Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden....” (27 Cal.3d at p. 369.) The CNA court, therefore, acknowledged that in an appropriate case the scope of an insured's coverage could be affected by such factors as the insurer's time on the risk. (176 Cal.App.3d at p. 620.) And, indeed, in the present case, the trial court found its method of allocation, based upon both the policy limits and the time on the risk, to be the “most equitable.”

Given that the trial court's method of apportionment is not challenged on appeal, we find no error in the decision to hold each policy responsible in full subject to such apportionment.^{FN17} (See also *Owens-Illinois, Inc. v. United Ins. Co., supra*, 650 A.2d 974, 993-995, proposing the same method of *54 allocation.) We are not persuaded otherwise by *Ins. Co. North America v. Forty-Eight Insulations, supra*, 633 F.2d 1212, in which the trial court employed an exposure trigger and prorated liability among the multiple, successive insurers who were on the risk while the claimant was exposed to asbestos. On appeal, no question was raised concerning this proration; the dispute focused on prorating the costs of defense. The appellate court affirmed, finding the exposure theory to provide a reasonable means of proration: “An insurer contracts to pay the entire cost of defending a claim which has arisen within the policy period. The insurer has not contracted to pay defense costs for occurrences which took place outside the policy period... [¶] [The] exposure theory ... establishes that a reasonable means of proration is available.... [I]ndemnity costs can be allocated by the number of years that a worker inhaled asbestos fibers.” (*Id.* at pp. 1224-1225.) Although other courts using an exposure theory have similarly prorated

liability among the insurers (*Commercial Union Ins. Co. v. Sepco Corp.*, *supra*, 765 F.2d at p. 1544; *Porter v. American Optical Corp.*, *supra*, 641 F.2d at p. 1145 [the rule of proration among insurers is “logically consequent” to the exposure theory]), we agree with the Illinois Supreme Court that a pro rata approach does not apply to defense costs or indemnity if the exposure theory is not used. (*Zurich Ins. Co. v. Raymark Industries*, *supra*, 514 N.E.2d 150, 165.) In finding that asbestos injuries continue to occur even after exposure to asbestos ceases, the trial court necessarily rejected the underlying temporal premise of the exposure theory, that injury occurs and the insurers' obligations are triggered only during the claimant's period of exposure to asbestos. ^{FN18}

FN17 Despite the phase III decision obligating the insurers to respond “in full,” the effect of the trial court's apportionment formula is to make the liability of the insurers proportionate. In their briefs on phase III, the insurers make little mention of the phase IV decision and imply that the trial court did not prorate the losses or take into account the amount of time that insurance coverage was provided to the policyholder. Yet when the phase III and phase IV decisions are read together, the insurance carriers got what they want—pro rata allocation of liability.

As a practical matter, the point is academic for most insurers. The trial court noted that “all primary policies have been or will be exhausted by asbestos-related claims. The method of allocation affects only the timing of payments.” With respect to Fibreboard, however, two of its insurers (Pacific Indemnity and Continental) issued policies without aggregate limits. Thus, as to presently unpaid claims against Fibreboard, the only allocation will be between those two unexhausted policies. Contrary to the assertions of the insurers, this fact is not the result of any flaw in the trial court's decision on the scope of coverage. Whether the policies provide unlimited coverage is before us on other issues which Pacific Indemnity and Continental have asked us to defer.

FN18 The insurers have relied upon the

appellate court's decision in *J.H. France Refractories v. Allstate* (1990) 396 Pa.Super. 185 [578 A.2d 468], which applied a continuous trigger and also allocated liability pro rata among insurers based upon the time each insurer was on the risk. But during the pendency of this appeal, the Pennsylvania Supreme Court reversed that decision and instead followed *Keene* to hold, as we do here, that each insurer must bear potential liability for the entire claim, subject to allocation based on the “other insurance” provisions of the policies. (*J.H. France Refractories v. Allstate*, *supra*, 626 A.2d 502.)

Moreover, the rule of proration adopted by *Forty-Eight Insulations* and its progeny fails to recognize that the event which triggers coverage does not define the scope of coverage. Although each policy is triggered only by the occurrence of an injury during the policy period, once a policy is triggered, the policy obligates the insurer to pay “all sums” for which the policyholder *55 becomes liable. There is nothing in the policies limiting the scope of coverage to that portion of a continuous injury that developed during the policy period. (*Keene Corp. v. Ins. Co. North America*, *supra*, 667 F.2d at p. 1049.) “As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as [the policyholder] must pay damages as a result, the insurer must indemnify [the policyholder] for whatever damages it must pay.” (*Id.* at pp. 1044-1045, fn. 20; see also *J.H. France Refractories v. Allstate*, *supra*, 626 A.2d 502, 508.)

In *Montrose*, the Supreme Court criticized language in *California Union Ins. Co. v. Landmark Ins. Co.*, *supra*, 145 Cal.App.3d at page 478, which held the successive insurers liable “jointly and severally” for the full amount of the damage. ^{FN19} (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at p. 681, fn. 19.) (8a) In the present case, the trial court correctly explained that the doctrine of joint and several liability has no application to the obligations of successive insurers of a single policyholder. ^{FN20} () Nevertheless, the insurance companies insist that the trial court's decision on the scope of coverage imposes joint and several liability upon the insurers. It does not. The trial

court's decision ensures that the policyholder is indemnified by one insurer for the full extent of the loss up to the policy's limits, but apportions liability among all insurers whose policies were triggered by the claimant's asbestos-related bodily injury. We find nothing erroneous in that decision.

FN19 Despite the *California Union* court's appellation of the liability as "joint and several," the court went on to apportion the damages pro rata between the two insurers based on the policy limits. (145 Cal.App.3d at p. 478.)

FN20 The trial court expressly disavowed joint and several liability: "The Court recognizes that 'joint and several liability' is a doctrine of tort liability, not contract law. Furthermore, the Court is aware that liability for many of the underlying injury claims which are the subject of this coverage dispute is not joint and several among the policyholders, but rather is pursuant to settlement agreements which specify distinct damage amounts attributed to each policyholder. [¶] This Court emphasizes that its determination of the scope of coverage for asbestos-related bodily injury claims is not predicated on the joint and several liability which is sometimes but not always imposed on the policyholders in the underlying lawsuits."

(2) Effect of Policyholder's Self-insurance

(9a) In phase III, the trial court concluded that "the policyholders do not have an obligation to share pro rata in indemnification and defense costs because of any uninsured or self-insured periods of time simultaneous with the 'occurrence' of bodily injury pertaining to a claim" The insurers challenge that ruling. The insurers argue that they are obligated to pay only for injuries that took place during the policy periods; thus the manufacturers must pay for injuries that occurred during periods in which the manufacturers were uninsured or self-insured. *56

The leading support for the insurers' position is provided by those cases in which the courts apportioned coverage among insurers based upon the time each policy was on the risk. Those courts then included the policyholder in the allocation scheme and held the policyholder responsible for a pro rata share for periods of self-insurance or no insurance. (*Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at pp. 1202-1204; *Commercial Union Ins. Co. v. Sepco Corp.*, *supra*, 765 F.2d at p. 1544; *Ins. Co. North America v. Forty-Eight Insulations*, *supra*, 633 F.2d at p. 1225; *NSP v. Fidelity & Cas. Co. of New York* (Minn. 1994) 523 N.W.2d 657, 662; see also *IMCERA Group, Inc. v. Liberty Mutual Ins. Co.* (1996) 47 Cal.App.4th 699, 736-743 [50 Cal.Rptr.2d 583] [defense costs] review granted May 22, 1996 (S052878); *Gulf Chemical & Metallurgical v. Associated Metals* (5th Cir. 1993) 1 F.3d 365, 372.)

We decline to follow this approach, for we conclude that a distinction must be drawn between apportionment among multiple insurers and apportionment between an insurer and its insured. (10) This distinction was noted in *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th 645, 665: "In suits between an insured and an insurer to determine coverage, interpretation of the policy language ... will typically take precedence.... [¶] In contrast, where two or more CGL carriers turn to the courts to allocate the costs of indemnity for a paid loss, different contractual and policy considerations may come into play in the effort to apportion such costs among the insurers. The task may require allocation of contribution amongst all insurers on the risk in proportion to their respective policies' liability limits (such as deductibles and ceilings) or the time periods covered under each such policy."

As we have already explained in sub part (1) above, the trial court apportioned the liability of the successive insurers based upon both the policy limits and the time on the risk. FN21 () That apportionment among multiple insurers, however, has no bearing upon the obligations of the *57 insurers to the insured. The insurance policies obligate the insurers to pay on behalf of a policyholder "all sums" that the policyholder becomes legally obligated to pay as damages because of bodily injury during the policy period. We interpret this

language to mean that once coverage is triggered, the insurer's obligation to the policyholder is to cover the policyholder's liability "in full" up to the policy limits. It is irrelevant that only part of the asbestos-related disease developed during any single policy period or during a period in which the manufacturer had no insurance. The logical consequence of this ruling is that the policyholder is covered (up to the policy limits) for the full extent of its liability and need not pay a pro rata share. (*ACandS, Inc. v. Aetna Cas. and Sur. Co.*, supra, 764 F.2d at p. 974; *Keene Corp. v. Ins. Co. of North America*, supra, 667 F.2d at pp. 1047-1049; *Zurich Ins. Co. v. Ravmark Industries*, supra, 514 N.E.2d at p. 165; *J.H. France Refractories v. Allstate*, supra, 626 A.2d 502, 508; but see *Keene Corp. v. Ins. Co. of North America*, supra, 667 F.2d at p. 1058 (conc. opn. of Wald, J.).)

FN21 In phase IV, where the issue was the method of allocating indemnity and defense costs among multiple insurers pursuant to "other insurance" clauses, no insurer argued that the "other insurance" clauses apply to periods when the policyholder is self-insured. Indeed, most courts hold that "other insurance" refers only to another policy, not to self-insurance. (E.g., *Metro U.S. Services v. City of Los Angeles* (1979) 96 Cal.App.3d 678, 683 [158 Cal.Rptr. 207]; *Universal Underwrit. Ins. Co. v. Marriott Homes, Inc.* (1970) 286 Ala. 231 [238 So.2d 730, 732]; *American Nurses Ass'n v. Passaic Gen. Hosp.* (1984) 98 N.J. 82 [484 A.2d 670, 674]; contra, *Aetna Casualty & Surety Co. v. Market Insurance Co.* (Fla. Dist. Ct. App. 1974) 296 So.2d 555, 558; see generally, Annot. (1986) 46 A.L.R.4th 707.) Thus, we construe the insurers' argument as one directed to the insurers' obligations to its insured and not as a challenge to the allocation formula governing the insurers' obligations to other insurers.

In any event, the trial court employed a hybrid method of allocation, taking into account both the time on the risk and the policy limits. Because the policy limits are an essential part of the trial court's apportionment formula, it would be virtually impossible to compute the

policyholder's share of the losses for periods of no insurance. The *Keene* court so reasoned: "We have no authority upon which to pretend that Keene also has a 'self-insurance' policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be?" (667 F.2d at pp. 1048-1049; accord, *J.H. France Refractories v. Allstate*, supra, 626 A.2d 502, 508; contra, *Owens-Illinois, Inc. v. United Ins. Co.*, supra, 650 A.2d 974, 995.)

We therefore affirm the trial court's decision in phase III relieving the policyholders from any responsibility to share in the loss for periods of no insurance.

b. Obligations of Insurers Covering Multiple Tortfeasors on a Claim

When a claimant was exposed to products of more than one manufacturer such that an asbestos manufacturer-policyholder is but one of several tortfeasors held liable to an injured victim, the question arises as to how liability should be apportioned among the defendant-manufacturers, especially if the claimant was minimally exposed to one manufacturer's product and extensively exposed to another's.

No general statement can be made about the allocation of tort liability of multiple asbestos manufacturers. In some cases, the manufacturers may be held jointly and severally liable to the injured claimant, despite the claimant's relatively short period of exposure to a particular defendant's product. (*Borel v. Fibreboard Paper Products Corporation* (5th Cir. 1973) *58493 F.2d 1076 cert. den. (1974) 419 U.S. 869 [42 L.Ed.2d 107, 95 S.Ct. 127].) ^{FN22} In other cases, upon adequate proof of the claimant's varying exposures to different products, damages may be apportioned among the defendants. (*Moore v. Johns-Manville Sales Corp.* (5th Cir. 1986) 781 F.2d 1061; see Prosser & Keeton on Torts (5th ed. 1984) § 52, p. 352; 3 Harper et al., *The Law of Torts* (2d ed. 1986), § 10.1, p. 1.) In some jurisdictions, the market share doctrine may be applied, at least where the claimant was exposed to fungible asbestos products (*Wheeler v. Raybestos-Manhattan*

(1992) 8 Cal.App.4th 1152 [11 Cal.Rptr.2d 109]), making the manufacturers only severally liable, based upon each manufacturer's share of the national market at the time of the plaintiff's exposure to the product. (*Brown v. Superior Court* (1988) 44 Cal.3d 1049, 1072-1075 [245 Cal.Rptr. 412, 751 P.2d 470]; *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588 [163 Cal.Rptr. 132, 607 P.2d 924, 2 A.L.R.4th 1061], cert. den. (1980) 449 U.S. 912 [66 L.Ed.2d 140, 101 S.Ct. 285].)

FN22 In California, as in many states, statutory modifications have been made to the doctrine of joint and several liability. Liability among concurrent tortfeasors for noneconomic damages is now several-proportionate to fault, not joint. (Civ. Code, § 1431.2, subd. (a).) The purpose of this change was to eliminate the unfairness of requiring a tortfeasor who was minimally culpable to bear all of the plaintiff's damages when the more culpable tortfeasor became insolvent. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198 [246 Cal.Rptr. 629, 753 P.2d 585].)

It bears emphasizing that questions concerning the nature and extent of the *tort* liability of the asbestos manufacturers are not involved in this litigation. Those questions must be resolved in the underlying injury suits. The question here is the extent of the *indemnity* obligations of the insurers toward their policyholders. () The contractual obligations of insurers to a single manufacturer-policyholder are separate and distinct from the *tort* liability of multiple asbestos manufacturers to an asbestos claimant. (*Keene Corp. v. Ins. Co. of North America, supra*, 667 F.2d at p. 1051; *Ins. Co. North America v. Forty-Eight Insulations, supra*, 633 F.2d at p. 1225.) No matter what the *tort* liability of an asbestos manufacturer—whether joint and several, proportionate to fault or proportionate to market share—the *indemnity* obligations of its insurers are as set forth in part 2.a above: to respond in full to the policyholder's liability obligations up to the policy's limits, subject to apportionment pursuant to “other insurance” clauses. (See *Keene Corp. v. Ins. Co. of North America, supra*, 667 F.2d at pp. 1050-1051, 1051

fn. 39.)

(11a) The insurers, however, have raised a trigger question which arises when multiple asbestos manufacturers are held liable on a single claim and each manufacturer is insured by multiple, successive policies: For purposes *59 of deciding which of a manufacturer-policyholder's successive policies cover the manufacturer's liability on the claim, is insurance coverage triggered if the claimant was first exposed to the policyholder's product *after* the insurer's policy had expired? That is, does an insurer have any *indemnity* obligation if the policyholder's product was not involved in the claimant's injury during the policy period? ^{FN23}

FN23 For purposes of our discussion, we assume that the claimant was exposed to a policyholder's product at some point. In most jurisdictions, an asbestos manufacturer will not be held liable unless the plaintiff proves, directly or circumstantially, actual exposure to the defendant's product. (See *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1415-1419 [37 Cal.Rptr.2d 902]; *Mullen v. Armstrong World Industries, Inc.* (1988) 200 Cal.App.3d 250, 257-258 [246 Cal.Rptr. 32]; *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 816-818; *Bauer v. Raymark Industries, Inc.* (2d Cir. 1988) 849 F.2d 790, 792-793; *Roehling v. Nat. Gypsum Co. Gold Bond Bldg.* (4th Cir. 1986) 786 F.2d 1225, 1228, fn. 5; *Blackston v. Shook & Fletcher Insulation Co.* (11th Cir. 1985) 764 F.2d 1480, 1482, 1485; *Gideon v. Johns-Manville Sales Corp.* (5th Cir. 1985) 761 F.2d 1129, 1144-1145.) In other jurisdictions, under the market share doctrine, the plaintiff need not identify the manufacturer of the asbestos product; the burden of proof is shifted to the defendant-manufacturer to prove its product did not cause the plaintiff's injury. (*Wheeler v. Raybestos-Manhattan, supra*, 8 Cal.App.4th 1152; *Menne v. Celotex Corp.* (10th Cir. 1988) 861 F.2d 1453, 1469; see *Sindell v. Abbott Laboratories, supra*, 26

Cal.3d 588.) Nevertheless, if the plaintiff was not exposed to the manufacturer's product, the manufacturer will not be liable.

We note, however, that the New York Court of Appeals has modified tort law principles of causation and held that a manufacturer may be held severally liable in proportion to its market share even if it can prove that its product did not contribute to the plaintiff's injury; only those defendants who can prove that they never participated in the marketing of the product for use by the class of injured victims are exculpated. (*Hymowitz v. Eli Lilly and Co.* (1989) 73 N.Y. 487 [541 N.Y.S.2d 941, 950, 539 N.Ed.2d 1069], cert. den. (1989) 493 U.S. 944 [107 L.Ed.2d 338, 110 S.Ct. 350] [DES case].)

Of course, new forms of liability created by statute or by judicial pronouncement come within the scope of liability covered by a CGL policy. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, fn. 8 [274 Cal.Rptr. 820, 799 P.2d 1253]; *Travelers Ins. Co. v. Industrial Indem. Co.* (1971) 18 Cal.App.3d 628, 632 [96 Cal.Rptr. 191].) The question before us, however, is not whether the manufacturers' liability is covered but when coverage begins.

The trial court's trigger decision states that all of a policyholder's policies are triggered upon the claimant's exposure to any asbestos product. The effect of this decision is to trigger an insurer's indemnity obligations even if the claimant was not exposed to the policyholder's product until after the insurer's policy period had expired. For example, if a claimant was first exposed to asbestos products of manufacturer A in 1957 but was not exposed to manufacturer B's asbestos products until 1967, the trial court's decision would make policies insuring manufacturer B covering the period from 1957-1966 triggered: the 1957 policy by virtue of the claimant's exposure to asbestos and the 1958-1966 policies by virtue of the latent development of asbestos disease. (Policies insuring manufacturer B from 1967 to the date of claim or death would, of course, also be triggered by the continuous development of asbestos disease.) *60

In this respect, the trial court's decision runs counter to the decision in *Keene Corp. v. Ins. Co. of North America*, supra, 667 F.2d 1034. After concluding that

insurance coverage is continuously triggered from the point of exposure to the point of manifestation, and after concluding that each successive insurer must indemnify the policyholder in full, subject to apportionment under the "other insurance" provisions, the *Keene* court went on to hold that an insurance company has no liability if it can prove that the claimant was not exposed to the manufacturer-policyholder's product either during the policy period or before the policy period. "If a victim sues more than one asbestos-product manufacturer, it may be impossible to prove which company's products were used at which time. If so, it will be impossible to prove that exposure to Keene's products—as opposed to those of another manufacturer—occurred during a particular time period. In such a case, there should be a presumption that throughout the victim's period of exposure to asbestos he or she was exposed to Keene's and the other manufacturers' products. The insurer defending Keene in the underlying tort suits may then try to show that Keene's products could not have been involved for certain years. Similarly, if a suit arises to resolve the allocation of insurance liability, any insurance company can try to prove that there was no inhalation of Keene's asbestos during or before its policy period. If an insurance company does so, then that company will be free of liability." (*Id.* at p. 1052.)

Although the above quoted portion of the *Keene* decision purports to pertain to the allocation of liability among insurers, it effectively serves to qualify the trigger of coverage. The *Keene* court held that there is no coverage unless the injury resulted from exposure to the policyholder's products. "If [there was no inhalation of Keene's asbestos during or before an insurer's policy period], then that company will be free of liability." (667 F.2d at at p. 1052.) Indeed, despite its rejection of the exposure theory for purposes of triggering coverage, the *Keene* court recognized that the time of the claimant's exposure to the policyholder's products is relevant to the trigger of coverage: "[The full extent of the claimant's exposure to asbestos] is essential to determining which policies cover Keene's liability." (*Id.* at at p. 1051.)

On this point, the *Keene* court cited and followed the decision in *Ins. Co. North America v. Forty-Eight*

Insulations, supra, 633 F.2d 1212, even though *Forty-Eight Insulations* had applied an exposure trigger. (*Keene Corp. v. Ins. Co. of North America, supra*, 667 F.2d at p. 1052, fn. 42.) In *Forty-Eight Insulations*, the court recognized the basic contract principle that an insurance policy provides coverage only for injuries resulting from the policyholder's own products, and the court concluded that "where an insurer can *61 show that no exposure to asbestos manufactured by its insured took place during certain years, then that insurer cannot be liable for those years. The reason is simple: no bodily injury *resulting from Forty-Eight's products*, took place during the years in question." (633 F.2d at p. 1225, italics in original.) At the same time, the court in *Forty-Eight Insulations* held that in asbestos cases, because of the difficulties of proof, each asbestos manufacturer's products should be presumed to be involved upon a claimant's exposure to asbestos, but an insurer is entitled to show that the claimant was not exposed to its manufacturer-policyholder's products. (*Id.* at 1225-1226, fn. 27.)

Both *Forty-Eight Insulations* and *Keene* instruct that an insurance policy is not triggered if the claimant's exposure to the manufacturer-policyholder's products took place *after* the policy period. ^{FN24} Even though coverage is triggered continuously, upon exposure, upon manifestation, and upon exposure-in-residence, it is not enough to trigger coverage that the claimant experienced some asbestos-related injury during a policy period; the injury must have resulted from exposure to the policyholder's products. In the hypothetical example given above, then, the policies insuring manufacturer B would not be triggered until 1967, the date of the claimant's first exposure to B's products. B's policies in effect before 1967 would not be triggered on the claim, despite the claimant's earlier exposure to manufacturer A's products in 1957, as there was no injury from B's products until 1967. (Of course, B's policies in effect from 1967 onward, to the date of the claimant's death or claim, would be triggered by virtue of the progressive development of the disease, even if exposure ceased in 1967.)

FN24 Language in *Montrose* supports our

conclusion. In describing the continuous trigger, the *Montrose* court observed that the timing of the event or conditions causing the injury or damage is largely immaterial: "it can occur *before or during* the policy period." (10 Cal.4th at p. 675, italics added.) We construe this language to mean that exposure to hazardous conditions *after* the policy period will not trigger coverage.

We think this conclusion is sound. The language of the CGL policies reflects the requirement of a causal connection between the claimant's injury and the policyholder's conduct. The insurance policies obligate the insurer to pay all sums "which the insured shall become legally obligated to pay as damages because of bodily injury ... caused by an occurrence." An "occurrence" is defined as injurious exposure to conditions "which results during the policy period in bodily injury" When a claimant was not exposed to the insured's products until after the policy had ended, the causal connection is missing. If there is bodily injury during the policy period due to exposure to another manufacturer's products, the insured does not become liable "because of" such bodily injury. The insured does not become liable *at all* unless and until there is an exposure to its own products. It is only *62 "because of" the bodily injury caused by the later exposure to the insured's products that the insured becomes "legally obligated to pay" damages. As a matter of common sense, an ordinary lay reader would not understand the policy provisions to extend coverage to damages arising from conduct that took place after the policy had expired. ^{FN25} (*Contra, Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d 1178, 1200-1201, finding policy ambiguous and holding policies triggered on exposure to asbestos generally.)

FN25 Throughout our discussion we have referred to the claimant's "contact with" or "exposure to" the policyholder's products, for in this case the policyholders' wrongful conduct, upon which their underlying liability is based, consists of exposing the asbestos victims to hazardous products. (Fn. 23, *ante*.) The parties have neither raised nor briefed the

question of trigger of coverage when the underlying liability is established in a jurisdiction such as New York, where a manufacturer may be held liable in proportion to its market share despite proof that the claimant was not exposed to its products. We express no opinion on that question. We hold only that coverage is not triggered if the policyholder's liability-producing conduct took place after the policy expired.

Thus, in our hypothetical example, if a manufacturer is held liable to a claimant who was exposed to the products of other manufacturers in 1957 and who was exposed to the manufacturer-policyholder's products in 1967, the manufacturer's legal liability would be "because of" that *later* exposure to its own products, not because of the 1957 exposure. Hence, policies in effect before 1967 would not be triggered on the claim. To construe the policy language otherwise so as to trigger coverage upon exposure to any asbestos product could have the absurd result of triggering policies in effect before the manufacturer-policyholder ever manufactured asbestos products.

(12a) In the present case, the trial court's trigger decision fails to acknowledge this point. The decision creates in effect an irrebuttable presumption that all of an asbestos manufacturer's policies are triggered by a claim of injurious exposure to any asbestos product. We agree with *Keene* and *Forty-Eight Insulations* that an insurer is entitled to rebut that presumption and show that its policy was not triggered because the claimant was first exposed to its manufacturer-policyholder's products after the policy period had expired.

() We therefore modify the judgment to read that a policyholder's policies are triggered from the claimant's first exposure to the policyholder's products. An insurer has no liability if its policy expired before the claimant was exposed to the policyholder's product. () We emphasize, however, that pursuant to *Keene* and *Forty-Eight Insulations* the claimant will be presumed to have been exposed to asbestos products of all defendant-manufacturers, and the burden is on the insurer to prove that the claimant *63 was not exposed to its policyholder's product before or during the policy

period.

We reiterate, too, our affirmance of the trial court's continuous trigger decision: all of a policyholder's policies are triggered from first exposure to the policyholder's products until the date of claim or death, whichever occurs first. Thus, coverage is triggered if either (1) the claimant was exposed to the manufacturer's products during the policy period or (2) the claimant was exposed to the manufacturer's products at an earlier time such that during the policy period the claimant was experiencing latent asbestos injury from that earlier exposure.

(13) In seeking to justify the imposition of liability upon an insurer which was on the risk before the claimant was exposed to the policyholder's product, the policyholders contend the insurer's liability should parallel the "joint and several" liability of the manufacturers. Although one court has said as much (*ACandS, Inc. v. Aetna Cas. and Sur. Co., supra*, 764 F.2d at p. 974), we think this reasoning is faulty. First, as already noted at the beginning of this section, the liability of the manufacturers is not necessarily joint and several. Second, this is a trigger issue; we are not concerned with apportionment of liability. Whether the liability of the manufacturers is joint and several, proportionate to fault, or proportionate to market share, the contractual obligation of an insurer to indemnify the manufacturer-policyholder, to pay "all sums" which its policyholder becomes legally obligated to pay, arises only if coverage is triggered. And coverage is triggered only if the claimant was exposed to the policyholder's product either before or during the policy period.

In summary, we affirm the trial court's continuous trigger decision, and we affirm the trial court's allocation of indemnity and defense costs among the insurers, including the decision relieving policyholders from bearing a share of the loss for periods of no insurance. But we modify the first sentence of paragraph 8 of the judgment to read that all of a policyholder's policies that were in effect from the date of the claimant's first exposure to the policyholder's asbestos product until the date of death or claim, whichever occurs first, are triggered on an asbestos-related bodily injury claim, but the claimant is

presumed to have been exposed to all defendant-manufacturers' asbestos products, and the burden is on the insurer to prove that the claimant was not exposed to its policyholder's product before or during the policy period.

B. "Neither Expected Nor Intended"

(14a),(15a) In phase III of the proceedings, the trial court was called upon to interpret the phrase "neither expected nor intended," which appeared *64 in the standard CGL policy definition of an occurrence: "'Occurrence' means an accident, including injurious exposure to conditions, which results during the policy period, in bodily injury ... neither expected nor intended from the standpoint of the insured." The trial court determined that the phrase applies to exclude coverage "where the insured acted either wilfully, intentionally, or maliciously for the purpose of causing injury."

In phase IV, two insurers of Armstrong, Commercial Union and Travelers, argued that their policies provided no coverage for the claims of asbestos-related injuries because Armstrong expected or intended bodily injury resulting from exposure to asbestos. The trial court, however, rejected the argument and, applying its earlier test, found that Armstrong did not act for the purpose of causing injury. Hence, the court found the injuries from exposure to asbestos were neither expected nor intended by Armstrong.

Commercial Union appeals and challenges the trial court's interpretation of the policy language, arguing that the trial court's interpretation focuses only on the term "intended" and fails to give effect to the term "expected." The distinction between intended and expected takes on significance because Commercial Union's policy (issued by its predecessor, Employers' Liability Assurance Corporation (ELAC)), being an excess policy to the underlying policy of Continental Casualty, followed the form of that Continental manuscript policy whose language differed from the standard form policy language and defined occurrence as follows: "The term 'Occurrence' means an event or continuous or repeated exposure to conditions, which *unexpectedly* causes Personal Injury and/or Property

Damage and/or Advertising Liability during the policy period...." (Italics added.) (That is, in lieu of the standard phrase "neither expected nor intended," the policy used the term "unexpectedly.")

The Commercial Union policy was in effect from January 1, 1966, to January 1, 1969. Commercial Union contends that by 1966 Armstrong officials were well aware of asbestosis and other problems associated with inhalation of asbestos. In the view of Commercial Union, because Armstrong knew of the injurious effects of asbestos, the current claims for asbestos-related injuries are not claims for "unexpected" injuries and therefore are not covered, even though Armstrong may not have intended to cause the injuries.

1. Facts

The corporation now known as Armstrong World Industries, Inc. (hereafter Armstrong) began operating in the 1800's as a cork company and has a *65 long history as a manufacturer of cork products, including L.T. Cork Covering, a low temperature insulation. That product had a paper backing and in 1956, after an episode in which the paper had burned, the decision was made to include asbestos in the paper backing. From 1956 to 1959, Armstrong manufactured this asbestos-containing product.

The asbestos in L.T. Cork Covering was not friable; it was bonded into the paper. The record reveals that Armstrong officials believed L.T. Cork Covering was not a harmful product because it was not dusty. In fact, the cases now pending against Armstrong involving L.T. Cork Covering are relatively few, and in those cases Armstrong is a peripheral defendant. In 1959 Armstrong discontinued the manufacture and sale of L.T. Cork Covering and replaced it with Armaflex, a ^{FN26} new insulation product that did not contain asbestos.

FN26 Because most claims filed against Armstrong for asbestos-related injuries involve insulation workers, the focus of the trial was on Armstrong's insulation products.

In addition, Armstrong also manufactured floor tiles, which until 1983 contained asbestos. Again, the asbestos was not friable; it was bonded into the tiles. And until 1984, Armstrong manufactured an asbestos-containing gasket used for automotive purposes. The phase IV record does not indicate whether any bodily injury claims have arisen from these products. (Note that the floor tiles are involved in the phase V dispute over property damage.)

In the manufacturing operations, Armstrong's safety supervisor was concerned with the inhalation of dust, especially silica dust, which was known to cause silicosis. The manufacturing plants were kept well ventilated, and in the areas where sacks of asbestos (or other dusty material) were opened and dumped into a hopper for mixing into a product, a suction device was used to draw the dust away from the workers. Respirators were also made available, although they were seldom, if ever, used, as they were bulky and uncomfortable. Employees were given regular chest X-rays, and any employee with a sign of lung disease was transferred to another area of the plant. Actually, Armstrong has received relatively few claims for asbestos-related injuries arising from its manufacturing operations.

Most claims stem from Armstrong's insulation installation business. Armstrong began in the 1940's installing various asbestos-containing insulation products which were manufactured by other companies. In some cases Armstrong's name was placed on the insulation, but Armstrong did not manufacture the insulation.

For its manufacturing operations, Armstrong employed a staff of permanent employees, but for its insulation installation business, Armstrong used temporary workers, hired from the union hall, for each job. A job might last *66 a week; it might last a year. Different insulation products were used on different jobs. It is not entirely clear from the record what precautions were taken with respect to the insulation workers. Because the insulation installations were performed on the owners' property, Armstrong had less control over

working conditions. Respirators were apparently available, but not frequently used, except when using a spray-on product.

Armstrong received its first workers' compensation claim for an asbestos-related injury in 1952, from an insulation installer. The worker had worked for many different insulation installation companies, but had worked for Armstrong for only 2 weeks. The claim was dismissed as to Armstrong. During the 1960's, the number of workers' compensation claims from insulation installers for asbestos-related injuries substantially increased. Yet, about half of the workers' compensation claims filed against Armstrong were eventually dismissed.

In 1958 Armstrong was restructured so that its installation business became a subsidiary, Armstrong Contracting and Supply Company. In the late 1960's, Armstrong decided to focus its business on home furnishings rather than commercial installations, and it sold the subsidiary in 1969.

One of the asbestos-containing products used by Armstrong Contracting and Supply was a spray-on insulation called Limpet, which was manufactured in England. (A spray-on product is probably the most dangerous because the asbestos particles are sent directly into the air.) By the 1960's, Limpet was becoming expensive (due to import duties) and difficult to obtain in sufficient quantities. Moreover, the workers were not happy with the dustiness of the product. Hence, Armstrong Contracting and Supply asked its parent company, Armstrong, to come up with an alternative product, and in 1967 Armstrong began to manufacture Armaspray, a spray-on asbestos insulation. Armstrong sold it only to its subsidiary, Armstrong Contracting and Supply Company, as a test product. Ultimately, the product was deemed a failure, and it was discontinued in December 1968, although the inventory continued to be used by Armstrong Contracting and Supply into 1969 to finish jobs in progress. By that time, too, Armstrong Contracting and Supply was sold. According to the testimony, the decision to discontinue Armaspray was based not on health concerns, but on the lack of sales.

Armaspray was only 9 percent asbestos, in contrast to Limpet, which was nearly 100 percent asbestos. Armstrong's manufacturing policy called for safety testing of a product before manufacture, and Armaspray passed the *67 health and safety examination given it by Armstrong's industrial hygienists. Yet, in fact, no tests had been done to determine the airborne dust levels during use of the product. Not until 1968, after a meeting with Dupont, one of Armstrong's major customers for insulation installations, did Armstrong undertake its first tests of Armaspray to determine the dust count. But by December 1968 Armstrong had stopped manufacturing Armaspray. Test results that came in after Armaspray had been discontinued showed dust levels more than 10 times the acceptable limit.

The first asbestos-related lawsuit was filed against Armstrong in 1970, *Borel v. Fibreboard*, *supra*, in which Armstrong was one of the many named defendants. By 1987, the time of the phase IV trial, Armstrong had been sued by over 60,000 plaintiffs. Nearly all cases involve Armstrong's contract insulation installations. Some plaintiffs were Armstrong's own workers. (Not all states make workers' compensation benefits an exclusive remedy.) Some were workers at the job sites where the insulation work was done. Others were household members exposed to the dust on a worker's clothes.

2. The Trial Court's Decision

In phase III, the trial court ruled in part as follows on the meaning of the "neither expected nor intended" clause: "This Court determines that the 'neither expected nor intended' clause applies where the insured acted either wilfully, intentionally, or maliciously for the purpose of causing injury. (See *U.S. Fid. & Guar. Co. v. American Employers Insurance Co.* (1984) 159 Cal.App.3d 277 [205 Cal.Rptr. 460].) The intent behind the act in question must involve an element of wrongfulness or misconduct. (*Mullen [v. Glens Falls Ins. Co.]* 73 Cal.App.3d [163.] 171 [140 Cal.Rptr. 605].)

.....

"One final clarification on the standard is in order. An insurer is not required to produce express testimony or documentation as to an insured's subjective, wrongful intent to cause injury, but may show that reason mandates that by the very nature of the act undertaken, coupled with the knowledge actually in possession of the insured, harm must have been intended. [Citation.] This clarification accords with the language of the policy, which speaks in terms of what *was* 'expected or intended,' and not in terms of what *should have been* 'expected or intended.' It further accords with the general duty and right of courts to make determinations based on circumstantial evidence and inferences, as well as determinations drawn directly from the evidence." (Italics in original.)

After the trial in phase IV, the trial court concluded that "the evidence presented by Commercial Union does not satisfy [the phase III] standard.... that the insured acted wilfully, intentionally, or maliciously *for *68 the purpose of causing injury*. Here, the Court finds that Armstrong did not act for the purpose of causing injury." (Italics in original.) ^{FN27}

FN27 In phase III, the trial court determined that because the effect of the "neither expected nor intended" clause was to limit coverage, the burden was on the insurer to prove the injury was expected or intended. In phase IV, the trial court explained that it would have found that Armstrong did not act for the purpose of causing injury even if the burden of proof had been upon the insured.

3. Discussion

Prior to 1966, standard liability policies covered injuries "caused by accident." The words "caused by accident" served to exclude coverage for wilful acts of the insured. (1 Long, *The Law of Liability Insurance* (1993) § 1.08[1].) Beginning in 1966, however, the standard policy language was changed to provide coverage for injuries "caused by an occurrence" so long as the injuries were "neither expected nor intended from the standpoint of the insured." (See *Montrose Chemical*

Corp. v. Admiral Ins. Co., supra, 10 Cal.4th 645, 671-672.)

The meaning of the phrase "neither expected nor intended" has been a puzzle for the courts around the country, and the courts have given it varying interpretations. Some find the phrase "neither expected nor intended" to be ambiguous. Other courts do not. Some courts find the terms "expected" and "intended" to have separate meanings. Others find them to be synonymous. Some courts employ a subjective standard (the insured actually expected), while others employ an objective standard (the insured should have expected). It is difficult to find a clear trend in the law. (See Keeton & Widiss, Insurance Law (1988) § 5.4(d)(1) & (2), pp. 518-524; 1 Long, *op. cit. supra*, § 1.08[2] [b]; Annot. (1984) 31 A.L.R.4th 957.) As we will explain below, we give the phrase its plain meaning and construe "expected" to mean an actual awareness that harm was practically certain even though harm was not intended.

a. High Probability

Several courts in other jurisdictions have construed "expected" within the phrase "neither expected nor intended" to mean a high degree of probability: "The term "expected" when used in association with "intended" carries the connotation of a high degree of certainty or probability ... "practically [to] equate with "intended"" (*Patrons-Oxford Mut. Ins. Co. v. Dodge* (Me. 1981) 426 A.2d 888, 891, quoting from *State Farm Fire & Casualty Company v. Muth* (1973) 190 Neb. 248 [190 Neb. 272, 207 N.W.2d 364, 366].) *69

In *Patrons-Oxford, supra*, the court found the phrase "neither expected nor intended" ambiguous and construed it against the insurer. Accordingly, the court interpreted the word "expected" so as not to enlarge the exclusion of coverage. Other courts have adopted substantially similar interpretations by examining the ordinary (dictionary) definition of "expect." (*Indiana Farmers Mut. Ins. Co. v. Graham* (Ind.Ct.App. 1989) 537 N.E.2d 510, 512 ["the insured acted although he was consciously aware that the harm caused by his

actions was practically certain to occur"]; *Brown Foundation v. St. Paul Ins. Co.* (Ky. 1991) 814 S.W.2d 273, 278 [the insured "subjectively foresaw as a practically certain or expected-to-be result of the conduct"]; *Quincy Mut. Fire Ins. Co. v. Abernathy* (1984) 393 Mass. 81, 469 N.E.2d 797, 800 [the insured "knew to a substantial certainty that the bodily injury would result"]; *United Services Auto. Ass'n v. Elitzky* (1986) 358 Pa.Super. 362, 517 A.2d 982, 991 ["the insured acted even though he was substantially certain that an injury ... would result"]; and see *Bay State Ins. Co. v. Wilson* (1983) 96 Ill.2d 487 [71 Ill.Dec. 726, 451 N.E.2d 880, 883] [the insured was "consciously aware that ... injuries were practically certain to be caused by his conduct"]; *Farmers Union Oil v. Mutual Service Ins.* (Minn.Ct.App. 1988) 422 N.W.2d 530, 533 [the insured subjectively "knew of the substantial risks involved, proceeded in light of this knowledge, and disregarded the known hazard"]; see also Keeton & Widiss, Insurance Law, *op. cit. supra*, § 5.4(e)(2), at p. 535.)

() In California, the fundamental principle guiding judicial interpretation of insurance policy language is that words must be construed in their ordinary and popular sense unless the parties intended a special or technical sense. (Civ. Code, § 1644; *AIU Ins. Co. v. Superior Court, supra*, 51 Cal.3d at pp. 821-822.) (16) The plain and ordinary meaning of "expect," as reflected in dictionary definitions, is to anticipate, to consider probable or certain. ^{FN28} Hence, in *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715 [15 Cal.Rptr.2d 815], this court concluded that "expected," as used in the language of insurance policies, means anticipation with a high degree of probability, no matter whether the degree of that probability is expressed as "substantially certain, practically certain, highly likely, or highly probable." (*Id.* at p. 746.) *70

FN28 "Expect" is given the following dictionary definitions: "to look forward: look with anticipation ... : to look forward to; *specif.*: to anticipate the occurrence of ...: to consider probable or certain" (Webster's New Internat. Dict. (3d ed. 1965) p. 799); "to

look forward to (an event), regard (it) as about to happen; to anticipate the occurrence of (something whether good or evil)" (5 Oxford English Dict. (2d ed. 1989) p. 556); "1. To look forward to the probable occurrence or appearance of. 2. To consider likely or certain" (American Heritage Dict. (2d college ed. 1982) p. 476).

b. *Subjective Awareness*

() In *Shell Oil*, the jury had been instructed that " 'the exclusionary word "expected" denotes that the actor knew or should have known that there was a substantial probability that certain consequences would result from his or her acts or omissions.' " (12 Cal.App.4th at p. 743.) The appellate court rejected the objective (should have known) standard, holding instead that the appropriate inquiry is what the insured *actually* knew or believed. (*Id.* at pp. 746-748; see also *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 17 [44 Cal.Rptr.2d 370, 900 P.2d 619]; *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 468 [27 Cal.Rptr.2d 476].)

This interpretation conforms to a line of product liability cases in which the California courts have held that an injury is excluded from coverage only if the insured knew of the defects. The rationale underlying these product liability cases seems to be that if the insured knew of the defects the insured also knew that injuries were practically certain to occur and, hence, the injuries were expected: "[T]o bar third party liability coverage, the defect causing the postsale damage must have been *known* to Chu or their agents before the units were sold" (*Chu v. Canadian Indemnity Co.* (1990) 224 Cal.App.3d 86, 97 [274 Cal.Rptr. 20], italics in original.) "As previously discussed, the purpose of third party liability insurance is to protect the insured against injuries to third parties neither expected nor intended by the insured. To the extent Chu knew of extant defects pre-sale, any injuries flowing therefrom would not be an unexpected or unintended consequence of selling defective units.... [¶] However, if Chu did not have pre-sale knowledge of the defect, any injuries suffered would be an unexpected or unintended consequence of selling the units." (*Id.*, at pp. 98-99; see also *Hogan v.*

Midland National Ins. Co. (1970) 3 Cal.3d 553, 560 [91 Cal.Rptr. 153, 476 P.2d 825]; *Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co.* (1959) 51 Cal.2d 558, 563-564 [334 P.2d 881]; *Economy Lumber Co. v. Insurance Co. of North America* (1984) 157 Cal.App.3d 641, 648 [204 Cal.Rptr. 135].)

Several out-of-state courts have similarly concluded a subjective test should be employed to determine whether the injury was intended or expected. (*Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d 1178, 1205; *Broderick Inv. Co. v. Hartford Acc. & Indem. Co.* (10th Cir. 1992) 954 F.2d 601, 605-606, cert. den. 506 U.S. 865 [121 L.Ed.2d 133, 113 S.Ct. 189]; *City of Johnstown v. Bankers Standard Ins.* (2d Cir. 1989) 877 F.2d 1146, 1151, *fn. 1*; *Hatco Corp. v. W.R. Grace & Co.-Conn.* (D.N.J. *71 1992) 801 F.Supp. 1334, 1375-1376; *Indiana Farmers Mut. Ins. Co. v. Graham, supra*, 537 N.E.2d at p. 512; *Brown Foundation v. St. Paul Ins. Co., supra*, 814 S.W.2d at pp. 278-279; *Patrons-Oxford Mut. Ins. Co. v. Dodge, supra*, 426 A.2d 888; *Quincy Mut. Fire Ins. Co. v. Abernathy, supra*, 469 N.E.2d at p. 800; *Queen City Farms v. Central Nat. Ins. Co.* (1994) 126 Wn.2d 50 [882 P.2d 703, 712-714]; and see *Farmers Union Oil v. Mutual Service Ins., supra*, 422 N.W.2d at p. 533; *United Services Auto. Ass'n v. Elitzky, supra*, 517 A.2d at p. 991.)

The courts have used various approaches to reach that conclusion. In *Patrons-Oxford Mut. Ins. Co. v. Dodge, supra*, 426 A.2d 888, the court found the phrase "neither expected nor intended" to be ambiguous and therefore construed the phrase against the insurer. In *United Services Auto. Ass'n v. Elitzky, supra*, 517 A.2d at page 991, the court focused on the ordinary, dictionary definitions of "expected": "Each of these definitions connotes an element of conscious awareness by the insured. None of them defines expected as events the insured should have known about." (See also *Indiana Farmers Mut. Ins. Co. v. Graham, supra*, 537 N.E.2d at p. 512 ["Nothing in the definition of 'expected' excludes harm that the insured 'should have anticipated.'"])

Other courts have focused on the language of the exclusionary clause: "neither expected nor intended

from the standpoint of the insured." As one court put it, "The policies here state that the insurer has a duty to indemnify or defend the insured for damage if the damage was neither expected nor intended from the standpoint of the insured. They do not say from the standpoint of a reasonable person." (*Brown Foundation v. St. Paul Ins. Co.*, *supra*, 814 S.W.2d at p. 279.)

Other courts have rejected an objective standard because such a standard would extend the exclusionary clause to exclude coverage even for negligence—the very risk the insured sought coverage for. "We are also fearful that an exclusion of injuries the insured 'should have anticipated' might exclude from coverage, not only intentional injuries but also those caused by negligence." (*United Services Auto. Ass'n v. Elitzky*, *supra*, 517 A.2d at p. 991; see also *Queen City Farms v. Central Nat. Ins. Co.*, *supra*, 882 P.2d at pp. 712-713; *Grange Mutual Casualty Company v. Thomas* (Fla. Dist. Ct. App. 1974) 301 So.2d 158, 159 [declining to differentiate "expected" from "intended" because to do so would exclude coverage for gross negligence].)

In the *Shell Oil* decision, the court took this approach and reasoned in part that the objective standard would deny coverage for mere negligence: "By *72 testing what Shell should have known, the instructions invited denial of coverage for conduct within the realm of negligence" (12 Cal.App.4th at p. 748.)

That decision finds support in *Chu v. Canadian Indemnity Co.*, *supra*, 224 Cal.App.3d 86, where the insured was aware of certain construction defects in the condominium units at the time of sale, but other defects manifested themselves later. The insurer argued that coverage should be denied for the postsale defects, as they were the inevitable result of the known defects. The appellate court rejected the insurer's argument and held that "third party liability coverage was not barred merely because Chu 'should have discovered' the defect but negligently failed to do so." (224 Cal.App.3d at p. 97; see also *Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1021 [251 Cal.Rptr. 620] ["We assume that the [phrase] '... neither expected nor intended by the insured' excludes from insurance coverage only conduct by the insured which was subjectively intended to harm or injure."].)

The *Chu* court reasoned that if the insured was actually ignorant of the defects, denial of coverage on account of a negligent failure to investigate would defeat the very purpose of third party liability coverage: "[I]f Chu did not have pre-sale knowledge of the defect, any injuries suffered would be an unexpected or unintended consequence of selling the units. This is the case even though Chu may have had notice of facts which would incite investigation by a reasonably prudent person, but nevertheless negligently failed to investigate and obtain actual knowledge of the existence of such defects. [Citation.] Since a major purpose of third party liability insurance is to protect the insured from claims for negligence (*Garvey v. State Farm Fire & Casualty Co.*, *supra*, 48 Cal.3d 395, 407-408 ...), Chu's third party coverage is not forfeited merely because they should have known of the existence of defects but negligently failed to discover such defects." (224 Cal.App.3d at p. 99.) "In reviewing the pertinent authorities, we find no cases denying third party liability coverage to an insured who sold property when he 'should have known' of the defect, but who through negligence was actually ignorant of the defect." (*Id.*, at pp. 99-100.)

We are persuaded by the *Chu* court's reasoning, and we apply it here. In our view, imposing a "should have known" standard on insureds would defeat the essential purpose of insurance agreements. What is expected or intended is different from that which was reasonably foreseeable or which should have been known. An insurance policy exclusion from manufacturing activities which carry a risk of causing environmental harm, although not known or intended to cause harm in the insured's business conduct, would *73 create an exclusion swallowing the entire purpose of insurance protection for unintended consequences. Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent indeed in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If coverage is lost for damage which a prudent person should have foreseen, there would be no point to purchasing a policy of liability insurance.

c. "Expected" Differentiated from "Intended"

() In the *Shell Oil* case some insurance policies did not contain the exclusionary phrase "neither expected nor intended." The court therefore had to decide whether *Shell's* environmental pollution came within the statutory exclusion for "wilful" acts (Ins. Code, § 533).^{FN29} The court concluded that a "wilful" act extends beyond an act which causes harm that the insured intended and encompasses as well an act which causes harm that the insured expected: "A 'wilful act' under section 533 must also include a deliberate, liability-producing act that the individual, before acting, expected to cause harm. Conduct for which the law imposes liability, and which is expected or intended to result in damage, must be considered wrongful and willful. Therefore, section 533 precludes indemnification for liability arising from deliberate conduct that the insured expected or intended to cause damage." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.*, supra, 12 Cal.App.4th 715, 743.)

FN29 Insurance Code section 533 provides: "An insurer is not liable for a loss caused by the wilful act of the insured; but [the insurer] is not exonerated by the negligence of the insured, or of the insured's agents or others."

By implication, then, the *Shell Oil* court acknowledged that "expected" injuries are different from "intended" injuries in that the insured may expect injuries-believe them to be substantially certain to occur-without having the express purpose of causing damage. (See also 12 Cal.App.4th at p. 745.)

Good reasons exist for excluding injuries that are expected though they are not intended. (17) "[O]rdinarily insurance does not provide indemnification for the type of economic detriments that occur so regularly that they are commonly regarded as a cost, rather than as an insurable risk, of an enterprise or activity. Closely associated with this basic principle is the view that it is fundamentally inconsistent with the legitimate purpose of an insurance arrangement for one to seek to use it as protection against calculated risks" (Keeton & Widiss,

Insurance Law, *op. cit. supra*, § 5.4(e), pp. 534-535.) "If the single insured is allowed through *intentional or *74 reckless* acts to consciously control the risks covered by the policy, a central concept of insurance is violated." (*Farmers Union Oil v. Mutual Service Ins.*, supra, 422 N.W.2d at p. 533, quoting from *Bituminous Cas. Corp. v. Bartlett* (1976) 307 Minn. 72 [240 N.W.2d 310, 313] overruled on other grounds, *Prahm v. Rupp Const. Co.* (Minn. 1979) 277 N.W.2d 389, 391; italics added; see also *City of Carter Lake v. Aetna Cas. and Sur.* (8th Cir. 1979) 604 F.2d 1052, 1059 [where insured took calculated risk that damage would occur and elected to proceed, the results were not accidental]; 7A Appleman, Insurance Law & Practice, *op. cit. supra*, § 4492.01, p. 21.)

() Several out-of-state courts have determined that the two words "expected" and "intended" within the phrase "neither expected nor intended" language cannot be treated as synonymous. These courts have reasoned that the purpose of adding the phrase "neither expected nor intended from the standpoint of the insured" was to broaden the class of excluded injuries beyond intentional injuries. (*Patrons-Oxford Mut. Ins. Co. v. Dodge*, supra, 426 A.2d at pp. 890-891; *Farm Bureau Town & Country Ins. v. Turnbo* (Mo.Ct.App. 1987) 740 S.W.2d 232, 236; *United Services Auto. Ass'n. v. Elitzky*, supra, 517 A.2d at p. 990; see Keeton & Widiss, Insurance Law, *op. cit. supra*, § 5.4(e)(4), p. 538; *id.*, § 5.4(g), pp. 544-545; 7A Appleman, *op. cit. supra*, § 4491, pp. 3-4.) Accordingly, the courts have concluded that unless the terms are given different meanings, "expected" would serve no purpose within the exclusionary clause. (*Bay State Ins. Co. v. Wilson*, supra, 451 N.E.2d at p. 882; *Aetna Cas. & Sur. Co. v. Freyer* (1980) 89 Ill.App.3d 617 [44 Ill.Dec. 791, 411 N.E.2d 1157, 1159]; *Indiana Farmers Mut. Ins. Co. v. Graham*, supra, 537 N.E.2d at p. 512; *Steelman v. Holford* (Mo.Ct.App. 1989) 765 S.W.2d 372, 377 [765 SW2d 372]; *Farm Bureau Town & Country Ins. v. Turnbo*, supra, 740 S.W.2d at p. 236.)

In dictum, this court, too, has observed that the inclusion of the term "expected" within the policy language renders the exclusionary clause broader than the exclusion for intentional or wilful acts. (See *United Pacific Ins. Co. v. McGuire Co.* (1991) 229 Cal.App.3d

1560, 1566, fn. 2 [281 Cal.Rptr. 375].)

(,)(In light of these authorities, we conclude that in the present case the exclusion within the Commercial Union policy for "unexpected " injuries applies to injuries that the insured subjectively knew or believed to be practically certain to occur even though the insured did not act for the purpose of causing injury. The trial court correctly used a subjective standard, but the court failed to differentiate "expected" from "intended" and did not consider whether Armstrong, the insured, though not intending to cause *75 injury, expected the injuries because it knew of the hazards of asbestos and was aware of the substantial probability of harm from its manufacture and sale.

Armstrong contends that the insurers' arguments come too late because the insurers failed to alert the trial court to the distinct language of the Continental policy. This contention, however, is not persuasive. The trial court expressly acknowledged that one argument before it, advanced by some insurers, was that "the term 'expected' must be given a meaning independent of 'intended' so as to bar coverage when the resultant damage is a 'substantial probability,' or is 'likely,' or is 'highly expectable.'" Whether that argument was directed at the standard form language ("neither expected nor intended") or the Continental manuscript policy ("unexpectedly") is irrelevant. The fact remains that the trial court did not give meaning to the term "unexpected" and did not make a finding on whether the asbestos injuries were expected by Armstrong.

(18a) Although we find the trial court's interpretation of the policy language in error (paragraphs 20 and 21 of the judgment), we find it unnecessary to remand for further findings in accordance with a broader interpretation of the exclusionary language. When a trial court fails to make a finding on a material issue, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party. (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525 [246 Cal.Rptr. 823]; *People ex rel. Sorenson v. Randolph* (1979) 99 Cal.App.3d 183, 187 [160 Cal.Rptr. 69]; *South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 Cal.App.3d

944, 995 [133 Cal.Rptr. 166].) From our review of the trial record, we find insufficient evidence to support a finding that Armstrong officials knew or believed the asbestos bodily injuries were practically certain to occur.

(19) By all accounts, Armstrong executives believed that the company's own asbestos products, L.T. Cork Covering and Armaspray, were not dangerous. There was concern about the dustiness of Armaspray-but not so much for health reasons as for reasons of cleanup and potential damage to electrical equipment. The specifications for Armaspray called for good ventilation, screening off the areas from non-users, and respirators while using the product.

There is no evidence that Armstrong officials knew that its own workers were endangered by Armstrong's insulation installation operations. Mr. Bushnell, Armstrong's research and development specialist, testified that he *76 first learned of the health dangers of asbestos at a May 1968 conference. Mr. King, the marketing manager for Armaspray, testified that he was unaware of the health risk of asbestos until the 1968 meeting with Dupont officials. Other Armstrong executives, however, were aware by the early 1960's that breathing asbestos dust could be dangerous. But general knowledge of the hazards of asbestos is not equivalent to knowledge that asbestos bodily injuries were practically certain to occur. The record indicates that the Armstrong officials believed that the workers would not be harmed as long as the dust levels were controlled. There is no evidence the Armstrong officials actually knew the dust levels at their own job sites were hazardous.

Armstrong's insurance manager, Mr. Hofferth, knew that Armstrong's insurers periodically sent "loss prevention engineers" to inspect Armstrong's manufacturing plants and job sites. He relied on them to alert Armstrong to potential problems. At no time during the 1953-1973 policy periods did any loss prevention report from any of Armstrong's carriers express a concern for the dangers of using or inhaling asbestos. (In 1977, Armstrong's carrier inserted an exclusion for asbestosis.) In fact, Mr. Hofferth knew that Armstrong got favorable premiums because of its

relatively low loss experience compared to the national average.

Commercial Union primarily relies upon the evidence that Armstrong expected workers' compensation claims from its insulation installers. By 1961, Mr. Hofferth was "alarmed" and "concerned" at the rise in workers' compensation claims for asbestos injuries. At trial, Mr. Hofferth explained that what had concerned him was that Armstrong was being saddled with workers' compensation claims for injuries that occurred on other companies' jobs. He knew that the workers hired from the union hall worked for other companies who might not take the same precautionary measures. And he knew that in many states the workers' compensation laws make the last employer responsible for payment of workers' compensation benefits. Mr. Hofferth proposed that the insulation workers be given preemployment chest X-rays, so that diseased employees could be screened out, but that plan was opposed by the union and was not put into effect. Mr. Hofferth therefore expected the workers' compensation claims to increase.

But Mr. Hofferth testified that he believed that Armstrong was taking every necessary precaution to protect the workers from injury; he believed the dust levels were being controlled. Moreover, Mr. Hofferth relied on Armstrong's carriers to investigate workers' compensation claims. Despite the carriers' awareness of the increasing number of claims, no carrier expressed concern over the use of asbestos products. *77

Finally, there is no evidence that anyone at Armstrong knew that third parties might be injured by exposure to asbestos fibers released during Armstrong's contract installation activities. The record indicates that until the *Borel* lawsuit was filed in 1970, Armstrong officials had been unaware that its asbestos products were a danger to third parties. In fact, in 1973, Armstrong changed its primary insurance carrier to Liberty Mutual, and even though the *Borel* lawsuit had been filed, Liberty Mutual expressed no concern for Armstrong's potential liability for asbestos injuries.

In summary, although the evidence of Armstrong's general knowledge of asbestos dangers might support a finding that Armstrong should have expected the

asbestos bodily injuries, the insurer's burden was to prove, directly or circumstantially, that Armstrong actually did expect them. () In light of the whole record, we find the evidence insufficient to support a finding that during the policy period at issue here, 1966 through 1968, Armstrong was actually aware the asbestos bodily injuries were practically certain to occur. Consequently, we affirm the trial court's judgment (paragraph 32) that coverage under the Commercial Union policy for asbestos bodily injury claims is not excluded.

C. Premerger Liability

(20a) From May 1, 1961, to May 1, 1967, Continental Casualty and Commercial Union provided excess insurance coverage to GAF Corporation under three separate policies. The premiums were based on GAF's gross sales and were adjusted annually to reflect changes in GAF's operations, including corporate acquisitions, during the policy period. During the 1961-1967 policy periods, GAF did not manufacture asbestos products. On May 26, 1967-after the expiration of the Continental and Commercial Union policies-GAF merged with Ruberoid Co., which had manufactured asbestos building materials since the 1880's. After the merger, Ruberoid ceased to exist. All of its assets were transferred to GAF, which took over its asbestos-manufacturing operations. Not until 1969 was the first claim brought against GAF for an asbestos-related bodily injury arising out of Ruberoid's products.

In phase IV of the coordinated proceedings below, the trial court was asked to decide whether the premerger insurers of GAF (Continental and Commercial Union) provided coverage for asbestos-related injuries attributable to the products of the Ruberoid Company. The trial court concluded that the premerger policies do provide coverage, but we have concluded that ruling was erroneous. *78

1. The Insuring Agreements

The insuring agreements in each of the three insurance policies at issue here obligate the insurers to pay "for all

sums which the insured shall be obligated to pay by reason of the liability imposed upon him by law or assumed by him under contract for damages ... on account of ... personal injuries" In support of the trial court's ruling, GAF emphasizes that upon the merger with Ruberoid GAF became obligated both by law (*Rav v. Alad Corp.* (1977) 19 Cal.3d 22, 28 [136 Cal.Rptr. 574, 560 P.2d 31]; *Moe v. Transamerica Title Ins. Co.* (1971) 21 Cal.App.3d 289, 304 [98 Cal.Rptr. 547]) and by contract for the liabilities of Ruberoid.^{FN30} Hence, GAF argues that the insuring agreements extend coverage to damages for which GAF is held liable on account of asbestos-related injuries caused by exposure to Ruberoid's products.

FN30 The laws of Delaware and New Jersey, the respective states of GAF and Ruberoid, are in accord with the general rule that upon a merger a surviving corporation is answerable for the debts and liabilities of the acquired corporation. (N.J. Rev. Stat. § 14A:10-6(e); 8 Del. Code § 259(a).)

The trial court accepted this argument and ruled that "Coverage is mandated by the language contained in the insuring agreement of each of the three policies.... Courts have imposed liability for asbestos-related bodily injury damages on GAF because of its acquisition of Ruberoid. The plain language in the insuring agreements therefore provides coverage to GAF for that liability. " We cannot agree.

It is axiomatic that insurance policies must be interpreted as a whole. (*Producers Dairy Delivery Co. v. Sentriv Ins. Co.* (1986) 41 Cal.3d 903, 916, fn. 7 [226 Cal.Rptr. 558, 718 P.2d 920]; *Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1536 [274 Cal.Rptr. 632].) Although, on its face, the insuring agreement may appear to extend coverage to GAF's liabilities attributable to Ruberoid, the insuring agreement must be read in conjunction with the "named insured" provision. (*Milazo, supra*, at p. 1536.) (21) (See fn. 31.), () As we will discuss below, Ruberoid does not qualify as a named insured.^{FN31} *79

FN31 The insurers rely upon *Aetna Life & Cas. v. United Pac. Rel. Ins.* (Utah 1978) 580 P.2d 230, but that case holds that insurance coverage survives a corporation's merger and passes to the surviving corporation along with the liabilities. (See also *Oklahoma Morris Plan Co. v. Security Mutual Cas. Co.* (8th Cir. 1972) 455 F.2d 1209; *Maryland Cas. Co. v. W.R. Grace & Co., supra*, 794 F.Supp. at pp. 1233-1236.) Application of that principle here means that upon GAF's succession to Ruberoid's liabilities, GAF became entitled to insurance coverage by *Ruberoid's* insurers. This principle is of no relevance to the issue before us. As a general rule, insurance policies should be interpreted as if no other insurance is available. (*Pacific Indemnity Co. v. Imperial Casualty & Indemnity Co.* (1976) 176 Cal.App.3d 622, 627 [222 Cal.Rptr. 115]; *Chamberlin v. Smith, supra*, 72 Cal.App.3d at p. 844.) Therefore, in construing GAF's premerger policies we do not consider the availability of coverage under Ruberoid's policies.

2. Named Insured

(22a) The two policies issued by Commercial Union's predecessors, Employers' Surplus Lines Insurance Company (ESLIC) and Employers' Liability Assurance Corporation (ELAC), contain language limiting products liability coverage to products manufactured "by the named insured or by others trading under his name." The Continental policy follows form to the underlying ESLIC policy. The "named insured" is identified in the ESLIC and Continental policies as "[GAF] and/or its subsidiary, associated, and affiliated companies or owned and controlled companies as now existing or hereafter constituted." The ELAC policy contains a more limited definition of named insured, insuring only those companies owned or acquired during the policy term.^{FN32}

FN32 The ELAC policy provides in pertinent part: "It is agreed that the Named Insured shall read as follows: [GAF] and any other business

organization while the foregoing named insured owns an interest therein of more than fifty percent (50%) during the policy period."

Commercial Union and Continental contend that the definition of "named insured" within the ESLIC and Continental policies cannot extend to Ruberoid because Ruberoid was never a subsidiary of GAF nor was it an owned and controlled company: upon the merger, Ruberoid ceased to exist. GAF, on the other hand, argues that the purpose of the language was to extend coverage to corporations acquired by GAF. The trial court agreed with GAF's argument: "The plain meaning of 'hereafter constituted' indicates an intention to provide coverage to GAF despite its assumption of new liabilities resulting from the acquisition of Ruberoid."

We conclude to the contrary. We do not doubt that the phrase "or hereafter constituted" within the named insured definition would extend coverage to a company acquired after the policy period began.^{FN33} (See Reserve Insurance Co. v. Apps (1978) 85 Cal.App.3d 228, 231 [149 Cal.Rptr. 223] [dictum: named insured includes spouse acquired after policy took effect].) But the word "hereafter" cannot reasonably be read as referring to any time in the indefinite future. Obviously, in the abstract, the phrase "or hereafter constituted" could refer either to companies acquired at any time in perpetuity or to those acquired after the inception of the policy but before the end of the policy term. (See, e.g., Webster's New International Dict., *supra*, p. 1058 *80 [defining "hereafter" as "in some future time or state".]) As a matter of policy interpretation, however, the phrase must be read within the context of the policy as a whole, and thus must be read in conjunction with the policy period.

FN33 Similarly, in light of the phrase "as now existing," coverage would extend to a subsidiary severed after the policy period began.

(23) A liability insurance policy has a finite duration. The period of time during which the insurance policy is effective is an essential element of a liability insurance contract (Ins. Code, § 381, subd. (e); Parlier Fruit Co.

v. Fireman's etc. Ins. Co. (1957) 151 Cal.App.2d 6, 21 [311 P.2d 62]), and the reason is obvious: the insurer's obligation to indemnify is limited to insurable events occurring during the coverage period. Unless coverage has been triggered during the policy period, there is no coverage once the policy period has ended. Logically, then, neither is there a named insured once the policy period has ended. Thus, a corporate acquisition taking place after the policy has expired can have no retroactive effect on the identity of the named insured during the policy period.^{FN34}

FN34 Although we rely upon a plain reading of the language of the policy, we reach the same result as was reached in Cooper Companies v. Transcontinental Ins. Co. (1995) 31 Cal.App.4th 1094 [37 Cal.Rptr.2d 508], in which the court found the language ambiguous and relied upon the reasonable expectations of the insured. We find the policy language, when construed in the context of the policy as a whole, capable of only one plausible construction; hence, we discern no ambiguity. (See generally Bav Cities Paving Grading, Inc. v. Lawyers' Mutual Ins. Co. (1993) 5 Cal.4th 854, 867 [21 Cal.Rptr.2d 691, 855 P.2d 1263], defining ambiguity.)

() We therefore conclude that the named insured definition under the ESLIC and Continental policies does not include a company acquired, as here, after the policy period ended.^{FN35} This conclusion applies as well to the ELAC policy, which expressly limits the named insured to those companies owned or acquired by GAF during the policy term.

FN35 Continental and Commercial Union contend an acquired company qualifies as a named insured only if it was already acquired at the time of the occurrence-at the time insurance coverage was triggered. This contention suggests that insurance coverage would be excluded if an occurrence arising from the acquired company's conduct took place before the merger (and during the policy

period), even though the tortfeasor-company was acquired during the policy period. We need not decide this point, i.e., whether the phrase "or hereafter constituted" would qualify the acquired company as a named insured during the entire policy period and extend insurance coverage to occurrences that took place before the merger as well as occurrences that took place afterward. We decide only that there is no coverage when the merger took place after the policy period had expired.

() Indeed, in all of the California cases we have located on this issue, the party who qualified as a named insured did so during the policy period. (See, e.g., Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal.2d 423, 438 [296 P.2d 801, 57 A.L.R.2d 914] [negligent driver qualified as a *81 "managing employee"]; Uiley v. Allstate Ins. Co. (1993) 19 Cal.App.4th 815, 819, 823 [24 Cal.Rptr.2d 1] [adult son was additional insured as "resident relative" of insured]; Safeco Ins. Co. v. Gibson (1989) 211 Cal.App.3d 176, 182, 184 [259 Cal.Rptr. 206] [minor child of divorced parents was "resident" of the insured's household]; Reserve Insurance Co. v. Apps, *supra*, 85 Cal.App.3d at p. 231 [separated spouse was "resident" of the household]; State Farm Mut. Auto. Ins. Co. v. Elkins (1975) 52 Cal.App.3d 534, 538 [125 Cal.Rptr. 139] [insured's college student daughter was "resident" of the household]; cf. National Auto. & Cas. Ins. Co. v. Underwood (1992) 9 Cal.App.4th 31, 40 [11 Cal.Rptr.2d 316] [minor child of divorced parents was not "resident" of insured's household].) ^{FN36}

FN36 Although the decision in Oliver Machinery Co. v. United States Fid. & Guar. Co. (1986) 187 Cal.App.3d 1510 [232 Cal.Rptr. 691] (product of predecessor company was not one of named insured's products) supports the decision here, we do not rely upon it, as it involved very different facts and issues. The question before the Oliver court was whether the named insured's distributor qualified as an additional insured. The meaning of "hereafter constituted" was

not in issue.

Two other decisions reached the same conclusion reached here, that the premerger insurer of the acquiring company does not provide coverage for liabilities of the acquired company: State of Idaho v. Bunker Hill Co. (D.Idaho 1986) 647 F.Supp. 1064, 1077, and Maryland Cas. Co. v. W.R. Grace & Co., *supra*, 794 F.Supp. 1206, 1230-1232. However, the courts in those cases employed a somewhat different analysis, reasoning that during the premerger policy period the insured was not responsible for the liabilities of the later-acquired company. Although we focus instead on the fact that Ruberoid was not a named insured under the premerger policies, those cases support our view that the named insured must qualify as such during the policy period.

In the present case, Ruberoid had no relationship with GAF during the 1961-1967 policy periods. The merger of Ruberoid and GAF took place after the Continental and Commercial Union policies had expired. The fact that the companies became affiliated later is not enough to give Ruberoid the status of a named insured under the premerger policies. Accordingly, we reverse the trial court's judgment (paragraph 30) on this point.

D. The Wellington Agreement

In 1985 certain parties of the coordinated proceedings, along with other asbestos manufacturers and insurers, joined in a settlement known as the Wellington Agreement. The trial court described the settlement as follows:

"Negotiations between producers of asbestos products and insurers began in 1982 in response to the problems associated with massive, nationwide litigation of asbestos bodily injury claims. During the period the Wellington Agreement was being negotiated, producers of asbestos were faced with literally tens of thousands of bodily injury claims by workers, as well as *82 cross-claims by co-defendants in the underlying cases. In addition, there were numerous and major coverage disputes between producers and insurers. After several years of negotiations, the Wellington Agreement was executed on June 19, 1985. There were 47 original signatories to Wellington, including both insurers and

producers. Any other producer or insurer could become a signatory to the agreement.

“The purposes of the Wellington Agreement were to resolve the numerous coverage disputes between and among insurers and producers, to revolve the cross-claims among producers, and to reduce the costs of litigation. According to the agreement itself, the subscribers to Wellington desired to take reasonable and practical steps 'to ensure the expenditure of funds for the reasonable payment of meritorious claims at reasonable processing costs.'

“To this end, the subscribing members of Wellington agreed to establish a non-profit organization, the Asbestos Claims Facility, which would administer, evaluate, settle, pay or defend all asbestos-related claims against the subscribing producers and insurers. The Wellington Agreement sets forth standards for the handling of claims by the facility. The facility is governed by a board of directors which contains an equal number of producers and insurers.

“Settlement of the cross-claims among producers was essential to the consolidation of the handling of asbestos claims into a single entity. In order to achieve such a settlement, producers agreed to pay a percentage of all claims, whether or not they were named in a claim. The mechanism by which liability on each asbestos-related claim is allocated among producers is the producer allocation formula. The Court does not have before it the percentage that each producer pays, but rather the formula from which the numbers are derived. The percentage allocation is computed based on the number of open and closed claims for each producer as of September 30, 1983 and the amount paid or owing on closed claims.”

1. *The Trial Court's Findings*

In phase IV of the proceedings the trial court was called upon to decide the effect of the Wellington Agreement (and other settlements) on disputes among settling and non-settling insurers: does the settlement determine the amount of “other insurance” available to the policyholder for payment of claims for purposes of

contribution among insurers? The court was also called upon to decide the effect of the Wellington Agreement on disputes between settling policyholders and nonsettling insurers. Continental Casualty Company and its related companies, Columbia Casualty Company and *83 CNA Casualty of California, (hereafter referred to collectively as the CCC Companies) challenge the trial court's decision on the latter issue.

Reasonable Settlement

Although the former (other insurance) issue is not before us, the trial court's decision on that issue has relevance to our analysis of the effect of the settlement upon the CCC Companies' indemnity obligations. We therefore take note that the trial court heard evidence and made a finding that the Wellington Agreement was a reasonable, good-faith settlement, despite the charge of inaccuracy in the producer allocation formula. The trial court's decision follows:

“Dr. Wecker testified that the producer allocation formula is inaccurate in that it does not replicate the tort system. A major source of inaccuracy, according to Dr. Wecker, is the requirement that producers pay on claims in which they are not named. Dr. Wecker testified that the formula assumes that the frequency with which a producer is named in a claim will not change over time. If new categories of claims arise which apply to a particular producer, the frequency with which that producer is named would increase, and there would be a corresponding decrease in the frequency with which other producers are named. Mr. Pulkrabek testified that there were new categories of claims and that some producers and insurers have expressed concern regarding their Wellington share.

“Assuming that the formula has resulted over time in differentials between what producers would pay under the tort system and what producers are paying under Wellington, it does not follow that the producer allocation formula is unreasonable. The Court must evaluate the settlement at the time it was made. It is clear to the Court that at the time the Wellington Agreement was executed, the producer allocation formula was intended to replicate what producers would

have paid on claims outside of Wellington. Mr. Pulkrabek testified that Armstrong, for example, looked very hard at the formula and determined that Armstrong's liability would not increase under Wellington. This is borne out by the formula itself, which determines each producer's share on the basis of the producer's litigation experience over the years prior to September 30, 1983. Although a producer pays on all claims, whether or not that producer is named in a particular claim, it is equally true that other producers pay on claims in which they are not named and thus pay a proportionate share of the named producer's liability. In addition, the Court finds that defense costs were reduced substantially by the Wellington Agreement. Given the circumstances in which the Wellington Agreement *84 was executed, the producer allocation formula clearly meets the standard of reasonableness.

"The Wellington Agreement represents a unique solution to an unprecedented litigation problem. Given the lengthy negotiations between insurers and producers preceding the execution of the agreement, the procedures and standards set up for handling claims, and the allocation formulas incorporated in the agreement, the Court is convinced that the Wellington Agreement represents a reasonable, good faith settlement among the subscribing insurers and producers."

Liability of Policyholders

The nonsettling insurers argued below that their obligations to indemnify the asbestos manufacturers should not be defined by the manufacturers' Wellington payments because the producer allocation formula requires the manufacturers to pay on claims for which they are not legally liable. The trial court rejected the argument: "The Court concludes that the amounts paid by the policyholders pursuant to the producer allocation formula are presumptive evidence of the legal liability of the policyholders for asbestos-related claims.... [¶] Since the insurers have failed to offer sufficient evidence to rebut this presumption, the Court concludes that the insurers are obligated to reimburse the policyholders for their liability for asbestos-related claims as defined by the producer allocation formula,

subject to the contribution principles set forth in this decision."

2. Discussion

(24a) Fibreboard and Armstrong became parties to the Wellington Agreement, but the CCC Companies declined to join the settlement. In this segment of the appeal, the CCC Companies argue that the trial court's finding that the policyholders' Wellington payments are "presumptive evidence" of the policyholders' liability contravenes basic principles of insurance law.

The CCC Companies rely on the rule that it is the policyholder who has the initial burden of proving that a claim comes within the scope of coverage. (*Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 47 [261 Cal.Rptr. 273]; *Royal Globe Ins. Co. v. Whitaker* (1986) 181 Cal.App.3d 532, 537 [226 Cal.Rptr. 435].) And the CCC Companies emphasize the policy language which triggers coverage only if the occurrence "results during the policy period in bodily injury" and which obligates the insurers to indemnify the policyholders for amounts the policyholders become "legally obligated to pay as damages." The CCC Companies argue, *85 therefore, that the policyholders have the burden of establishing the policies were triggered by the claims paid. Since no evidence was presented on the facts of any of the claims paid through Wellington and, indeed, since the Wellington payments admittedly went toward *all* claims regardless of whether they were claims for which the policyholders were liable, the CCC Companies argue they have no obligation to reimburse the policyholders for their Wellington payments.

We cannot agree. The general rule placing the burden on the policyholder to establish facts to trigger coverage is subject to the exception explained in *Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775 [244 Cal.Rptr. 655, 750 P.2d 297]: When the insurer refuses to accept a settlement and the insured meets its burden of proving the settlement was reasonable, then the insured is entitled to a presumption in his favor—a presumption that the insured is indeed liable to the claimant and that the amount of his liability is the

amount of the settlement.

(25a) In *Isaacson*, the Supreme Court reiterated the rule that if an insurance carrier breaches its contract with the insured and erroneously denies coverage or refuses to defend, then the insured is entitled to make a reasonable settlement with the claimant and to sue the carrier to recover the amount of the settlement. (44 Cal.3d at p. 791; see also *Clark v. Bellefonte Ins. Co.* (1980) 113 Cal.App.3d 326, 335 [169 Cal.Rptr. 832].) (26a) Further, in such an action for reimbursement of the settlement, the settlement is presumptive evidence of the insured's legal liability on the third party's claim and the amount of the insured's liability. (*Isaacson, supra*, 44 Cal.3d 775; see also *Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1493-1494, 1497 [13 Cal.Rptr.2d 624]; *Kershaw v. Maryland Casualty Co.* (1959) 172 Cal.App.2d 248, 256-257 [342 P.2d 72]; *Lamb v. Belt Casualty Co.* (1935) 3 Cal.App.2d 624, 631 [40 P.2d 311].)

() The *Isaacson* court went on to say that even if the insurer has not denied coverage or refused to defend, the insurer has a duty to accept a reasonable settlement, and the insurer's refusal to settle may give rise to the insured's action for reimbursement of the settlement. (44 Cal.3d at p. 792; see also *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198].) () In such a case, the insured has the burden of showing the settlement was reasonable and if it meets that burden, then again the act of settlement raises two presumptions: that the claim was legitimate and that the amount of the settlement was the amount of the insured's liability. (*Isaacson v. California Ins. Guarantee Assn., supra*, 44 Cal.3d at pp. 793-794.) *86

() In *Isaacson*, the court held the insureds in that case were not entitled to reimbursement for their contribution toward the settlement because the insurer had neither denied coverage nor refused to defend and the insured had failed to prove the settlement was reasonable. In the present case, the trial court distinguished *Isaacson* on these grounds: "In this case, no determination has as yet been made as to whether the non-settling insurers wrongfully refused to defend or

indemnify claims. However, it is clear that the insurers were disputing defense and coverage obligations at the time that the policyholders entered into the Wellington Agreement. The policyholders in this case have 'offered evidence of sufficient substantiality' that the Wellington Agreement is reasonable, and that the non-settling insurers had the opportunity to join Wellington but declined to do so."

Further, the trial court reiterated that the Wellington Agreement is a reasonable settlement: "In *Isaacson*, the court evaluated the reasonableness of the settlement of the underlying claim in determining whether the insureds were entitled to a presumption of liability. Here, there is no evidence before the Court regarding the specifics of the settlements of the underlying claims. However, in the unique context of this case, the Court finds that the principles of *Isaacson* are applicable to the producer allocation formula and to the ongoing process of claims handling by the Asbestos Claims Facility as set forth in the Wellington Agreement. It would place an unreasonable burden on the policyholders and on the judicial system to allow the non-settling insurers to revisit the merits of the many claims which have been settled by the facility since its inception. Moreover, the insureds have offered no evidence of bad faith or unreasonableness in the facility's handling of the underlying claims. [¶] Under the circumstances of this case, the Court finds that the amounts paid by the policyholders pursuant to the producer allocation formula ... are presumptive evidence of the policyholders' liability."

The trial court's finding that the Wellington Agreement was a reasonable settlement is not challenged on appeal, and it is determinative of the issue. ^{FN37} Once the trial court found the settlement was reasonable, despite the inaccuracy of the producer allocation formula, the *Isaacson* rule became operative and justified the trial court's treatment of the settlement as presumptive *87 evidence of liability. (See *Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d 1178, 1206-1208.) The judgment on the effect of the Wellington Agreement (paragraph 19) is affirmed.

FN37 Language in *Isaacson* suggests that the

“reasonableness” of a settlement includes a showing that the underlying claim was covered, although the insured “need not prove his actual liability on the underlying claim, and establishing a breach [of the insurer’s duty to settle for a reasonable amount] does not require a trial of the underlying action.” (44 Cal.3d at p. 793.) Thus, the trial court’s finding that the Wellington Agreement was a reasonable settlement disposes of the objection of the CCC Companies that the Wellington payments go to claims for which the manufacturers are not legally liable. The trial court found the Wellington Agreement to be a reasonable means to resolve the claims among the producers: “Although a producer pays on all claims, whether or not the producer is named in a particular claim, it is equally true that other producers pay on claims in which they are not named and thus pay a proportionate share of the producer’s liability.” The CCC Companies have not challenged this finding on appeal; their appellate arguments pertain to the application of the presumption of liability.

Issue Group III: Property Damage

In phase V of the coordinated proceedings, the trial court was asked to determine the obligations of Armstrong’s insurers to defend and indemnify Armstrong in the so-called “building cases”—the myriad of property damage lawsuits filed against Armstrong on account of the presence of asbestos-containing building material (ACBM) in buildings. ^{FN38} Armstrong is facing liability primarily for its manufacture of asbestos-containing floor tile and insulation materials.

FN38 While this appeal was pending, we received notices of injunctions and stays issued in connection with receivership and liquidation proceedings involving the following subscribers to certain Armstrong policies: Kingscroft Insurance Company Ltd., El Paso Insurance Company Ltd., Lime Street Insurance Company Ltd., Mutual Reinsurance

Company Ltd., and Walbrook Insurance Company Ltd. Nothing in this opinion should be construed as being inconsistent with the orders staying proceedings against those parties.

The underlying complaints in the building cases, taken as a whole, reveal that the presence of ACBM in buildings may have various consequences to the buildings’ owners. The ACBM may pose a health hazard to those who use the building in that asbestos fibers may be released into the air or onto building surfaces (walls, upholstery, fixtures, etc.) or settled releases may be disturbed and “reentrained” into the air. Whether or not the ACBM has released asbestos fibers, the building owner may decide to remove or encapsulate the asbestos to eliminate the potential health risk. Or the building owner may incur costs for inspecting, assessing, maintaining and repairing in-place ACBM. And the market value of the property may fall as a result of the presence of asbestos.

Beginning in the early 1980’s, after the federal government started to voice concern about the safety of ACBM, numerous lawsuits were brought against Armstrong and other asbestos producers for property damage to buildings in which ACBM had been installed. At the start of phase V there were 163 building cases, including a number of class actions, pending against Armstrong in courts across the country. Although the complaints advance various legal theories, the plaintiffs in the building cases generally seek compensation for the sums they must expend to eliminate the alleged *88 health hazard in their buildings and for the diminished value of their buildings resulting from the presence of asbestos.

A. Coverage for “Property Damage”

We begin with the question whether the injuries allegedly suffered by the building owners constitute “property damage” as defined by the insurance policies. Many of Armstrong’s policies are standard CGL policies; others have substantially the same provisions. The insuring agreements of the CGL policies obligate the insurers to pay “all sums which the insured shall

become legally obligated to pay as damages because of ... property ... damage caused by an occurrence.”^{FN39} Since 1973, the standard CGL policy has defined property damage as follows: “(i) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or ii) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.”

FN39 We discuss separately, in part C below, the early policies covering property damage “caused by accident.”

Before 1973, under the 1966 revision to the standard CGL occurrence policy, “physical injury” was not a necessary element of property damage; property damage was defined as “injury to or destruction of tangible property.” Before 1966, the standard CGL policy had no requirement that the property be “tangible.” Because the post-1973 policies contain the most restrictive definition of property damage, we confine our analysis to those policies, for if there is coverage under the post-1973 policies, there will be coverage under the pre-1973 policies as well.

The trial court concluded that all claims, whether for release of asbestos fibers or for mere installation of ACBM, are for covered “property damage” under all of Armstrong’s policies. The trial court reasoned that the release of asbestos fibers is an act of contamination that amounts to physical injury and, even without a release of fibers, the diminished value resulting from the incorporation of ACBM in a building constitutes property damage. Although we employ slightly different reasoning, we agree with the trial court’s conclusion that the building claims allege “property damage” within the meaning of the insurance policies.

1. Injury Is Assumed

(27) Relying upon the rule that in a coverage dispute the burden is on the insured to prove coverage (*89 Royal Globe Ins. Co. v. Whitaker (1986) 181

Cal.App.3d 532 [226 Cal.Rptr.2d 435]), the insurers argue that Armstrong failed to prove that the buildings have suffered physical injury. The insurers complain that Armstrong relied on the allegations of injury, without actual evidence of such injury. Indeed, the trial court noted that “Armstrong introduced little evidence independent of the underlying allegations to support its position.”

We find no merit in the insurers’ argument. This is a declaratory relief action, held before the determination of Armstrong’s liability for property damage. None of the 163 building cases filed against Armstrong have yet gone to trial. In such circumstances, the trial court may properly determine questions of insurance coverage on the basis of the underlying pleadings and such other evidence as is available. (See Underwriters Ins. Co. v. Purdie (1983) 145 Cal.App.3d 57, 64 [193 Cal.Rptr. 248]; State Farm Fire & Cas. Co. v. Kohl (1982) 131 Cal.App.3d 1031, 1034 [182 Cal.Rptr. 720].) Here, in ruling upon the meaning of “property damage,” the trial court looked to the “nature of the insured’s potential liability,” taken from the allegations in the various complaints in the underlying building cases, together with the “totality of the evidence.” We see no error in this approach.

We emphasize that there is nothing in the trial court’s decision, nor in our own, which resolves whether the various effects of ACBM upon a building will give rise to liability of the asbestos manufacturer for property damage. In fact, we note that in some circumstances tort liability is uncertain. (See, e.g., Anthony v. Kelsey-Hayes Co. (1972) 25 Cal.App.3d 442, 446-447 [102 Cal.Rptr. 113] [mere depreciation in value caused by safety concern not compensable property damage]; San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal.App.4th 1318, 1324-1335 [44 Cal.Rptr.2d 305] [mere presence of ACBM, without contamination from released fibers, not compensable property damage]; Adams-Arapahoe School Dist. No. 28-J v. GAF Corp. (10th Cir. 1992) 959 F.2d 868, 872 [same].)

The trial court’s conclusion that the claims of injury from ACBM are covered “property damage” as defined by the insurance policies was necessarily based upon

the *assumption* that there have been legally compensable injuries to the buildings for which Armstrong will be held liable, for if it is ultimately determined that there have been no such injuries, then there will be no need for insurance coverage. In this appeal, too, for purposes of deciding the coverage dispute, we *assume*, as did the trial court, the buildings have been injured as alleged in the complaints.

2. Admissibility of Evidence

(28) In a separate brief, four insurers challenge the admissibility of certain deposition testimony during the trial held on Armstrong's declaratory *90 relief action. FN40 We treat the issue rather summarily, as the evidence was not prejudicial.

FN40 The insurers on this brief are United States Fire Insurance Co., Central National Insurance Co. of Omaha, Puritan Insurance Co., and Interstate Fire & Casualty Company.

The challenged evidence consists of the deposition testimony of experts designated by Reliance Insurance Co., which the trial court had initially excluded from Armstrong's case-in-chief, but which the trial court eventually admitted after various insurers had moved for judgment on the ground that Armstrong had failed to prove property damage. The four challenging insurers claim that without the deposition testimony Armstrong's case was devoid of evidence and the trial court would have granted the insurers' motion for judgment.

We reject the argument. Although the deposition testimony supported Armstrong's position that buildings are injured by the presence of ACBM, that position was founded in the allegations of the underlying complaints. As we have explained in part A.1 above, the trial court relied primarily upon the allegations in the underlying building cases and *assumed*, for purposes of the declaratory relief action, that the buildings suffered damage for which Armstrong will be held liable. We can discern no prejudice to the insurers from the admission of the deposition testimony.

3. The Injury Is Physical

(29) Because we assume there has been an injury, the question we must decide is whether injury to a building from ACBM qualifies as a "physical" injury. In cases alleging releases of asbestos fibers into a building's air supply and onto building surfaces, the issue is relatively easy to resolve. As the trial court found, upon a release of asbestos fibers within a building, "[t]he area becomes hazardous and certain measures must be taken to restore the surface to its prior condition." The courts have held that contamination of buildings and their contents from released fibers constitutes a physical injury and, hence, property damage covered under the terms of the insurance policies. (*Dayton Independent School D. v. National Gypsum* (E.D.Tex. 1988) 682 F.Supp. 1403, 1407, revd. on jurisdictional grounds *sub nom. W.R. Grace & Co. v. Continental Cas. Co.* (5th Cir. 1990) 896 F.2d 865, 875; *USF&G v. Wilkin Insulation Co.* (1991) 144 Ill.2d 64 [161 Ill.Dec. 280, 578 N.E.2d 926, 931-932]; see *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 829, 842 [274 Cal.Rptr. 820, 799 P.2d 1253] [contamination of environment from release of hazardous waste]; *Abraham, Environmental Liability Insurance Law* (1991), pp. 80-81, 88.) This conclusion finds support in a *91 number of tort cases in which the courts have held, under the tort doctrine allowing recovery only upon physical injury to property, that contamination from the release of asbestos fibers constitutes a physical injury. (*City of Greenville v. W. R. Grace & Co.* (4th Cir. 1987) 827 F.2d 975, 980; *City of Manchester v. National Gypsum Co.* (D.R.I. 1986) 637 F.Supp. 646, 651-652; *Town of Hooksett School Dist. v. W.R. Grace Co.* (D.N.H. 1984) 617 F.Supp. 126, 130-131; 80 S. 8th St. Ltd. Ptsp. v. *Carey-Canada* (Minn. 1992) 486 N.W.2d 393, 399 modified 492 N.W.2d 256; *Sch. Dist. of Independence v. U.S. Gypsum* (Mo.Ct.App. 1988) 750 S.W.2d 442, 456-457; *Northridge Co. v. W.R. Grace and Co.* (1991) 162 Wis.2d 918 [471 N.W.2d 179, 186].)

The insurers complain that "contamination" is not a legally defined term, and the trial court's ruling makes the release of even a single asbestos fiber property damage. We find the complaint unfounded, as the insurers have failed to distinguish between the question

whether Armstrong is liable for asbestos property damage and the question whether the insurance policies provide coverage. As to the former, whether and to what extent a release of asbestos fibers has damaged the buildings are factual issues for the underlying building cases. It may be that the trier of fact will conclude in a particular case that a low level of contamination was not damaging, and Armstrong then will have no liability and no need for insurance coverage. As we have explained in part A.1 above, however, for purposes of determining the separate question of insurance coverage for the property damage claims, we assume, as did the trial court, that damage has occurred for which Armstrong will be held liable. We hold that as long as Armstrong is held liable for the release of asbestos fibers, whatever the level of contamination, the injury is a physical injury covered by the insurance policies.

(30a) Some of the underlying complaints in the building cases, however, allege that the mere presence of ACBM in buildings is a health hazard because of the potential for *future* releases of asbestos fibers. The complaints allege that common daily activities may cause asbestos fibers to be released from the ACBM and thus the ACBM poses a threat of harm. We conclude that even in such cases, when there have been no releases of asbestos fibers, if Armstrong is held liable for the mere presence of ACBM, the injury to the buildings is a physical one.

(31) Once installed, the ACBM, whether in the form of insulating pipe coverings, fireproof floor tile, acoustical ceiling finishes, or the like, is physically linked with or physically incorporated into the building and therefore physically affects tangible property. We agree with the formulation put forth by the Seventh Circuit Court of Appeals that the term “physical *92 injury” covers “a loss that results from physical contact, physical linkage, as when a potentially dangerous product is incorporated into another and, because it is incorporated and not merely contained (as a piece of furniture is contained in a house but can be removed without damage to the house), must be removed, at some cost, in order to prevent the danger from materializing.” (*Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.* (7th Cir. 1992) 972 F.2d 805, 810 cert. den. (1993) 507 U.S. 1005 [123 L.Ed.2d 267, 113 S.Ct. 1646]

[defective plumbing systems]; see also *American Motorists Ins. Co. v. Trane Co.* (7th Cir. 1983) 718 F.2d 842, 844 [defective heat exchangers, a component of a natural gas plant].)

(32) The physical incorporation of ACBM into the buildings distinguishes the present case from those cases involving hazardous waste leaks or spills from containers. In the latter cases, the courts have held that remedial costs incurred in cleaning up contaminated waste sites are covered by CGL policies, but “prophylactic” costs—costs incurred in advance of any release of hazardous waste, to prevent threatened future pollution—are not incurred because of property damage. (*AIU Ins. Co. v. Superior Court, supra*, 51 Cal.3d 807, 843; *Aerojet-Corp. v. Superior Court* (1989) 211 Cal.App.3d 216, 237-238 [258 Cal.Rptr. 684]; *Maryland Cas. Co. v. Armco, Inc.* (4th Cir. 1987) 822 F.2d 1348, 1353, cert. den. (1988) 484 U.S. 1008 [98 L.Ed.2d 654, 108 S.Ct. 703].) In contrast, in the present case, because the potentially hazardous material is physically touching and linked with the building, and not merely contained within it, the injury is physical even without a release of toxic substances into the building's air supply.

(33) The insurers rely upon the rule that physical incorporation of a defective product into another does not constitute property damage unless there is physical harm to the whole. (*St. Paul Fire & Marine Ins. Co. v. Coss* (1978) 80 Cal.App.3d 888, 892 [145 Cal.Rptr. 836]; *Hamilton Die Cast, Inc. v. United States F. & G. Co.* (7th Cir. 1975) 508 F.2d 417, 419-420; see *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 969-970 [270 Cal.Rptr. 719]; *Fresno Economy Import Used Cars, Inc. v. United States Fid. & Guar. Co.* (1977) 76 Cal.App.3d 272, 284 [142 Cal.Rptr. 681]; *General Ins. Co. v. Intern. Sales Corp.* (1977) 18 Wn.App. 180, 566 P.2d 966, 968-969.) In our view, however, that rule is designed to limit the liability coverage of contractors against claims of defective materials or poor workmanship, for such claims are a commercial risk which is not passed on to the liability insurer. (See *Maryland Casualty Co. v. Reeder, supra*, 221 Cal.App.3d at p. 967; *Economy Lumber Co. v. Insurance Co. of North America* (1984) 157 Cal.App.3d 641, 649-651 [204 Cal.Rptr. 135];

Rafeiro v. American Employers' Ins. Co. (1970) 5 Cal.App.3d 799, 808 [*9385 Cal.Rptr. 701].) Here, Armstrong is facing liability not as a contractor but as a manufacturer or supplier of ACBM. The claims against Armstrong go beyond allegations of defective work or materials and allege injury to other property. (See discussion in part G, *post*.)

(34) The insurers further argue that the mere presence of ACBM results only in economic losses—e.g., diminished property value, abatement costs, or costs of responding to the presence of asbestos—and not in a physical injury. They urge us to follow those cases which have construed the phrase “physical injury” so as to differentiate economic losses: e.g., Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 17-18 [44 Cal.Rptr.2d 370, 900 P.2d 619]; New Hampshire Ins. Co. v. Vieira (9th Cir. 1991) 930 F.2d 696, 697-701; Federated Mut. Ins. Co. v. Concrete Units (Minn. 1985) 363 N.W.2d 751, 756; Wvoning Sawmills v. Transportation Ins. Co. (1978) 282 Or. 401 [578 P.2d 1253]. In our view, however, the damages allegedly suffered by the building owners from the presence of ACBM cannot be considered solely economic losses. Diminished market value or abatement costs or costs of inspecting, assessing, and maintaining the in-place ACBM are not the “property damage.” They are “damages because of property damage.” That is, they are the alternative measures of the physical injury to the building. (Maryland Cas. Co. v. W.R. Grace and Co. (2d Cir. 1993) 23 F.3d 617, 627, cert. den. (1994) ___ U.S. ___ [130 L.Ed.2d 559, 115 S.Ct. 655]; see Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co. (1959) 51 Cal.2d 558, 565 [334 P.2d 881], quoting from Hauenstein v. Saint Paul-Mercury Indem. Co. (1954) 242 Minn. 354 [65 N.W.2d 122, 125]; see also Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co. (1965) 63 Cal.2d 602, 609 [47 Cal.Rptr. 564, 407 P.2d 868]; Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565, 576 [136 Cal.Rptr. 751].) The fact that the measure of damages is economic does not preclude a physical injury. (Northridge Co. v. W.R. Grace and Co., *supra*, 471 N.W.2d 179, 184; see U.S. Fid. & Guar. v. Specialty Coatings (1989) 180 Ill.App.3d 378 [129 Ill.Dec. 306, 535 N.E.2d 1071, 1081].)

(35a) At trial, the insurers introduced evidence to show

that the mere presence of ACBM is not necessarily injurious: that ACBM's do not spontaneously emit asbestos fibers, nor do releases occur more frequently as the ACBM's deteriorate with age; that left undisturbed, ACBM's pose no health hazard to building occupants; and that even if the ACBM's are occasionally disturbed such that asbestos fibers are released, the fibers are removed quickly by normal air circulation. That evidence, however, has no bearing on the insurance coverage issue before us. (,) Once again, the insurers have failed to distinguish between questions of liability and questions of insurance coverage. Whether ACBM has actually caused harm is a *94 question for the underlying building cases, and if the trier of fact finds that the mere presence of Armstrong's products does not cause damage, then Armstrong will have no liability and no need for insurance coverage. The posture of the present case is such that for purposes of determining the separate question of insurance coverage we *assume* that the presence of ACBM is injurious and that Armstrong will be held liable for injuring the buildings. Given that assumption, we conclude that the alleged injury from installation of ACBM qualifies as “physical injury to ... tangible property” under the terms of the policies.

B. Trigger of Coverage

1. Multiple Trigger

(36a) Having concluded that there is property damage, we must next decide when the property damage takes place, for purposes of determining which policies are responsible for indemnifying Armstrong. As we have discussed in Issue Group II, part A, *ante*, the courts have devised several approaches for determining when asbestos-related bodily injuries occur, and we have upheld the trial court's use of a continuous trigger. In property damage cases, too, some courts have applied a continuous trigger. (E.g., California Union Ins. Co. v. Landmark Ins. Co. (1983) 145 Cal.App.3d 462 [193 Cal.Rptr. 461] [leaking swimming pool]; Hatco Corp. v. W.R. Grace & Co.-Conn., *supra*, 801 F.Supp. 1334, 1345 [hazardous waste]; Hirschberg v. Lumbermens Mut. Cas. (N.D.Cal. 1992) 798 F.Supp. 600, 603

[same]; *New Castle County v. Continental Cas. Co. (CNA)* (D.Del. 1989) 725 F.Supp. 800, 813, affd. in part and revd. in part (3d Cir. 1991) 933 F.2d 1162 [same]; *Dayton Independent School D. v. National Gypsum, supra*, 682 F.Supp. at pp. 1409-1410, reversed *sub nom. W.R. Grace & Co. v. Continental Cas. Co., supra*, 896 F.2d at pp. 875-876 [asbestos]; *Lac d'Amiante du Quebec v. Am. Home Assur.* (D.N.J. 1985) 613 F.Supp. 1549 [asbestos]; *Owens-Illinois, Inc. v. United Ins. Co., supra*, 650 A.2d 974, 983-984, 995 [asbestos]; *Gottlieb v. Newark Ins. Co.* (1990) 238 N.J.Super. 531 [570 A.2d 443] [toxic insecticides].

In *Montrose Chemical Corp. v. Admiral Ins. Co., supra*, 10 Cal.4th 645, our Supreme Court has held that a continuous trigger should be applied to claims of continuous or progressively deteriorating bodily injuries or property damage. The *Montrose* court observed, however, that proper resolution of a trigger of coverage issue may depend on whether the CGL policy insures against liability to third parties for bodily injury, property damage, or both. (*Id.* at pp. 665-666.) In *Montrose*, the coverage clauses in the CGL *95 policies did not distinguish between the nature of the underlying harm, whether bodily injury or property damage. Accordingly, the parties in *Montrose* did not dispute that "under a plain reading of that unambiguous aspect of the policy language, whatever be the circumstances (or timing of the circumstances) that will potentially trigger liability coverage under the policies, coverage will apply uniformly under such circumstances whether the claims be for bodily injury, or property damage, alleged in the underlying third party lawsuits." (10 Cal.4th at p. 666.)

Yet, in *Montrose*, the property damage and the bodily injuries were all alleged to be continuous or progressive. As the *Montrose* court put it, "... we are dealing both with claims of continuous or progressively deteriorating bodily injury ... and progressively deteriorating property damage ... all arising from continuous or repeated exposure to hazardous waste contamination over time" (10 Cal.4th at p. 666.)

In *Lac d'Amiante du Quebec v. Am. Home Assur., supra*, 613 F.Supp. 1549, 1561 the court found that contamination of buildings from released asbestos

fibers was both continuous and progressive: "release of [asbestos] fibers ... may occur by a slow continuous degradation of the insulating surface which may be accelerated by the air movement and vibration which occurs in most buildings.... [T]he injury to property caused by asbestos is both continuous and progressive and certainly not complete upon the act of installation." Reasoning that it would be "illogical" to apply the continuous trigger to asbestos bodily injury claims but not to asbestos property damage, the court ruled that coverage was triggered at the time of installation, at the time of removal, and at all points in between.

In the present case, in contrast, the record indicates that releases of asbestos fibers, if they occur at all, occur sporadically, as a result of episodic disturbances such as accidental striking, vandalism, water damage, and the like. The trial court declined to apply a continuous trigger to the property damage claims, finding that asbestos property damage is not necessarily continuous: "the evidence presented to this court indicates that property damage from ACBM is not always continuous. The continuous trigger adopted by this Court in the bodily injury cases was based upon a finding that bodily injury from asbestos exposure was a continuous process beginning with first exposure. Because property damage from ACBM is not always continuous, the Court cannot adopt a comprehensive 'continuous trigger' approach as to which policies owe a duty to defend in the building cases.... [T]he Court declines to adopt a comprehensive rule stating that all policies from the time of installation until the time of removal of ACBM *96 owe a duty to indemnify for property damage. The evidence presented in this phase as to the nature of property damage does not support the 'continuous' trigger approach adopted by this Court in the bodily injury case."

Instead of a continuous trigger, the trial court adopted a *multiple* trigger: "Aside from property damage occurring at the time ACBM is installed, property damage also happens at any time asbestos fiber or material is released from ACBM into the air or on surfaces of the building, and when settled releases are disturbed and reentrained into the air.... The Court therefore holds that indemnity obligations are triggered if it is shown that ACBM was installed in the building

or buildings in question, that ACBM released fiber or material into the air or on surfaces of the buildings in question, or that settled releases of ACBM were disturbed and reentrained into the air, during any portion of the period that the policy was in effect.”

(37a) Unlike the court in *Lac d'Amiante*, we do not find it illogical to apply different triggers for asbestos-related bodily injuries and asbestos-related property damage. The same legal rule applies in both instances: coverage is triggered when the injury actually occurred. (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at pp. 669-670.) (,) But the triggers are different because the injury to the human body upon inhalation of asbestos fibers is not the same as the injury to a building from the presence of ACBM. (See *Maryland Casualty Co. v. W.R. Grace & Co.*, *supra*, 23 F.3d at p. 627.) We interpret the trial court's decision to mean that in contrast to the continuous, progressive physiological process involved in the inhalation of asbestos, asbestos property damage is episodic, with measurable intervals between episodes, so that the process of injuries cannot be deemed continuous.

(38) As the Supreme Court recognized in *Montrose* (10 Cal.4th at p. 694), whether the underlying damage or injury is in fact continuous is a matter for determination by the trier of fact. (*Carey Canada, Inc. v. California Union Ins. Co.* (D.D.C. 1990) 748 F.Supp. 8; see also *Triangle Publications v. Liberty Mut. Ins. Co.* (E.D.Pa. 1989) 703 F.Supp. 367, 371.) In light of the trial court's factual finding that asbestos property damage is not always continuous, good reason exists for adopting a trigger different from the continuous trigger adopted for asbestos-related bodily injuries. (See *Home Ins. Co. v. Landmark Ins. Co.* (1988) 205 Cal.App.3d 1388, 1394-1395 [253 Cal.Rptr. 277] [property damage cases differ from asbestos bodily injury cases]; Arness & Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases* (1986) 72 Va. L.Rev. 943, 972-973.) *97

2. Release and Reentrainment as Triggers

In *Maryland Cas. Co. v. W.R. Grace and Co.*, *supra*, 23

F.3d 617, 627-628, the Second Circuit Court of Appeals concluded that property damage occurs upon installation of asbestos products in a building, but the damage does not continue afterward. “Once installed, the damage that asbestos inflicts is complete.... If [asbestos fibers are constantly released and re-entrained into a building's atmosphere], its damaging effect concerns solely the health of those persons who breathe the contaminated air. No further property damage occurs because the need to remove or encapsulate the asbestos, which occurred upon the product's installation, remains unchanged.” (*Id.* at p. 628.) Hence, the court applied a single trigger, holding that only the insurers on the risk at the time of installation were obligated to defend and indemnify the insured. (See also *Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d 1178, 1210.)

(39a) As we have already said, the trial court concluded otherwise, that “property damage ... happens at any time asbestos fiber or material is released from ACBM into the air or on surfaces of the building, and when settled releases are disturbed and reentrained into the air.” In deciding the trigger of coverage issue, the trial court ruled that the duty to indemnify is triggered “when it is shown that property damage occurred during any portion of the period that the policy was in effect.... The Court therefore holds that indemnity obligations are triggered if it is shown that ACBM was installed in the building or buildings in question, that ACBM released fiber or material into the air or on surfaces of the buildings in question, or that settled releases of ACBM were disturbed and reentrained into the air, during any portion of the period that the policy was in effect.”

The insurers complain that the trial court's decision, taken literally, makes any release—even the release of a single asbestos fiber—enough to trigger coverage, despite the fact that the release was inconsequential and, by itself, would not constitute compensable property damage.^{FN41} The insurers contend that coverage should not be triggered unless the fibers released during the policy period were “sufficiently appreciable.”

FN41 As a practical matter, the insurers' argument seems academic. We find it difficult

to envision a scenario in which a single released fiber would be detected, much less serve as the sole basis for triggering coverage.

We reject the argument. The trigger question-*which* policies provide coverage-must be distinguished from the question *whether* the policies provide coverage. As to the latter issue, we reiterate that the trial court *98 assumed, as we must do for purposes of deciding insurance coverage, that compensable property damage has occurred for which Armstrong will be held liable. As we have explained in part A.3 above, as long as Armstrong is held liable for contamination from the release of asbestos fibers, no matter what the level of contamination, the insurance policies provide coverage.

(40a) With respect to the separate question of when the property damage occurred for purposes of determining which policies are triggered, the fact that a particular release or reentrainment of asbestos fibers, by itself, might not give rise to liability is irrelevant. The property damage for which Armstrong may be held liable and for which the policies provide coverage is the contamination of the buildings from the introduction of asbestos fibers into the building air supply and onto building surfaces. We understand the trial court's decision to mean that each release or reentrainment contributes to the state of contamination of the building: "[P]roperty damage ... happens at any time asbestos fiber or material is released from ACBM into the air or on surfaces of the building, and when settled releases are disturbed and reentrained into the air.... [¶] ... The release of a harmful substance onto an area is a 'physical injury to tangible property.' [Citation.] The area becomes hazardous and certain measures must be taken to restore the surface to its prior condition. Release of asbestos material and fiber and reentrainment are all property damage events because each is an act of contamination which makes the building more hazardous." Each release or reentrainment, then, is a part of the overall property damage giving rise to Armstrong's liability.

We infer from the trial court's multiple trigger decision that the total property damage may take place across several policy periods. That is, although property damage from release and reentrainment of asbestos

fibers is episodic and not continuous, the property damage is continual in that new episodes of releases or reentrainments of asbestos fibers may occur repeatedly over time. There is nothing in the policies to preclude coverage from being triggered simply because only a part of the total damage occurred during any particular policy period. We therefore conclude that when, as here, property damage takes place during several policy periods, the trial court correctly ruled that insurance coverage is triggered when any part of the damage-any release or reentrainment-takes place.

(), (40b), (41a)(See fn. 42.) In sum, we find no error in the trial court's decision that if Armstrong is held liable for contamination of a building from *99 released asbestos fibers, each policy is triggered if any part of the contamination damage, no matter how small the quantity of the released fibers, took place when the policy was in effect. ^{FN42}

FN42 The trial court concluded that "the duty to indemnify is triggered when Armstrong proves an occurrence during the policy period to [*sic*] which it is held liable." We infer from this ruling that if Armstrong is held liable not for contamination of a building from released asbestos fibers but for the mere presence of ACBM (and the potential for releases), coverage would be triggered only at installation. This is so because any incidental releases that may have occurred during subsequent policy periods would not constitute damage for which Armstrong was held liable. We agree. Releases or reentrainments of asbestos fibers during a policy period will trigger coverage only if the basis of Armstrong's liability is contamination from released asbestos fibers.

(42) The insurers further argue that triggering coverage upon reentrainment violates the loss-in-progress rule, as resuspension of settled fibers is a continuation of the loss that began when the fibers were released from the ACBM. The argument is unsound. The loss-in-progress rule provides that an insurer can insure only against a contingent or unknown loss. (Ins. Code, §§ 22, 250)

The rule does not apply if the damage was unknown or contingent or the insured's liability was uncertain at the time the policy was issued, even if the damage was inevitable. (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at pp. 689-693.) As long as Armstrong's liability for the reentrainments was uncertain when the policy was issued, the loss-in-progress rule does not preclude coverage.

3. Installation as Trigger

(43) The insurers contend that the selection of the installation of ACBM as an event triggering insurance coverage violates the rule that coverage is triggered by "the event causing the actual injury and not an earlier event which created the potential for future injury." (*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1018 [247 Cal.Rptr. 638]; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, 647-648 [148 Cal.Rptr. 80]; see also *Whittaker Corp. v. Allianz Underwriters, Inc.* (1992) 11 Cal.App.4th 1236 [14 Cal.Rptr.2d 659]; *Millers Mut. Fire Ins., etc. v. Ed Bailey* (1982) 103 Idaho 377 [647 P.2d 1249].) The insurers argue that installation of the ACBM did not inflict injury at the moment of installation; rather, there was a time gap between the installation and the injury, and coverage should be triggered when costs were actually incurred for removing or neutralizing and maintaining the asbestos materials or when the building's market value was actually reduced.

We conclude, however, that the trial court's decision fully conforms to the "actual injury" requirement. The underlying complaints allege that the installation of ACBM in a building created a health hazard to the building *100 occupants—a hazard that has come to light only in recent years as a result of governmental reports and increased knowledge. This hazard occurred no less at installation than upon realization of the dangers of asbestos. The damage was done as soon as the ACBM was installed. (*Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at p. 1209; *Maryland Cas. Co. v. W.R. Grace and Co.*, *supra*, 23 F.3d at p. 627.)

The Seventh Circuit Court of Appeals has held that in light of the purposes of insurance, property damage

occurs in the policy year in which a defective product is installed, rather than the policy year in which it fails or is replaced in anticipation of failure or causes the market value of the building to diminish. "[T]he incorporation of a defective product into another product inflicts physical injury in the relevant sense on the latter at the moment of incorporation—here, the moment when the defective Qest [plumbing] systems were installed in homes." (*Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, *supra*, 972 F.2d at p. 814; see also *Colonial Gas Co. v. Aetna Cas. & Sur. Co.* (D.Mass. 1993) 823 F.Supp. 975 [installation of "UFFI" insulation].) We are persuaded by that view and find it applicable to asbestos products.

Our conclusion is supported by the line of property damage cases in which the courts have held that injury occurs and coverage is triggered immediately upon first exposure to the hazardous material or latent defect. (*California Union Ins. Co. v. Landmark Ins. Co.*, *supra*, 145 Cal.App.3d 462 [water seepage from leaking swimming pool]; *Ray Industries, Inc. v. Liberty Mut. Ins. Co.* (6th Cir. 1992) 974 F.2d 754, 764-766 [dumping of hazardous waste]; *Continental Ins. v. N.E. Pharm. & Chem. Co.* (8th Cir. 1987) 811 F.2d 1180, 1189-1192, vacated on other grounds upon rehearing en banc 842 F.2d 977, cert. den. 488 U.S. 821 [102 L.Ed.2d 43, 109 S.Ct. 66] [same]; *Trizec Properties v. Biltmore Const. Co.* (11th Cir. 1985) 767 F.2d 810, 813 [latent defects in roof]; *Lac d'Amiante du Quebec v. Am. Home Assur.*, *supra*, 613 F.Supp. at pp. 1560-1561 [release of asbestos]; *Gruol Construction Co. v. Insurance Co. of No. Amer.* (1974) 11 Wn.App. 632 [524 P.2d 427] [dry rot of foundation from defective backfilling].) ^{FN43}

FN43 The courts in the cited cases found the damage both immediate and continuous and employed a continuous trigger. As we have discussed in part B.1 above, the continuous trigger was not applied here, as the trial court found asbestos property damage is not continuous. But the fact that property damage is not continuous does not preclude the damage from being immediate upon exposure to the hazardous material.

() We emphasize that for purposes of determining insurance coverage, we have assumed, as did the trial court, that Armstrong will be held liable for the damages alleged in the underlying complaints. Some of those *101 complaints do not allege contamination from released asbestos fibers, but allege only that asbestos is present in the buildings, posing a threat of future releases. We hold that in the event that Armstrong is held liable for the mere presence of ACBM, without evidence of contamination from released asbestos fibers, coverage is triggered at the time ACBM was installed in the building. (As we explain in footnote 42 *ante*, where the basis of liability is the mere presence of ACBM, not contamination from released fibers, coverage would not also be triggered by subsequent, incidental releases of asbestos fibers.)

(44) Moreover, even in those jurisdictions in which the mere presence is not enough to give rise to liability, if Armstrong is held liable for contamination of the building from released asbestos fibers, coverage is triggered at the time of installation as well as at the time of release. Our reasoning parallels that set forth in part B.2 above. The fact that the mere presence of ACBM, by itself, might not give rise to liability for property damage is of no consequence if the insured has, in fact, been held liable for property damage. The installation of ACBM obviously contributes to the state of contamination of the building; it is a part of the overall property damage for which the insured is liable. The trial court correctly concluded that insurance coverage is triggered when any part of the damage—installation, release, or reentrainment—took place.

(45) The insurers urge us to reject the trial court's multiple trigger and to follow *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 694-699 [274 Cal.Rptr. 387, 798 P.2d 1230], to conclude instead that property damage occurs on a single date of loss, the date of "manifestation." The Supreme Court, however, has held that the rationale of *Prudential-LMI*, adopting a manifestation trigger of coverage for first party cases, is inapposite in the context of third party liability policies. (*Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th 645, 663-666, 683-685, 687-689.) Indeed, here the

unique facts surrounding property damage from ACBM provide good reasons to reject a manifestation trigger.

The manifestation rule deems damage to occur only when the damage has become apparent. Yet, the health hazard allegedly created by the presence of ACBM occurred no less at installation than upon the realization of the dangers of asbestos. That the building owners were unaware of the dangers until years after installation of the ACBM does not mean that the hazard was not present or that damage did not occur. Nor does the fact that the damage was not susceptible of measurement until the dangers of asbestos were known obviate the occurrence of injury at an earlier time. (*Maryland Casualty Co. v. W.R. Grace and Co.*, *supra*, 23 F.3d at pp. 626-627.) *102

As one court has made clear, the manifestation rule creates a legal fiction: "There are situations ... in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leakage of hazardous wastes ... is a clear example. Determining exactly when damage begins can be difficult, if not impossible. In such cases we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves." (*Mraz v. Canadian Universal Ins. Co., Ltd.* (4th Cir. 1986) 804 F.2d 1325, 1328.) With respect to asbestos building cases, however, as we have explained, the alleged injury to the buildings first occurred when the ACBM was installed. That date is ascertainable; there is no need for a fictional date of injury. (See *Maryland Cas. Co. v. W.R. Grace and Co.*, *supra*, 23 F.3d at pp. 627-628.)

Finally, a manifestation trigger would place the entire burden for property damage claims upon those insurers who were on the risk in later years, when the dangers from ACBM were perceived. Despite the fact that Armstrong paid insurance premiums to a number of companies over the years to insure it against the risk of property damage, only a small group of insurers would be liable.

Although the manifestation rule does serve to promote certainty in the insurance industry and to avoid the problems of apportionment among insurers

(Prudential-LMI Com. Insurance v. Superior Court, supra, 51 Cal.3d at p. 699; Home Ins. Co. v. Landmark Ins. Co., supra, 205 Cal.App.3d at pp. 1395-1396), we reject the manifestation rule as an appropriate trigger for insurance coverage of asbestos property damage. We conclude that in asbestos property damage cases coverage is triggered pursuant to the rule applicable generally in third party liability cases, i.e., when the claimant's injury actually took place.

We affirm the trial court's decision that insurance coverage is triggered if any part of the underlying property damage-installation, release, or reentrainment-took place during a policy period.

C. Accident Policies

(46a) From 1942 to 1951, Armstrong was insured by Standard Accident Insurance Company, the predecessor of Reliance Insurance Company, whose policies provided coverage for property damage "caused by accident." Reliance argued below that its policies provide no coverage for damage from ACBM because, unlike an occurrence policy, an accident policy requires a sudden, unexpected event. The trial court rejected the argument for two reasons: (1) there is no requirement of suddenness; and (2) the release and reentrainment of asbestos fibers qualify as sudden events. *103

(47) We disagree with the trial court on the first point. The trial court reasoned that "[i]n ordinary language, an unexpected and unintended event is viewed as an accident." Although we agree that the word "accident" carries the meaning of unexpected and unintended (Hogan v. Midland National Ins. Co. (1970) 3 Cal.3d 553, 559-561 [91 Cal.Rptr. 153, 476 P.2d 825]; Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., supra, 51 Cal.2d 558), we conclude that an accident policy covers only unexpected and unintended events which are also sudden. ^{FN44} (Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., supra, 51 Cal.2d at pp. 563-564; Shell Oil Co. v. Winterthur Swiss Ins. Co., supra, 12 Cal.App.4th 715, 751-752; see Montrose Chemical Corp. v. Admiral Ins. Co., supra, 10 Cal.4th 645, 672; 1 Long, The Law of Liability Insurance (1993) § 1.08[1], p. 1-50.)

FN44 There is no dispute that in order for the policy to provide coverage it is the act or event that must be accidental, not the consequences. (Shell Oil Co. v. Winterthur Swiss Ins. Co., supra, 12 Cal.App.4th 715, 749-750; Commercial Union Ins. Co. v. Superior Court (1987) 196 Cal.App.3d 1205, 1208 [242 Cal.Rptr. 454].)

() The trial court found, however, that the suddenness requirement was fulfilled by the releases and reentrainments of asbestos fibers: "Reliance's arguments assume a finding that ... damage occurs solely upon installation. However, as discussed, property damage from ACBM occurs episodically upon release and reentrainment of material and fibers. Episodic ACBM releases fulfill the more restrictive sudden and fortuitous requirement Reliance suggests and therefore the events are 'caused by accident.' These releases trigger the policies immediately after the ACBM is installed."

Reliance does not challenge the trial court's finding that the releases qualify as sudden events. Instead, Reliance argues that past releases or reentrainments of asbestos fibers cannot trigger coverage because no actual injury occurred at the time of those events; the injury occurred later, when costs were actually incurred and property value actually diminished. Insofar as this argument advocates a manifestation trigger, we reject the argument for the reasons explained in part B.3. Moreover, as we have explained in part A.3, response costs and diminished property values are not the "property damage"; they are the measures of the property damage. The property damage is the contamination of the buildings from the introduction of asbestos fibers into the building air supply and onto building surfaces. Each release or reentrainment contributes to the state of contamination and forms a part of the overall property damage. Accordingly, for the reasons we have explained in part B.2 above, insofar as Armstrong is held liable for contamination of a building from released asbestos fibers, the Reliance policies are *104 triggered if any part of the contamination damage took place when the policies were in effect. ^{FN45}

FN45 Reliance also argues that installation of ACBM during a policy period cannot trigger coverage because installation poses only the potential for release of asbestos fibers. As we have explained in part B.3 above, however, we conclude that actual injury was inflicted at the moment of installation.

Neither Reliance nor any other party has argued that the installation of ACBM fails to meet the suddenness requirement. Nor has any party argued that the installation of ACBM fails to qualify as an unexpected or unintended event so as to meet the other defining element of "accident." Accordingly, we do not decide whether installation of ACBM constitutes an "accident" or an "occurrence" under policies defining "occurrence" as an "accident, including continuous or repeated exposure to conditions."

D. Scope of Coverage

Under the trial court's multiple trigger decision, several successive policies from the date of installation to the date of manifestation may be triggered on a single claim. Thus the question arises how the coverage should be allocated among the insurers whose policies are triggered.

In the present case, the trial court concluded that "[a]lthough the factual basis of the property damage claims differs from that of the bodily injury claims, the Court finds no reason to distinguish property damage from bodily injury for the purposes of the scope and allocation issues raised in phase V." Hence, the court reached the same conclusions it reached with respect to the bodily injury claims (discussed in Issue Group II, part A, *ante*): The court held each of the triggered policies responsible "in full" for the losses, subject to the "no stacking" qualification (only one policy's limits can apply to each claim) and subject to apportionment among the insurers based upon "other insurance" clauses. And the court ruled that Armstrong has no obligation to share pro rata in indemnification or defense costs because of any uninsured or self-insured periods. The insurers object to the latter ruling, that Armstrong need not pay a pro rata share of the damages.

The basic insuring agreement of the CGL policies obligates the insurer to pay "all sums which the insured shall become legally obligated to pay as damages" because of property damage. The occurrence policies define an "occurrence" as "an accident, including injurious exposure to conditions, which results during the policy period in ... [property damage]." In addition, the 1973 policies define property damage as "physical injury to ... tangible property which occurs during the policy period." (48) The insurers argue that each individual insurance policy can be called upon to pay only for property damage that took place during the policy period; *105 hence, Armstrong must pay for any damage that took place while it was uninsured or self-insured. ^{FN46}

FN46 In contrast to the insurers' position on the bodily injury claims (Issue Group II, part A, *ante*), the insurers have not raised the argument with respect to the property damage claims that liability should be allocated proportionately among the insurers based upon the time each insurer was on the risk. Their argument is confined to the assertion that Armstrong must contribute for periods during which it had no insurance.

We disagree. The insurers have confused the trigger of coverage and the scope of coverage. As we have explained in Issue Group II, part A, *ante*, the event which triggers an insurance policy's coverage does not define the extent of the coverage. Although a policy is triggered only if property damage takes place "during the policy period," once a policy is triggered, the policy obligates the insurer to pay "all sums" which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured's liability (up to the policy limits), not just for the part of the damage that occurred during the policy period. (*Keene Corp. v. Ins. Co. of North America*, *supra*, 667 F.2d 1034, 1047-1048; see also *Hatco Corp. v. W.R. Grace & Co.-Conn.*, *supra*, 801 F.Supp. at pp. 1345-1347; *New Castle County v. Continental Cas. Co. (CNA)*, *supra*, 725 F.Supp. 800, 817; *Davton Independent School D. v. National Gypsum*, *supra*, 682 F.Supp. at p.

1410; *Lac d'Amiante du Quebec v. Am. Home Assur.*, *supra*, 613 F.Supp. 1549, 1562; *Monsanto Co. v. C.E. Heath Comp. & Liability*, *supra*, 652 A.2d 30, 35; *J.H. France Refractories v. Allstate*, *supra*, 626 A.2d 502, 508.) It follows, then, that the insured need not pay a pro rata share for periods during which it had no insurance. (*Keene Corp. v. Ins. Co. of North America*, *supra*, 667 F.2d 1034.)

We recognize that there is language in some cases to suggest that the insurers' obligations to pay for the full extent of the policyholder's liability apply only if the injury was continuous and indivisible; otherwise, apportionment will be allowed. (*Hatco Corp. v. W.R. Grace & Co.-Conn.*, *supra*, 801 F.Supp. at pp. 1345-1347; *Lac d'Amiante du Quebec v. Am. Home Assur.*, *supra*, 613 F.Supp. at pp. 1562-1563; *Sandoz, Inc. v. Employer's Liability Assur. Corp.* (D.N.J. 1983) 554 F.Supp. 257, 266; *Diamond Shamrock Chemicals v. Aetna* (1992) 258 N.J.Super. 167 [609 A.2d 440, 467].)

As we have explained in Issue Group II, part A, *ante*, however, apportionment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies (*Keene Corp. v. Ins. Co. of North America*, *supra*, 667 F.2d 1034, 1049) or under the equitable doctrine of contribution *106 (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 369 [165 Cal.Rptr. 799, 612 P.2d 889]; *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 619-620 [222 Cal.Rptr. 276]). That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. (See *Dayton Independent School D. v. National Gypsum*, *supra*, 682 F.Supp. at pp. 1410-1411 and fn. 21.) A pro rata allocation among insurers "does not reduce their respective obligations to their insured." (*Sandoz, Inc. v. Employer's Liability Assur. Corp.*, *supra*, 554 F.Supp. at p. 267.) The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability (up to the policy limits).

(49) Moreover, in our view, the scope of coverage does

not depend upon the continuous, indivisible nature of the damage or the application of a continuous trigger. A continuous injury merely gives rise to the scope of coverage issue by triggering several successive policies on an individual claim. We believe the insurers have the same obligation to respond in full when several successive policies are triggered by continual, episodic property damage. In both situations the claimant's overall damage for which the insured is liable is unitary. It is irrelevant that the damage took place across several policy periods and only a part of the damage occurred during any particular policy period. The plain language of the policies requires that each triggered policy respond in full.

The *Keene* court said as much in dictum: "If each exposure is considered a separate 'injury,' under the terms of the policies, one might be able to argue that each insurer is responsible only for the 'injuries' that occurred during its policy periods It is clear, however, that such a result would be contrary to the terms of the insurance policies, which explicitly state that the insurer will pay 'all sums which the insured shall become legally obligated to pay as damages because of bodily injury [during the policy period]'. As long as there was either inhalation exposure or exposure in residence during a policy period, and as long as Keene must pay damages as a result, the insurer must indemnify Keene for whatever damages it must pay...." (*Keene Corp. v. Ins. Co. of North America*, *supra*, 667 F.2d at pp. 1044-1045. fn. 20.)

In the present case, we construe the trial court's decision to mean that although asbestos property damage is composed of a series of discrete injuries, each injury constitutes an ingredient of the overall property damage for which Armstrong is liable. Each release or reentrainment of asbestos fibers, along with the installation of the ACBM, forms a part of the unitary property damage for which Armstrong is alleged to be liable. We follow the *107 ruling in *Keene* and conclude that as long as there was property damage to a building during a policy period, whether from installation of ACBM or from releases or reentrainments of asbestos fibers from existing ACBM, and as long as Armstrong must pay damages as a result of that property damage, the policies provide coverage

(up to the policy limits) for whatever damages Armstrong must pay. ^{FN47} Armstrong need not pay a pro rata share.

FN47 The trial court was not asked to decide the number of occurrences in the building cases, and we express no opinion on that issue.

E. Duty to Indemnify

The uncertainty of Armstrong's underlying liability in the building cases prompted us to pose the question in a request for supplemental briefing whether declaratory relief is appropriate here, whether the determination of coverage for property damage should await resolution of Armstrong's liability in the underlying actions and a determination of the actual types of damages for which Armstrong is liable. ^{FN48} We find it unnecessary to analyze that issue in depth, as both sides have agreed there is an actual controversy on the meaning of the policies' language and no reason to defer a ruling on questions of interpretation. ^{FN49}

FN48 Obviously this question does not arise in connection with the asbestos-related bodily injury claims, as there is no dispute that the claimants have suffered bodily injuries; the key question is when the injuries occurred for purposes of triggering coverage. (Issue Group II, part A, *ante*.)

FN49 We express no opinion on whether declaratory relief would be appropriate if the insured objected to a determination of coverage questions in advance of a determination of liability.

(50a) The insurers argue, however, that the duty to indemnify, as distinct from the coverage of the insurance policies, cannot be determined in advance of the insured's underlying liability. (51) The insurers correctly point out that the duty to indemnify is different from the duty to defend. As the court explained in *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th 645, 659, fn. 9, the duty to

defend arises when there is a *potential* for indemnity. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081 [17 Cal.Rptr.2d 210, 846 P.2d 792]; *Grav v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276 [54 Cal.Rptr. 104, 419 P.2d 168].) It may exist even when coverage is in doubt and ultimately does not develop. (*Horace Mann, supra*; *Savlin v. California Ins. Guarantee Assn.* (1986) 179 Cal.App.3d 256, 263 [224 Cal.Rptr. 493].) The duty to indemnify, on the other hand, arises when the insured's underlying liability is established. (Civ. Code, § 2778, subd. 1; *Clark v. Bellefonte Ins. Co.* (1980) 113 Cal.App.3d 326, 336-337 [169 Cal.Rptr. 832]; *Alberts v. American Casualty Co.* (1948) 88 Cal.App.2d 891, 899-900 [200 P.2d 37]; see 1 Long, *The Law *108 of Liability Insurance, supra*, § 1.03[4], p. 1-11.) The duty to indemnify on a particular claim is determined by the actual basis of liability imposed on the insured. (*City of Laguna Beach v. Mead Reinsurance Corp.* (1990) 226 Cal.App.3d 822, 829-832 [276 Cal.Rptr. 438]; *International Surplus Lines Ins. Co. v. Devonshire Coverage Corp.* (1979) 93 Cal.App.3d 601, 610 [155 Cal.Rptr. 870].) Although an insurer may have a duty to defend, it may ultimately have no duty to indemnify—either because no damages were awarded or because the actual judgment was for damages not covered by the policy. (See *City of Laguna Beach v. Mead Reinsurance Corp.*, *supra*, 226 Cal.App.3d at p. 830; 1 Cal. Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 1992) § 4.6, p. 4-6.2.)

(52) Thus, the question whether an insurer has a duty to indemnify the insured on a particular claim is ripe for consideration only if the insured has already incurred liability in the underlying action. (*Aetna Cas. & Sur. Co. v. PPG Industries, Inc.* (D.Ariz. 1983) 554 F.Supp. 290, 296; *Outboard Marine v. Liberty Mut. Ins.* (1992) 154 Ill.2d 90 [180 Ill.Dec. 691, 607 N.E.2d 1204, 1221]; *USF&G v. Wilkin Insulation Co.*, *supra*, 578 N.E.2d at p. 930.) In a declaratory relief action held before the insured's liability has been established, the trial court cannot determine the amount of the insured's indemnity obligation; it must limit its declaration to whether the claim is covered by the policy. (*Aitchison v. Founders Ins. Co.* (1958) 166 Cal.App.2d 432, 439 [333 P.2d 178]; see *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th at p. 659, fn. 9.)

FN50

FN50 In an analogous context the same rule applies: a direct action by a third party claimant against an insurer must await a final determination of the insured's underlying liability. (*McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282 [19 Cal.Rptr.2d 286]; *Nationwide Ins. Co. v. Superior Court* (1982) 128 Cal.App.3d 711 [180 Cal.Rptr. 464]; *Laguna Pub. Co. v. Employers Reinsurance Corp.* (C.D.Cal. 1985) 617 F.Supp. 271.)

() In the present case, the insurers argue that the trial court should have denied Armstrong's request for a declaration of the insurers' duty to indemnify either because the request was premature or because Armstrong failed to prove its actual liability. We reject the argument for several reasons.

First, the trial court's declaration of the insurers' obligations to indemnify acknowledges the prematurity of Armstrong's request; the declaration is conditional: "[I]ndemnity obligations are triggered *if it is shown* that ACBM was installed in the building or buildings in question, that ACBM released fiber or material into the air or on surfaces of the buildings in question, or that settled releases of ACBM were disturbed and reentrained into the air, during any portion of the period that the policy was in effect." (Italics *109 added.) "The building claims trigger the indemnity obligations of any policy that has indemnity obligations *if it is shown* that covered property damage occurred during any portion of the period that the policy was in effect." (Italics added.)

From this language we infer that the trial court contemplated future proceedings between Armstrong and its insurers, after Armstrong's liability has been established, in which Armstrong would provide proof that the conditions for triggering coverage had been met in a particular case. We note that the trial court made no determination as to which policies would cover any particular claims; that issue was obviously left for future proceedings.

Second, we reject the insurers' contention that Armstrong failed to prove that its liability will necessarily result from covered property damage. As we have explained in part A.1 above, for purposes of deciding the coverage dispute, the trial court properly looked to the allegations of the underlying complaints and *assumed* Armstrong would be held liable for the damages alleged therein. The underlying complaints allege liability arising either from the release of asbestos fibers or from the mere installation of ACBM. Armstrong was not required to prove more.

The gist of the insurers' argument is not that Armstrong failed to prove its case but that the trial court erroneously found the building claims to constitute covered property damage. Because we have upheld the trial court's decision and have concluded that installation of ACBM and releases of asbestos fibers do qualify as "physical injury to tangible property," we find no error in the trial court's declaration that Armstrong is entitled to indemnification *if* Armstrong is held liable for the damages alleged in the underlying complaints.

F. Duty to Defend

The trial court's decision in phase V on property damage addressed the indemnification obligations of the insurers but said little about the duty to defend: "Each triggered policy has an independent obligation to pay in full any indemnity costs on an asbestos building claim and, if the policy contains a defense obligation, to also pay in full any defense costs on the claim." FN51

FN51 In its phase V decision on property damage, the trial court referred back to its decision in phase III (on bodily injury claims) in which the trial court concluded that although as a legal matter the duty to defend is broader than the duty to indemnify, when applied here the duty to defend coincides with the duty to indemnify: "the trigger and scope of defense follows [*sic*] the trigger and scope of indemnity." That is, with respect to bodily injury claims, "since any policy triggered by a

claim has an independent obligation to indemnify, each triggered policy which contains a defense obligation to the insured has an independent obligation to defend or reimburse defense costs, depending on the policy language.”

(53) In a separate brief, Liberty Mutual Insurance Company raises the issue of the duty to defend and argues that mere conclusory allegations of *110 “property damage” in the underlying complaints should not be enough to give rise to a duty to defend. Liberty Mutual asserts that the duty to defend should arise only if the underlying complaints allege actual contamination of the building and not merely a potential health hazard from the presence of ACBM.

Liberty Mutual is correct that as a general rule conclusory allegations are not enough to give rise to a duty to defend. (See *Fire Ins. Exchange v. Jiminez* (1986) 184 Cal.App.3d 437, 443, fn. 2 [229 Cal.Rptr. 83].) ^{FN52} But we construe Liberty Mutual's argument as an alternate attack on the trial court's ruling that the mere presence of ACBM in a building constitutes “physical injury to tangible property.” For the reasons explained in part A(3) above, physical injury occurs even in those cases in which there have not yet been any releases of asbestos fibers. Allegations of damages from the presence of ACBM in a building are therefore sufficient to show a potential for coverage and to give rise to a duty to defend.

FN52 The duty to defend is not dependent solely on the allegations in the underlying complaint; the duty to defend may be triggered if the insurer learns of facts from any source that create the potential for liability. (*Gray v. Zurich Insurance Co.*, *supra*, 65 Cal.2d at pp. 276-277; *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 606 [222 Cal.Rptr. 276].) Likewise, the insurer may produce undisputed extrinsic evidence that eliminates the possibility of coverage. (See *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 304 [24 Cal.Rptr.2d 467, 861 P.2d 1153].)

G. Exclusions

The trial court was also asked to determine the applicability of various policy exclusions—the so-called “business risk” exclusions. One commentator has explained the rationale for the business risk exclusions as follows: “In every business venture there is an element of risk; the product fails to perform as expected; it lacks appeal to the consumer and does not sell; or it actively malfunctions and a third party suffers a loss. Products liability coverage is designed to protect only the bodily injury or property damage of others and not the business risks that accompany every commercial venture.” (7A Appelman, *Insurance Law & Practice* (rev. ed. 1979) § 4508.01, p. 353.)

(54) The trial court concluded that none of the business risk exclusions apply to the asbestos building cases. The insurers first contend that the trial court erred in issuing such a sweeping ruling. They argue that a decision on the applicability of the exclusions must await a determination of the actual basis for Armstrong's liability, for it may turn out that a particular plaintiff *111 will recover damages which are excluded by the policy. (See *Central Mutual Ins. Co. v. Del Mar Beach Club Owners Assn.* (1981) 123 Cal.App.3d 916, 930-931 [176 Cal.Rptr. 895].)

We draw the same distinction here that we drew with respect to the coverage dispute discussed in part A above and the duty to indemnify discussed in part E above. For purposes of determining whether the property damage claims are covered or excluded under the insurance policies, we assume that Armstrong will be held liable for the damages alleged in the complaints in the underlying building cases. (Cf. *Maryland Cas. Co. v. W.R. Grace & Co.*, *supra*, 794 F.Supp. at pp. 1227, 1228 [summary judgment inappropriate to determine application of exclusions in the absence of factual development of the underlying claims].) We express no opinion on whether the damages alleged are sufficient to give rise to liability, nor do we determine whether the exclusions apply in the event Armstrong is actually held liable for damages other than those alleged in the underlying complaints. (See *Montrose Chemical Corp. v. Admiral Ins. Co.*, *supra*, 10 Cal.4th

at p. 694.)

1. Insured's Own Products

(55) The first exclusion put forth by the insurers bars coverage for damage to the insured's own products. The 1966 and 1973 standard form CGL policies exclude "property damage to ... the named insured's products arising out of such products or any part of such products." The earlier version (the 1947 standard form) excluded "injury or destruction of ... any goods or products manufactured, sold, handled, or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises."

The earlier version was explained by the Court of Appeal to mean that "if the insured becomes liable to replace or repair any goods or products ... after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under the policy. However, if the accident also caused damage to some other property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy, and is not excluded." (*Central Mutual Ins. Co. v. Del Mar Beach Club Owners Assn.*, *supra*, 123 Cal.App.3d at p. 929, quoting *Liberty Bldg. Co. v. Royal Indem. Co.* (1960) 177 Cal.App.2d 583, 587 [2 Cal.Rptr. 329], italics in original.)

The trial court ruled the "own products" exclusion inapplicable because the underlying building cases allege damage to the remainder of the building, not damage to the ACBM. A similar conclusion was reached by the *112 Illinois Supreme Court in *USF&G v. Wilkin Insulation Co.*, *supra*, 578 N.E.2d 926, 934. The court reasoned that the underlying complaints seeking recovery for the costs of removal, repair and/or replacement of the ACBM "seek these damages as a result of the contamination visited upon the buildings and the contents therein by the product that Wilkin installed. As such, the underlying complaints seek recovery for damage to property other than the product installed by Wilkin" (Italics in original; see also *Davton Independent School D. v. National Gypsum*,

supra, 682 F.Supp. at p. 1412 ["the 'own product' exclusion does not bar coverage for the damages alleged to have been sustained by the Plaintiffs' buildings or their contents"]; accord, *Stonewall Ins. Co. v. Asbestos Claims Management*, *supra*, 73 F.3d at p. 1210; *Maryland Cas. Co. v. W.R. Grace & Co.*, *supra*, 794 F.Supp. at p. 1227; and see *Aetna Cas. & Sur. Co. v. PPG Industries, Inc.*, *supra*, 554 F.Supp. at p. 294 [damage from foam insulation was damage to the building, not to the insulation itself; hence, exclusion not applicable].)

The reasoning in those preceding asbestos property damage cases conforms to rulings by California courts in analogous settings. (*Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co.*, *supra*, 63 Cal.2d 602, 606-608 [defective doors caused damage to whole house]; *Economy Lumber Co. v. Insurance Co. of North America*, *supra*, 157 Cal.App.3d 641, 649-650 [defective siding caused damage to whole house]; cf. *Volf v. Ocean Accident & Guar. Corp.* (1958) 50 Cal.2d 373, 375-376 [325 P.2d 987] [defective cement damaged only the wall, and the wall was the insured-contractor's own product]; *Diamond Heights Homeowners Assn. v. National American Ins. Co.* (1991) 227 Cal.App.3d 563, 572-573 [277 Cal.Rptr. 906] [various construction defects damaged the house, but the whole house was the insured-contractor's own product].)

Relying on *Volf* and *Diamond Heights*, the insurers argue that because the underlying claimants are seeking the costs of repairing or replacing only the ACBM, and not any other part of the building, only damage to the ACBM is at issue in the building cases. Yet, as explained in part A.1 above, we have assumed, for purposes of interpreting the policy language, that the buildings themselves have been injured by the ACBM. We hold only that insofar as Armstrong is held liable for the claimed damage to the buildings, the "own products" exclusion does not bar coverage.

2. Product Recall

(56) The second exclusion advanced by the insurers is the product recall or "sistership" exclusion, which is

expressed in the standard policy as *113 follows: "Damages claimed for the withdrawal, inspection, repair, replacement or loss of use of the named insured's products or work completed by or for the named insured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein."

The trial court found this exclusion, too, inapplicable to the building cases, and we affirm that ruling.

The term "sistership" stems from the practice in the aircraft industry of recalling planes for repairs when a plane of the same model—a sister ship—had crashed because of a design defect. (*Arcos Corporation v. American Mutual Liability Ins. Co.* (E.D.Pa. 1972) 350 F.Supp. 380, 384, fn. 2; Annot. (1984) 32 A.L.R.4th 630.) The sistership exclusion "operates to exclude coverage for the cost of 'preventative or curative action' when the insured withdraws a product in situations in which a danger is merely apprehended. [Citation.] It does not, however, operate to exclude coverage for actual damage caused by the very product giving rise to such an apprehension." (*Davton Independent School D. v. National Gypsum, supra*, 682 F.Supp. at p. 1412 [asbestos building products], quoting from *Todd Shipyards Corp. v. Turbine Service, Inc.* (5th Cir. 1982) 674 F.2d 401, 419 cert. den. 459 U.S. 1036 [74 L.Ed.2d 602, 103 S.Ct. 447] [malfunctioning turbine]; accord, *Stonewall Ins. Co. v. Asbestos Claims Management, supra*, 73 F.3d at p. 1211 [asbestos building products]; *Maryland Cas. Co. v. W.R. Grace & Co., supra*, 794 F.Supp. at p. 1227 [same]; see also *Gulf Mississippi Marine Corp. v. George Engine Co.* (5th Cir. 1983) 697 F.2d 668 [defective engines and gears]; *Marathon Plastics v. Intern. Ins. Co.* (1987) 161 Ill.App.3d 452, [112 Ill.Dec. 816, 514 N.E.2d 479, 487] [defective pipes].)

The insurers argue that because the underlying complaints allege that the mere presence of ACBM poses only a potential health risk, the removal of ACBM from the buildings is based upon an apprehension of danger, not actual damage. The argument is flawed in two respects. First, it ignores the allegations of damage from contamination from

asbestos fibers released into the air supply or onto surfaces of the buildings. Second, it ignores the fact that we have assumed, as did the trial court, that actual damage to the buildings has resulted from the mere presence of still-contained ACBM for which Armstrong will be held liable. Insofar as Armstrong is ultimately held liable for such damage, the sistership exclusion does not bar coverage. *114

3. Design Defect

(57a) The third exclusion put forth by the insurers was the design defect exclusion. The 1966 standard form CGL excludes: "Property damage resulting from the failure of the named insured's products or work completed by or for the named insured to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to ... property damage resulting from the active malfunctioning of such products or work."

(58) In *American Employers' Ins. Co. v. Maryland Casualty Co.* (1st Cir. 1975) 509 F.2d 128, 130, the court explained the "active malfunctioning" exception to this exclusion: "Design errors resulting in mere 'passive' failure to discharge an intended function are regarded as the insured's normal business risk and are excluded from coverage, while design errors themselves causing some positive or 'active' harm deemed extraordinary in the insured's business are covered. Thus, to recite some of the hypotheticals appearing in commentaries dealing with the clause, the policy is not intended to cover liability resulting from the faulty design of an insecticide which fails to kill insects, a hair tonic which fails to prevent baldness, or a rust inhibitor which fails to inhibit rust. On the other hand, the active malfunctioning exception would apply to provide coverage for liability resulting from an insecticide which harms crops to which it is applied, a hair tonic which causes a scalp rash, or a rust inhibitor which corrodes a radiator to which it is added." (Fns. omitted.)

() In the present case, the trial court found that the

“active malfunctioning” exception applies to make the design defect exclusion inapplicable: “In the instant case, the alleged defect in the ACBM is not a ‘passive’ failure to insulate or perform any of the normal functions expected of floor tile, pipe insulation or surfacing material. Rather, as resolved earlier in this phase, the building cases allege that a positive harm results from ACBM. The alleged contamination of the buildings from ACBM is closely analogous to the hypotheticals considered within the scope of the active malfunctioning clause. As in the above examples, the type of resulting harm is a side effect of the product and has nothing to do with the product failing to perform its primary purpose. Therefore, the active malfunctioning limitation applies to the building cases and renders the 1966 CGL design defect exclusion inapplicable.”

The insurers do not challenge this ruling as applied to cases in which the underlying complaints allege asbestos fibers have been released and have *115 contaminated the building. The insurers argue, however, that in cases alleging damages from the mere presence of still-contained ACBM, there is no “active malfunctioning.” Yet, this argument seems to be simply another presentation of the point that the mere presence of still-contained ACBM is not a physical injury. As we have explained in part A.1 above, we must assume for purposes of deciding coverage that the presence of ACBM is injurious and will be the basis of Armstrong’s liability to the building owners. And as explained in part A.3, we have concluded that injury from the presence of ACBM qualifies as a physical injury within the meaning of the policies. We therefore hold that insofar as Armstrong is held liable for injuries from the presence of ACBM, the design defect exclusion is inapplicable.

H. Excess Policies: Aggregate or Catastrophe ^{FN*}

FN* See footnote, *ante*, page 1.

.....

In summary, we affirm the trial court’s decision that all claims in the underlying building cases, whether for

releases of asbestos fibers or for the mere presence of ACBM, qualify as claims for “physical injury to ... tangible property” and are covered by the insurance policies. We affirm the trial court’s decision that coverage is triggered if ACBM was installed during a policy period or if releases or reentrainments took place during a policy period, and we affirm the trial court’s ruling that the policies provide coverage “in full,” without the participation of Armstrong, (up to the policy limits, and subject to apportionment based upon “other insurance” clauses). We also affirm the judgment concerning the duty to defend and the duty to indemnify. With respect to the judgment on the INA excess policy (paragraph 54), we remand for findings on the objectively reasonable expectations of the insured.

Disposition

The judgment on phase I denying recovery or relief to GAF Corporation under Continental Casualty Company policy RD 9972548 (paragraph 3) is affirmed.

The judgment on phase III concerning the trigger and scope of coverage for bodily injury claims is affirmed, except that the first sentence of paragraph 8 of the judgment is modified to read that all of a policyholder’s policies subject to this judgment that were in effect from the date of the *116 claimant’s first exposure to the policyholder’s asbestos product until the date of death or claim, whichever occurs first, are triggered on an asbestos-related bodily injury claim, but the claimant is presumed to have been exposed to all defendant-manufacturers’ asbestos products, and the burden is on the insurer to prove that the claimant was not exposed to its policyholder’s product before or during the policy period.

The declaration on the meaning of “expected or intended” language (paragraphs 20 and 21) is reversed, but the judgment that coverage exists under the policy of Commercial Union’s predecessor issued to Armstrong for asbestos bodily injury claims (paragraph 32) is affirmed.

The judgment that the policies issued to GAF prior to

May 26, 1967, by Continental Casualty and by predecessors of Commercial Union provide coverage for asbestos-related bodily injury claims related to the Ruberoid Co. (paragraph 30) is reversed.

The judgment on the effects of the Wellington Agreement (paragraphs 17 through 19) is affirmed.

The judgment on phase V concerning defense and indemnity obligations of the insurers on asbestos-related property damage claims against Armstrong, concerning policy exclusions, and concerning the trigger and scope of coverage is affirmed, except that the judgment on the INA excess policy (paragraph 54) is reversed and the matter is remanded for findings on the objectively reasonable expectations of the insured.

Newsom, J., ^{FN*} and Stein, Acting P. J., concurred.

FN* Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

The petitions of all appellants for review by the Supreme Court were denied August 21, 1996. *117

Cal.App.1.Dist.

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.

45 Cal.App.4th 1, 52 Cal.Rptr.2d 690, 96 Daily Journal D.A.R. 5048, 96 Cal. Daily Op. Serv. 3058

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EXHIBIT 2

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Oil, Chemical and Atomic Workers Intern. Union,
Local 1-547 v. N.L.R.B.C.A.9,1988.

United States Court of Appeals,Ninth Circuit.

OIL, CHEMICAL AND ATOMIC WORKERS

INTERNATIONAL UNION, LOCAL 1-547,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Chevron, USA, Respondent-Intervenor.

No. 85-7574.

Argued and Submitted June 4, 1987.

Decided March 28, 1988.

An action was brought challenging the National Labor Relations Board's interpretation of a no-strike clause in the collective bargaining agreement and its application to a sympathy strike. The Court of Appeals, Hug, Circuit Judge, held that: (1) language of a no-strike clause did not specify whether sympathy strikes were included or excluded from prohibition, and thus reference to external evidence was necessary, and (2) NLRB deference to arbitrator's decision simply by citing another Board decision was improper in light of complexity of extrinsic evidence available in the case and was unfaithful to the Board's own standard for determining the scope of a no-strike clause.

Reversed and remanded.

West Headnotes

[1] Labor and Employment 231H 1910

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of
Decisions of Labor Relations Boards

231HXII(J)2 Enforcement by Courts

231Hk1909 Decisions Enforceable

231Hk1910 k. In General. Most Cited

Cases

(Formerly 232Ak703.1, 232Ak703 Labor

Relations)

An order of the National Labor Relations Board must be enforced if the Board correctly applied the law, but the reviewing court is not required to defer to the Board's decision if the Board abuses its discretion by failing to follow its own standards. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[2] Labor and Employment 231H 1286

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1268 Construction

231Hk1286 k. Waiver. Most Cited Cases

(Formerly 232Ak257.1, 232Ak257 Labor
Relations)

Since the clear intention of a sympathy strike is to interfere with production in order to achieve solidarity with another union, the plain language of a clause of the collective bargaining agreement providing there would be no strikes, work stoppages, slow downs or other intentional interferences with production during the term of the agreement did not compel conclusion that sympathy strikes were omitted from the operation of the no-strike provision. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

[3] Labor and Employment 231H 1286

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1268 Construction

231Hk1286 k. Waiver. Most Cited Cases

(Formerly 232Ak257.1, 232Ak257 Labor
Relations)

In determining the intent of the parties as to whether a no-strike provision of the collective bargaining agreement prohibited sympathy strikes, relevant considerations included the bargaining history, party's interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated, as well as the doctrine of coterminous

(Cite as: 842 F.2d 1141)

interpretation. National Labor Relations Act, §§ 1 et seq., 8(a)(1, 3), as amended, 29 U.S.C.A. §§ 151 et seq., 158(a)(1, 3).

[4] Administrative Law and Procedure 15A ⚡498

15A Administrative Law and Procedure

15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents

15AIV(D) Hearings and Adjudications

15Ak498 k. Retroactivity. Most Cited Cases

Labor and Employment 231H ⚡1808

231H Labor and Employment

231HXII Labor Relations

231HXII(I) Labor Relations Boards and Proceedings

231HXII(I)9 Hearing

231Hk1806 Determination

231Hk1808 k. Past Policies or Position; Precedent. Most Cited Cases

(Formerly 232Ak506 Labor Relations)

Indianapolis rule, that general no-strike clause waives right to engage in sympathy strikes absent extrinsic evidence that the parties intended otherwise, could not be applied retroactively to collective bargaining agreement entered before the decision was made, as the new placement of the presumption could not have been anticipated by the parties and thus could not have been their intent. National Labor Relations Act, §§ 1 et seq., 8(a)(1, 3), as amended, 29 U.S.C.A. §§ 151 et seq., 158(a)(1, 3).

[5] Administrative Law and Procedure 15A ⚡819

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(F) Determination

15Ak817 Remand

15Ak819 k. Further or Corrected Findings, Remand For. Most Cited Cases

Labor and Employment 231H ⚡1870

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1869 Deference to Board

231Hk1870 k. In General. Most Cited

Cases

(Formerly 232Ak673 Labor Relations)

Labor and Employment 231H ⚡1889

231H Labor and Employment

231HXII Labor Relations

231HXII(J) Judicial Review and Enforcement of Decisions of Labor Relations Boards

231HXII(J)1 Review by Courts

231Hk1888 Remand to Board

231Hk1889 k. In General. Most Cited

Cases

(Formerly 232Ak673 Labor Relations)

National Labor Relations Board's deference to arbitrator's decision that a collective bargaining agreement's no-strike clause constituted a waiver of sympathy strike rights, by simply referring to another NLRB decision, was improper in light of the NLRB's knowledge of the complexity of the extrinsic evidence available in the case, and thus remand was required in order for the NLRB to consider whether there was extrinsic evidence that the parties did not intend to waive the right to engage in a sympathy strike through general no-strike clause. National Labor Relations Act, §§ 1 et seq., 8(a)(1, 3), as amended, 29 U.S.C.A. §§ 151 et seq., 158(a)(1, 3).

*1142 Wallace B. Knox, Karp & Mooney, Los Angeles, Cal., for petitioner.

John H. Ferguson, Deputy Asst. Gen. Counsel, Washington, D.C., for respondent.

Richard D. DeLuce, Lawler, Felix & Hall, Los Angeles, Cal., for respondent-intervenor.

Jeffrey B. Demain, Altshuler & Berzon, San Francisco, Cal., for amicus.

On Petition for Review of an Order of the National Labor Relations Board.

Before HUG and WIGGINS, Circuit Judges, and

PRICE,^{FN*} District Judge.

FN* Honorable Edward Dean Price, United States District Judge, Eastern District of California, sitting by designation.

HUG, Circuit Judge:

This case involves the interpretation of a no-strike clause in a collective bargaining agreement, and its application to a sympathy strike. Chevron U.S.A., Inc. ("Chevron") suspended members of the Oil, Chemical and Atomic Workers International Union, Local 1-547 ("the Union" or "Local 1-547") for one day when they engaged in a sympathy strike. The Union filed an unfair labor practice complaint with the National Labor Relations Board ("NLRB" or "the Board"), alleging violations of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1982). The Union petitions for review of the NLRB's dismissal of its complaint.

I.

On January 28, 1980, approximately 240 Local 1-547 members refused to cross a picket line at the Chevron plant where they were employed. The picket line was formed by another Union local from the Chevron plant.

Chevron suspended the Local 1-547 members for one day, claiming they had violated the no-strike clause included in their collective bargaining agreement.

Article XXI of the agreement provided:

ARTICLE XXI-STRIKES AND LOCKOUTS

During the term of this Agreement there shall be no strikes, stoppages of work, slowdowns, or other intentional interferences with production. The company agrees there will be no lockouts.

This clause was in the collective bargaining agreement between the Union and Chevron since at least 1959. In recent years, the only discussions concerning its effect took place during the negotiations for the 1977-79 agreement. The Union introduced a clause specifically allowing sympathy strikes, but then withdrew it. Throughout the negotiations, the Union maintained it was merely trying to reinforce a right it felt it already

had under the collective bargaining agreement and the NLRA.

In 1977, after negotiations were complete, Chevron disciplined employees who engaged in another sympathy strike. The Union took a grievance to arbitration. The arbitrator decided that the broad no-strike clause in the agreement waived the Union's statutory right to engage in sympathy strikes.

*1143 However, in 1978, the NLRB held that broad no-strike language does not in itself constitute a waiver of the right to engage in sympathy strikes. The burden fell on the employer to show clearly and unmistakably that the union intended to waive this right. *Davis-McKee, Inc.*, 238 NLRB 652 (1978).

The parties entered into a new agreement in 1979, maintaining the previous no-strike clause without discussion. This 1979-81 agreement was in effect at the time of the 1980 sympathy strike at issue in this case.

On July 22, 1981, an administrative law judge ("ALJ") found that the no-strike clause in the collective bargaining agreement did not waive the statutory right to engage in sympathy strikes, following *Davis-McKee*. He also found it inappropriate to defer to the earlier arbitration decision, finding it "clearly repugnant" to the NLRA under then-current law. Since the Union's right to strike had not been waived, he found that Chevron had violated sections 8(a)(1) and 8(a)(3) of the NLRA. Chevron filed exceptions to the decision and the Union filed cross-exceptions. Almost four years later, the NLRB reversed the ALJ's decision, deferring to the 1978 arbitrator's decision, which construed the agreement's no-strike clause as a waiver of sympathy strike rights. The Board also relied on its recent decision in *Indianapolis Power & Light*, 273 NLRB 1715 (1985), which overruled *Davis-McKee*. *Indianapolis* held that a broad no-strike clause bans all strikes, including sympathy strikes, unless there is clear evidence that the parties intended otherwise.

II.

[1] The right to engage in a sympathy strike is guaranteed by section 7 of the NLRA, 29 U.S.C. § 157 (1982). This right can be waived by a collective bargaining agreement if the waiver is "clear and unmistakable." See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); NLRB v. Southern California Edison Co., 646 F.2d 1352, 1364 (9th Cir.1981).

"Whether the contract waives the employees' right to strike 'turns upon the proper interpretation of the particular contract before us. Like other contracts, it must be read as a whole and in light of the law relating to it when made.'" IBEW Local 387 v. NLRB (Arizona Public Service Co.), 788 F.2d 1412, 1414 (9th Cir.1986) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1956)). The language of the no-strike clause does not specify whether sympathy strikes are included or excluded from the prohibition.^{FN1}

^{FN1}. The NLRB order must be enforced if the Board correctly applied the law. NLRB v. Island Film Processing Co., Inc., 784 F.2d 1446, 1450 (9th Cir.1986). The Board's interpretation of the NLRA will be upheld if reasonable. Ford Motor Co. v. NLRB, 441 U.S. 488, 497, 99 S.Ct. 1842, 1849, 60 L.Ed.2d 420 (1979); Whisper Soft Mills, Inc. v. NLRB, 754 F.2d 1381, 1384-85 (9th Cir.1984). Furthermore, so long as the Board's interpretation of contract terms is reasonable, it is entitled to deference. NLRB v. Southern California Edison Co., 646 F.2d 1352, 1362 (9th Cir.1981). But see Local Union 1395, IBEW v. NLRB, 797 F.2d 1027, 1030 (D.C.Cir.1986) (Board's interpretation of contractual provisions is entitled to "no particular deference" so as to prevent the development of two different standards of interpretation of collective bargaining agreements—the Board's and that which the courts develop in suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982)). If, however, an agency departs from its prior standards, the reviewing

court should carefully consider the consistency of the change with the agency's mandate. Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade, 412 U.S. 800, 807-08, 93 S.Ct. 2367, 2374-75, 37 L.Ed.2d 350 (1973); Continental Web Press v. NLRB, 742 F.2d 1087, 1089 (7th Cir.1984). The court also need not defer if the Board abuses its discretion by failing to follow its own standards. See, e.g., Ad Art, Inc. v. NLRB, 645 F.2d 669, 675 (9th Cir.1980).

[2] The Union argues that the phrase "or other intentional interferences with production" is significant.

The argument is that the use of the word "intentional" in the phrase means that any strike would also have to be an intentional interference with production. The Union contends that a sympathy strike is not an intentional interference with production but, instead, an intention to achieve solidarity with another *1144 union. We disagree. The clear intention of a sympathy strike is to interfere with production, in order to achieve solidarity. Thus, we do not agree that the plain language of the clause compels a conclusion that sympathy strikes were omitted from the operation of the no-strike provision.

[3] The intent of the parties cannot be determined from the language of the clause itself, without examining pertinent, extrinsic evidence. Relevant considerations include the bargaining history, the parties' interpretation of the contract, the conduct of the parties, and the legal context in which the contract was negotiated. Arizona Public Service Co., 788 F.2d at 1414. Another factor is the doctrine of coterminous interpretation, which states that a no-strike obligation is limited to arbitrable issues. Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 381-82, 94 S.Ct. 629, 638-39, 38 L.Ed.2d 583 (1974). If the arbitration clause and the no-strike clause in a contract are functionally linked, strong evidence exists that the parties did not intend a waiver of the sympathy strike right. NLRB v. Sav-On Drugs, Inc., 728 F.2d 1254, 1257 (9th Cir.1984) (en banc); Southern California Edison, 646 F.2d at 1367; accord Gavy Hobart Water Corp. v. NLRB, 511 F.2d 284, 287-88 (7th Cir.), cert. denied, 423 U.S. 925, 96 S.Ct. 269, 46 L.Ed.2d 252 (1975).

This analysis-examining the statutory language in conjunction with extrinsic evidence-is equally applicable in each of the Board's rulings concerning no-strike clauses. In *Indianapolis*, the Board established that a general no-strike clause waives the right to engage in sympathy strikes, unless there is extrinsic evidence that the parties intended otherwise. 273 NLRB 1715 (1985), rev'd, Local Union 1395, IBEW v. NLRB, 797 F.2d 1027, 1030 (D.C.Cir.1986) (Board's decision was reversed due to its failure to address the relevant extrinsic evidence of the parties' intent). This decision overruled established Board precedent that broad no-strike language does not in itself constitute a waiver of the right to engage in sympathy strikes; the burden fell on the employer to show clearly and unmistakably that the union intended to waive this right. *Davis-McKee*, 238 NLRB 652. Thus, *Indianapolis* shifts the presumption to benefit the employer. See *Arizona Public Service Co.*, 788 F.2d at 1414.

An analysis of the various indicators of intent is necessary in this case given the inconclusive nature of the clause's language itself. The Board's decision, however, is cursory, and suffers the same general defects which have led the courts in earlier cases to reverse and remand Board cases which apply the *Indianapolis* standard. See *Local Union 1395*, 797 F.2d at 1027; *Arizona Public Service Co.*, 788 F.2d at 1412.

[4] Furthermore, it is inappropriate to apply retroactively the new *Indianapolis* standard to interpret the collective bargaining agreement in this case, since the new placement of the presumption could not have been anticipated by the parties and thus could not have been their intent.^{FN2}

^{FN2} The question of whether new standards should be applied retroactively is one of law, which we review under the *de novo* standard. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984); *NLRB v. Guv F. Atkinson Co.*, 195 F.2d 141, 148-51 (9th Cir.1952) (decision of

retroactive application not one within agency's special competence, therefore not subject to deference).

The NLRB contends that the Union is precluded from arguing against the retroactive application of *Indianapolis*, since it did not raise the issue before the Board. See *supra* n. 1. This argument has been squarely rejected by both the Seventh and D.C. Circuits. *NLRB v. Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d 745, 749 (7th Cir.1985); *Local 900, Int'l Union of Elec., etc. v. NLRB (Gulton)*, 727 F.2d 1184, 1193 (D.C.Cir.1984). These cases reason that the issues had been presented to the Board and the objecting party had argued for a continuation of the current standards. Retroactivity is necessarily an issue any time a new rule of law is formulated. This fact, combined with the Board's extensive experience with retroactivity problems, should have alerted the Board to the Union's likely objection to the retroactive application of their new rules of law. We adopt these decisions as Ninth Circuit law.

The NLRB's reliance on *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66, 102 S.Ct. 2071, 2082-83, 72 L.Ed.2d 398 (1982) and *Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276, 281 n. 3, 95 S.Ct. 972, 975 n. 3, 43 L.Ed.2d 189 (1975) is misplaced as those cases deal with a very different situation.

In both cases the Board decided an issue which had not been presented to it; the Supreme Court held that under those circumstances, a motion for reconsideration must be filed to preserve appellate review. Here, while the precise issue of retroactivity was not before the Board, the Board necessarily had notice that it was an issue which would be raised by the parties if the rule of law was changed.

*1145 The Ninth Circuit has adopted a five-part analysis to balance the interests in considering retroactive application of a new rule of law. *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir.1982), citing *Retail, Wholesale and Dept. Store*

Union v. NLRB, 466 F.2d 380, 390-93 (D.C.Cir.1972).

The relevant factors are:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id.

The *Indianapolis* decision shifted the presumption that the Board applies to no-strike clauses, and the corresponding burden of proof, 180 degrees. The extent to which the Union relied on prior law is unclear, and is precisely the type of extrinsic evidence which the Board has not examined, yet must. The retroactive shifting of the presumption not only ignores the parties' intent at the time the contract was made, it burdens the Union with an interpretation of a clause which is exactly the opposite of the NLRB's interpretation at the time. Thus, the Union would bear the burden of proving the clause did not waive sympathy strikes, while, before, the employer needed to prove such waiver was intended. This burden is significant, as the Union might have continued to bargain for the express exclusion of sympathy strikes, had it known it would be required to prove intent. The statutory or regulatory interest in applying the new standard is small. The concern or goal in contractual interpretation is to discover the parties' intent, and interpretive rules should improve this process, not work to undermine it by ignoring the state of the law at the time a contract is formed. Finally, we note that this case was pending before the NLRB for four years. But for this delay, the case would have been decided under the earlier presumption. Given these circumstances, the statutory interest in applying the new standard is especially weak.

Having decided that retroactive application of the *Indianapolis* standard is inappropriate, we return to a discussion of the extrinsic evidence of intent. We identify such extrinsic considerations to demonstrate the

necessity that the Board undertake such analysis to determine the intent of the collective bargaining parties.

We look first to the bargaining history and the parties' conduct. Two bargaining agreements are relevant to this case. The first, effective from 1977-79, was in effect at the time of the earlier sympathy strike and the arbitration decision holding that such strikes were included in the no-strike clause and thus waived. The 1979-81 agreement was in effect at the time of the sympathy strike at issue in this case.^{FN3}

FN3. The administrative law judge ("ALJ") treated the collective bargaining agreement as one four-year agreement. The NLRB asserts that we must also treat it as a four-year agreement since the Union never objected to this finding. This court's jurisdiction to review specific objections to a NLRB order is limited by section 10(e), which states that "[n]o objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e) (1982). Section 10(f) incorporates this same standard by reference. 29 U.S.C. § 160(f) (1982). The purposes of this limitation on court review are to allow the Board notice and the opportunity to resolve all issues which are within its jurisdiction. Marshall Field & Co. v. NLRB, 318 U.S. 253, 255-56, 63 S.Ct. 585, 586, 87 L.Ed. 744 (1943) (per curiam). In most cases it is necessary to file an exception with the Board to any factual decision of the ALJ which will be disputed. See, e.g., NLRB v. Apico Inns of Cal., Inc., 512 F.2d 1171, 1174 (9th Cir.1975). However, the Union's failure to object on this specific issue does not preclude this court from considering the two separate contracts. Chevron is asking the court to ignore exhibits entered into evidence in the proceeding before the ALJ—the two separate agreements. Thus, we have a clearly erroneous factual statement by the ALJ which is belied by the very evidence in the record. We decline to shut

our eyes, and proceed to analyze this case based upon the two separate collective bargaining agreements which, in fact, exist.

*1146 The no-strike clause remained the same in both contracts, as the 1977-79 agreement was extended in 1979 without any further face-to-face bargaining. In the 1977 negotiations, the Union first proposed, and then withdrew, language explicitly allowing sympathy strikes. At all times, however, the Union indicated that it believed this would simply provide explicit recognition of a right they already had. See Southern California Edison, 646 F.2d at 1366 (failure to obtain a contractual confirmation of a right is evidence of waiver only if it shows that the union thought the right had been waived by other provisions of the contract and sought to regain the right). The Union's belief was not without basis, as Chevron had apparently not disciplined sympathy strikers for years.

In 1977, however, after negotiations were complete, Chevron disciplined sympathy strikers. The no-strike clause was interpreted by an arbitrator as including sympathy strikes, and Chevron's disciplinary action was upheld.

Then, in 1978, the NLRB decided Davis-McKee, which held that broad no-strike clauses were presumed *not* to prohibit sympathy strikes unless the bargaining history indicated otherwise. 238 NLRB 652. It was against this background of directly conflicting interpretations of broad no-strike language that the parties entered into the 1979-81 agreement without further negotiation. The law in effect at the time the contract is formed is another indication of the parties' intent, and thus this conflict must be considered by the NLRB, since a contract is interpreted in light of the law when last ratified. Mastro, 350 U.S. at 279, 76 S.Ct. at 356; Southern California Edison, 646 F.2d at 1365.

The D.C. Circuit has argued that an assumption of *sub silentio* incorporation of existing law under these same facts goes too far. Local Union 1395, 797 F.2d at 1035 & n. 8 (citing the Board's decision in the case before us giving great deference to arbitrator's decision). It is important to note, however, that the Seventh Circuit, where the Local Union 1395 contract was entered and

ratified, had rejected the Davis-McKee approach, see W-I Canteen Serv., Inc. v. NLRB, 606 F.2d 738 (7th Cir.1979), whereas there is no indication that the Ninth Circuit was dissatisfied with Davis-McKee.

The analysis of this case thus poses the challenge of searching for the parties' intent given opposing indicators. The then-current NLRB law indicated the Union could safely engage in sympathy strikes; the 1977 arbitration decision signalled that disciplinary action would be allowed if Union members honored others' picket lines.

[5] It is inappropriate under these circumstances for the Board to defer to the arbitrator's decision by simply citing Olin Corp., 268 NLRB 573 (1984). To do so ignores the complexity of the extrinsic evidence available in this case, and is unfaithful to the Board's own standard for determining the scope of a no-strike clause. See Indianapolis, 273 NLRB at 1715.

It is therefore unnecessary for us to address the validity of the Olin deferral standard and whether it is an improper abdication of the NLRB's obligation to resolve unfair labor practice disputes. We also need not address whether the Board adequately explained the factual parallel between the contract and statutory claims in making its decision to defer to the arbitrator. See Darr v. NLRB, 801 F.2d 1404 (D.C.Cir.1986). The Board now, in reconsidering the case and its deferral decision, can remedy any possible error in the manner in which it handled this aspect of its earlier decision.

Furthermore, due to our decision to remand based on the Board's failure to examine extrinsic evidence of intent, it is unnecessary for us to address whether the Indianapolis*1147 standard is proper under the NLRA.

We therefore reverse and remand for the NLRB to consider the relevant extrinsic evidence.

REVERSED and REMANDED.

C.A.9,1988.

Oil, Chemical and Atomic Workers Intern. Union,

842 F.2d 1141

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842 F.2d 1141, 127 L.R.R.M. (BNA) 3164, 56 USLW 2567, 108 Lab.Cas. P 10,396
(Cite as: 842 F.2d 1141)

Local 1-547 v. N.L.R.B.

842 F.2d 1141, 127 L.R.R.M. (BNA) 3164, 56 USLW
2567, 108 Lab.Cas. P 10,396

END OF DOCUMENT

EXHIBIT 3

INQUIRY

first question, do sections 4 and 5 pro-
to manufacturers and other product sellers

mean that recovery for design defects or
be possible under the theory of strict
under the standards of negligence

the draft committee report and in the
explained in full. Copies of that report
with the Secretary of the Senate."

question. Is the statute of limita-
our Supreme Court's decision in
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ould apply only to the discovery of
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INQUIRY

the committee amendments deals
contract specifications. Would you
contract specification?"

contract specification is one
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Senator Bottiger: "Senator, I would have to research that question. I just don't know. We can look it up and be able to give you an opinion on it, but off the top of my head, I don't know."

ROLL CALL

The Secretary called the roll on the final passage of Engrossed Senate Bill No. 3158, and the bill passed the Senate by the following vote: Yeas, 42; nays, 6; excused, 1.

Voting yea: Senators Bauer, Benitz, Bluechel, Bottiger, Charnley, Clarke, Conner, Craswell, Deccio, Fuller, Gallagher, Gaspard, Goltz, Gould, Guess, Haley, Hansen, Hayner, Hemstad, Hughes, Hurley, Jones, Kiskaddon, Lee, McCaslin, Metcalf, Moore, Newhouse, Patterson, Peterson, Pullen, Quigg, Scott, Sellar, Shipoch, Talley, Vognild, von Reichbauer, Wilson, Wojahn, Woody, Zimmerman—42.

Voting nay: Senators Fleming, Lysen, McDermott, Rasmussen, Ridder, Williams—6.

Excused: Senator Talmadge—1.

ENGROSSED SENATE BILL NO. 3158, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

Following is the report as referred to by Senator Bottiger in replying to questions by Senator Newhouse on Engrossed Senate Bill No. 3158. This report was given to the Secretary of the Senate for inclusion in the Senate Journal.

SENATE SELECT COMMITTEE ON
TORT AND PRODUCT LIABILITY REFORM

DRAFT

FINAL REPORT

Senator Phil Talmadge, Chairman

Senator Del Bausch

Senator Ted Bottiger

Senator George Clarke

Senator Jeannette Hayner

Senator John Jones

Senator Don Talley

December, 1980

FORMATION OF SELECT COMMITTEE

The Senate Select Committee on Tort and Product Liability Reform was formed on July 6, 1979, pursuant to the provisions of Senate Resolution 179-140. The following members were appointed to serve on the Select Committee: Senator Phil Talmadge, Chairman, Senator Del Bausch, Senator Ted Bottiger, Senator George Clarke, Senator Jeannette Hayner, Senator John Jones and Senator Don Talley. The Select Committee was directed to report its findings and recommendations to the Senate prior to the commencement of the 1980 Regular Session of the Legislature which it did by preparation of an Interim Report dated January 18, 1980. The issuance of this Final Report is the culmination of the Select Committee's work over the past year and a half.

HISTORY OF LEGISLATIVE ACTION ON TORT AND
PRODUCT LIABILITY REFORM IN WASHINGTON STATE

The issue of tort and product liability reform began gaining momentum at the state level in 1976. During that year, testimony on the issue was received by both House and Senate Committees, and in the fall the Insurance Commissioner-Elect formed a statewide product liability task force. Legislation drafted by the task force (HB 1162/SB 2744) was submitted to both houses of the 45th Legislature in February, 1977. Hearings were held on the legislation in both the House and the Senate, but it was not enacted into law.

Three other product liability related bills were introduced in 1977, all more limited in scope than HB 1162/SB 2744. The bills dealt with insurance reporting requirements, defining liability insurance, and revising liability rate setting laws. Also introduced in 1977 were two tort reform bills sponsored by the State Judicial Council dealing separately with the issues of contribution and comparative fault.

Subsequent to the 45th legislative session, in 1977, the House Judiciary Committee held interim hearings on the issue of product liability and tort reform. As a result of those hearings, several members of the Committee introduced HB 241 in 1979 during the 46th legislative session. This bill dealt with both product liability and general tort reform. The bill received a hearing in the House only. Other related legislation introduced in the House in 1979 included HB 403, dealing with insurance reporting requirements, and HB 843, another comprehensive product liability and tort reform measure.

Product liability legislation introduced in the Senate in 1979 included SB 3073, sponsored by Senator Phil Talmadge, which was modeled after a preliminary draft of the Model Uniform Product Liability Act proposed by the United States Department of Commerce. Also introduced in the Senate were SB 2677 and SB 2875 dealing with contribution and governmental affirmative defenses.

The primary focus of legislative activity during the 46th legislative session was SB 2333, which could also be characterized as a comprehensive product liability and tort reform measure. The bill received several hearings in both the House and the Senate and was amended substantially by each body. Different versions were approved by the House and Senate, but since the two houses were not able to reach an agreement on the exact language, the bill did not receive final approval.

As a response to the continuing product liability controversy, the Senate Select Committee on Tort and Product Liability was formed pursuant to Senate Resolution No. 140.

SELECT COMMITTEE OBJECTIVES

One of the first tasks facing the Committee was to develop its basic goals and objectives. The Committee, being aware of the controversy generated by the product liability and tort reform proposal considered in the 1979 session, decided that it was essential that it undertake a thorough and objective study of the issues raised by that bill. It felt that the debate concerning Senate Bill 2333 had been marred by a rash of charges and countercharges concerning the demonstrated need for, and the impact of, changes in the tort system proposed by the bill. Therefore, the Committee felt that one of its most important functions would be to serve as a forum for the full and open debate of product liability and tort reform issues.

An important consideration in developing goals and objectives was the fact that the scope of the Committee's inquiry included both product liability reform and tort reform. It would thus be important to distinguish between those issues which would only impact product liability law from those which would impact the entire tort system. This would become more important when the possible ramifications of various changes in the legal system were being considered.

Because of the magnitude of the study, the Committee indicated that it would resist any efforts to panic it into recommending unwise legislation. The Committee pointed out that it was primarily a study committee set up to examine the merits of

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liability reform began gaining momentum at the testimony on the issue was received by both the House and the Senate. The final legislation drafted by the task force in both houses of the 45th Legislature in February 1977 was passed in both the House and the Senate.

Legislation was introduced in 1977, all more comprehensive bills dealt with insurance reporting and revising liability rate setting laws. Bills sponsored by the State Judicial Council dealt with contribution and comparative fault.

In 1977, the House Judiciary Committee introduced HB 241 in which the committee dealt with both product liability and tort reform. Other related bills introduced in the House only. Other related bills included HB 403, dealing with insurance and comprehensive product liability and tort reform.

The Senate in 1979 included SB 3073, modeled after a preliminary draft prepared by the United States Department of Justice. SB 2677 and SB 2875 dealt with product liability and tort defenses.

The 46th legislative session was devoted to comprehensive product liability and tort reform in both the House and the Senate. Different versions were introduced in both houses were not able to reach final approval.

In the event of controversy, the Senate Select Committee on Product Liability and Tort Reform, pursuant to Senate Resolution 1979-1, was established.

OBJECTIVES

To develop its basic goals and objectives, the committee was formed. The committee, after a session, decided that it was necessary to address the issues raised by that legislation. The issues have been marred by a rash of litigation, and the committee felt that a need for, and the committee felt that a forum for the full discussion of these issues was necessary.

One of the primary objectives was the fact that the committee was formed to address the issues which would impact the entire tort system. The committee felt that the committee should address the various ramifications of various tort reform proposals.

The committee indicated that it would address the issues which would impact the entire tort system. The committee felt that the committee should address the various ramifications of various tort reform proposals.

various product liability and tort reform proposals. In the end, it would only recommend legislation which had been demonstrated to be necessary or desirable.

In order to assist it in carrying out its responsibilities under the Senate Resolution, the Committee directed its staff to gather information about product liability and tort reform legislation in other states. Staff was specifically directed to examine the final report and findings of the Federal Interagency Task Force on Product Liability and the work of its successor group, the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation.

The primary efforts of the Committee, however, were directed toward assessing the need for product liability and tort reform in the state of Washington. To that end, the Committee invited persons with expertise in the various areas that it was studying to give the Committee the benefit of their views. These persons included legal practitioners, business and insurance industry representatives, government regulators, court administrators, and academicians.

As a general approach, the Committee determined that the first phase of its activities would concentrate on the insurance aspects of the problem, specifically to determine the extent of the problem as to the availability and affordability of product liability insurance coverage. The Committee would then attempt to determine whether the problem in the insurance area was the result of underwriting practices in the industry or the result of the current state of the tort law. Its findings on these points would be important in determining the kinds of changes in the legal system that would be considered in the second phase of its study.

SUMMARY OF SELECT COMMITTEE ACTIVITIES

Prior to the commencement of public hearings in September, 1979, Senator Talmadge directed staff to survey larger insurance companies in this state to determine their product liability experience in an effort to discover if a crisis in product liability insurance exists at the present time.

During the time that this survey was being conducted, the Select Committee held its first public hearing on September 8 in Seattle. The purpose of the hearing was to receive background information on the history of product liability and on recent developments at the federal level. Professor Richard Settle from the University of Puget Sound Law School and Professor Victor E. Schwartz, Chairman of the United States Department of Commerce Task Force on Product Liability and Accident Compensation, were the featured speakers. Professor Settle gave an overview of the development of tort law in the area of product liability nationwide. Professor Schwartz's comments generally dealt with efforts at the federal level in dealing with product liability. Specifically, his testimony covered: 1) the conclusions drawn from the Department of Commerce's 18-month interagency study on product liability conducted in 1976-77; 2) proposed legislation at the federal level developed by the Commerce Department entitled "The Product Liability Risk Retention Act of 1979;" and 3) a summary of the preliminary draft of the Department of Commerce's Model Uniform Product Liability Act.

At this meeting, testimony was also received from Ron Bland, President of the Washington State Trial Lawyers' Association, Charles Kimbrough, President of the Washington Association of Defense Counsel, and Hugh McGough, also of the Washington Association of Defense Counsel. Their comments reflected the plaintiff's and defendant's perspective on the issue of product liability respectively.

The second public hearing of the Select Committee was held on October 5 in Olympia. The purpose of this hearing was to present the Select Committee with an overview of the complex process of insurance rate making procedures both generally and as they relate to product liability insurance. Mr. Ed Lazarek and Mr. Bernie Galiley from the Insurance Services Offices in San Francisco described the formulas

casualty area. Also at this hearing, staff outlined briefly for the Select Committee the questionnaire that was sent to insurance companies to solicit their product liability experience and the number and quality of responses received to date. SAFECO, one of the companies which had provided a fairly complete response, was asked by the Select Committee to explain its response, its rate making procedures, and how it is improving those procedures.

The third public hearing of the Select Committee was held on October 20 in Seattle. The agenda for this hearing included a discussion by Bob Higley of the Insurance Commissioner's Office, on regulatory oversight of the rate making process, and staff presentations on: 1) industry responses to the Select Committee's product liability insurance survey; 2) product liability reporting statutes in effect in other states; and 3) pooling and risk retention groups, including a discussion of the proposed Product Liability Risk Retention Act of 1979.

The fourth public hearing, held on November 16 in Olympia, was a staff briefing of the Select Committee on tort aspects of the product liability issue which included the current status of the law in Washington State as well as other states, and a review of the Model Uniform Product Liability Act proposed by the United States Department of Commerce.

The fifth public hearing was held on December 7 in Olympia for the sole purpose of receiving public testimony on the work of the Select Committee thus far, and on product liability and tort reform in general. Representatives from the following groups presented testimony at this meeting: Seattle Consumer Action Network; Washington State Bar Association, Tort Reform Task Force; Washington State Trial Lawyers' Association; and Yarder Manufacturers Association.

Professor Schwartz returned to Washington State for a hearing on December 29 in order to answer questions which had arisen on the meaning of certain provisions in the Model Uniform Product Liability Act.

The seventh public hearing was held on June 27, 1980, after the close of the 1980 Regular Legislative Session. The purpose of the hearing was twofold. Cleary Cone, Chair of the Washington State Bar Association's Task Force on Product Liability, presented the Select Committee with a first draft of its proposed product liability act. Ron Bland from the Washington State Trial Lawyers' Association testified on the Trial Lawyers' reaction to the Bar's proposal. The hearing also dealt with the relationship between product liability and the workplace injury. Staff gave a briefing on third party actions under the Industrial Insurance Act and recent efforts to amend that law. Virginia Bins, Assistant Attorney General was present representing the Department of Labor and Industries.

At the July 25 hearing, the Select Committee's staff gave an overview of the draft product liability act. Interested parties were encouraged to review the draft and to testify at an upcoming hearing to be held in the fall. Preliminary comments on the draft were made at this hearing by Pat Long representing PACCAR, Cleary Cone representing the Washington State Bar Association's Product Liability Task Force, Jan Peterson representing the Washington State Trial Lawyers' Association, and Ed Dawson.

The purpose of the hearing held on October 10, 1980 was to solicit public comment on the Select Committee's draft product liability act. Prior to the commencement of testimony, staff explained several amendments of a clarifying nature that had been made to the draft. Testimony was received from the following interested groups: Seattle Consumer Action Network, Safeco Corporation, Association of Washington Business, Independent Business Association, PACCAR, American Insurance Association and Washington State Trial Lawyers' Association.

SELECT COMMITTEE RESOURCE MATERIAL

Interagency Task Force on Product Liability

The Select Committee has depended heavily on two national studies in its examination of the product liability issue. By far the most extensive and authoritative examination of the product liability issue was conducted over an 18-month period by the Federal Interagency Task Force on Product Liability. The final report of the Task Force was issued in 1977 and has provided a reliable source of data for the Committee as well as a firm foundation against which to compare the Committee's own findings.

The Task Force identified three principal causes of the product liability problem—product liability insurance rate making procedures, manufacturing practices, and the tort-litigation system. The Task Force concluded that "the product liability problem is based on a confluence of causes and that it will only be resolved if each cause is properly addressed" (Executive Summary for the Final Report of the Federal Interagency Task Force on Product Liability, page 6).

Model Product Liability Legislation

As a result of the work of the Federal Interagency Task Force, the Department of Commerce developed model legislation for adoption by the states. After extensive public comment on its initial draft, the Commerce Department's final version was issued on October 31, 1979. The Model Uniform Product Liability Act, which suggests a variety of changes to many traditional tort law concepts, has received considerable attention by the Committee. The Model Act will continue to be a primary focus of the Committee as it continues its study of the product liability issue in Washington.

ISO Closed Claims Survey

In response to the growing concern about rising product liability insurance costs during 1975-76, the Insurance Services Office, an independent insurance industry statistical and rate making organization, conducted a nationwide study of product liability claims closed between July 1, 1976 and March 15, 1977. Twenty-three insurers were asked to contribute information to the study.

While there are a number of concerns with the figures reported in the ISO survey (for example, claims closed without payment are not included and dollar figures were "trended" to allow for future projections), a number of significant facts regarding product liability claims emerge from the ISO's study.

Workplace injuries account for 11 percent of the number of individuals receiving bodily injury payments, but these claims represent 42 percent of the claims dollars paid. This reflects the severity of industrial accidents and suggests the importance of the relationship between a state workers' compensation system and product liability.

The problem of the "long tail" in product liability claims is often cited in support of a statute of repose on product liability claims. The ISO study indicates that injuries accounting for 81 percent of payments occur within three years of purchase of the product and over 90 percent within six years. This raises questions regarding the need and effectiveness of a statute of repose.

Transaction costs, including litigation expenses, add to the cost of product liability insurance according to ISO data. As reported by the twenty-three insurers, defense costs amount to 35 percent of bodily injury payments and 48 percent of property damage payments.

Activity in Other States

Washington, of course, is not alone in its concern regarding the product liability issue, and the Committee has attempted to determine the level and direction of product liability and tort reform activity in other states, most of which having occurred over the last three years. Seventeen states have enacted some type of reporting requirements of product liability insurance costs, often in a manner similar to that currently utilized for medical malpractice in Washington. These laws all into

four basic categories of reporting: 1) notice of cancellation, nonrenewal or change in coverage; 2) closed claims; 3) financial/statistical data; and 4) general information. Recently, the National Association of Insurance Commissioners has adopted a supplementary form relating to product liability insurance to be used in conjunction with the annual statement submitted by all insurance companies to the State Insurance Commissioner. Representatives from Washington's Insurance Commissioner's Office have indicated that this new supplemental form will be required of insurance companies doing business in Washington beginning in 1980.

Representatives from ISO have testified that the statistical reporting procedures which ISO requires of its client companies are currently being refined to provide more refined classification details. These new procedures, which will reflect data on all types of product liability insurance ((manual), (a) rated and commercial multi-peril), should contribute to a more accurate picture of the data upon which premiums—and premium increases—are based. This, in turn, may result in a more complete picture of the history of the product liability crisis, as well as a firmer base upon which to recommend changes in industry and regulatory practices.

Nineteen states have adopted some measure of tort reform in response to the product liability issue. Activity has generally been concentrated in seven areas: 1) definition of a product liability action; 2) statutes of limitation/repose; 3) state of the art defense; 4) duty to warn; 5) governmental standards; 6) product modification and alteration; and 7) subsequent design changes.

MAJOR FINDINGS

From its inception, the Committee has recognized that the concerns generated during the discussions surrounding SB 2333 in the 1979 session involved issues which went beyond the narrow scope of product liability and included proposed reforms of the tort system in general. As such, the Committee has attempted to indicate clearly that the scope of its inquiry included both general tort reform and, in particular, product liability tort reform. In doing so it has considered the language of model proposals such as the Uniform Comparative Fault Act, the Uniform Contribution Among Joint Tortfeasors Act, as well as the Uniform Product Liability Act.

The Committee has solicited testimony from a broad range of groups and individuals interested in its study. Comments, suggestions, proposals and critiques have been received from consumers, manufacturers, retailers, insurers, and the plaintiff and defendant bars. Additionally, the Select Committee has attempted to compile independent data on product liability insurance practices, product liability related judgments, and activity and proposals for reform in other states.

As a result of this total investigation over the past eighteen months, the Committee offers the following findings.

Insurance Practices

As part of its initial inquiry into product liability insurance practices, the Committee developed a questionnaire which was sent to eighteen insurance companies offering product liability insurance in Washington State. Companies were asked to respond to questions in three broad areas: 1) volume of business, as reflected by the number of policies and premium dollar value of those policies; 2) profitability, as reflected by dollar profit and loss figures and loss/premium ratios; and 3) claims and litigation experience. Information was requested covering the years 1973-78.

Responses were received from fifteen companies. Many companies chose to respond on a model product liability questionnaire prepared by the National Association of Insurance Commissioners, and others who responded on the form submitted by the Committee did so only partially. Companies professed a great deal of difficulty in responding to the Committee's questionnaire. Especially troublesome

according to many of the companies, was the request that information be reported for each of the different types of product liability insurance written—monoline, comprehensive general liability and commercial multi-peril. Companies also reported that retrieval of claims and litigation information was a difficult problem, and the Committee received very few responses on the questions covering those areas.

Data prior to 1977 was generally not reported, and the figures which were received for the 1973-76 period are difficult to interpret since the method of compiling information often was not consistent among the various companies responding. Because of the variability which permeated both the manner in which the companies responded and the extent and depth of their responses, it is difficult to draw meaningful conclusions from the Committee questionnaire. A few observations, however, can be made.

The interagency study and testimony received by the Committee from representatives of ISO, support statements made by manufacturers that premiums for product liability insurance skyrocketed between 1974 and 1976, thereby generating what came to be known as the "product liability crisis." The Committee study also supports this conclusion. Most of the companies responding to the questionnaire utilized ISO ratemaking, and in 1974-75 ISO submitted increase in excess of 75 percent in its rates for bodily injury and property damage. These increases are reflected in premium figures for the Washington companies. Of the ten companies responding to question No. 6 (dollar value of policies) eight companies showed dramatic premium increases between 1974 and 1976.

According to statements of industry representatives and information contained in the interagency study, product liability losses exceeded premiums generally for all companies during 1973-75. Responses to the Committee questionnaire also tend to indicate that the years prior to 1975 were typically unprofitable in the product lines for responding companies. However, as new rates began to be reflected after 1975, most companies' profitability figures improved greatly, and only two of the eight companies responding to question No. 7 (loss/premium ratios) showed a loss/premium ratio in excess of generally acceptable levels for the years 1977 and 1978.

Apparently, then, there does not appear to be a severe problem regarding the availability of product liability insurance in Washington. Rather, the problem continues to be one of affordability. Indicative of this, the MAP-WASH program has received very few requests from individuals unable to secure coverage and has successfully placed all those who sought its assistance.

Because very few companies supplied data for questions 11 and 12 (claims and litigation experience) it is difficult to make any statements as to these items. However, it would appear that by far the greatest number of product liability claims are closed for amounts under \$10,000. The ISO study supports this, having concluded that in Washington during the closed claims study period, the average bodily injury claim (untrended) amounted to \$4,329, not including loss adjustment expenses (\$8,458 if trended for severity).

Because of the way product liability insurance is marketed and the current information on all product liability policies. There is evidence that steps are now being taken, however, by both state regulators and the insurance industry, to develop more complete and reliable data retrieval systems to allow greater accuracy in rate making process. Beginning in 1980, the Insurance Commission requires that information regarding product liability losses be reported annually for any policy in which the premium for product liability is separately stated. Such a method of reporting will not, however, reflect much of the data for comprehensive or commercial multi-peril policies, since product liability premiums are not separately stated in

such policies. Because a substantial amount of product liability insurance is sold in this way, there may be a need for additional reporting in order to obtain a more complete picture of the product liability situation in the future. The Washington State Trial Lawyers' Association has stated that insurance reporting legislation should be enacted prior to the adoption of any tort reform. It is the position of the Committee, however, that at this time it is advisable to monitor the information generated through the Insurance Commissioner's Office before requiring additional reporting procedures.

Product Liability Reform

Sections 2 through 7 of the Act deal with that portion of tort law relating to harm resulting from defective products. As an outgrowth of the concerns with the rapid increase in product liability insurance premiums, a number of commentators have expressed the view that because of the national character of product manufacturing and marketing, the product liability system is particularly sensitive to the lack of uniformity among jurisdictions as to standards and procedures governing recovery.

This was a primary concern of The Legal Study of The Interagency Task Force on Product Liability and led to the development of a Model Uniform Product Liability Act by the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation for consideration by the states.

The Committee has utilized the UPLA as a focal point for its consideration of product liability tort reform, and, to a great extent, the final proposal of the Committee closely adheres to its substance, if not its precise language, in four key areas.

(a) Single Cause of Action

Historically, one of the most confusing areas in product liability tort law involves the variety of causes of actions, including negligence, warranty and strict liability, available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product. In order to ensure his greatest chance of recovery, plaintiff typically pleads all three causes, even though he may not offer proof on all three. Testimony before the Committee reflected general agreement that the creation of a single cause of action, termed a "product liability claim" in the UPLA, eliminates this confusion and should be adopted.

(b) Standards of Liability for Manufacturers

In the words of the official analysis of Section 104 of the UPLA, no single product liability issue has generated more controversy than the question of defining the basic standards of responsibility to which product manufacturers are to be held. With its adoption of Section 402A of the Restatement, the Washington court has purported to extend strict liability to manufacturers of defective products, regardless of the nature of the defect. *Seattle-First National Bank v. Tabert*, 86 Wn. 2d 145 (1975). The notion of strict liability, with its disregard of evidence of the manufacturer's exercise of care, has generated heated discussion among commentators and practitioners, and concern and confusion regarding the precise nature of the basic elements in the proof and defense of liability has been reflected in testimony before the Committee.

The extension of strict liability for defects in construction or for breach of warranty, by and large, has not been challenged, since, as the drafters of the UPLA concluded, "strict liability for defective construction can be absorbed within the existing liability insurance system. . . [and] the consumer has the right to expect that a product will live up to the manufacturer's representations."

The issue of strict liability for design and warning/instruction defects is more difficult. The Washington court, while terming the liability in such cases as one of strict liability, has articulated a test which upon closer analysis involves the balancing of factors more akin to negligence. *Seattle-First National Bank v. Tabert*, *supra*

; *Teagle v. Fisher & Porter Co.*, 89 Wn. 2d 149 (1977). It is arguable that what the court has done is to create a negligence standard for the determination of whether a design or warning/defect exists, which when proved results in imposition of strict liability. However, such a two-pronged analysis has not been clearly articulated and may, in fact, be nothing more than an exercise in semantics. The continued use of both strict liability and negligence terminology has resulted in what the drafters of UPLA refer to as "a foggy area that is neither true strict liability nor negligence. The result has been the creation of a wide variety of legal 'formulae,' unpredictability for consumers, and instability in the insurance market." The Washington State Trial Lawyers and representatives of some consumer groups have argued strenuously for the retention of strict liability in all product liability cases, and have asked for a legislative adoption of Section 402A. Their position is based upon the belief that as between the innocent, unknowing consumer and the manufacturer who is rewarded economically for placing the product into the stream of commerce, the law should protect the consumer from all defects which cause harm, regardless of their nature and over which he has no control. The defense bar, represented primarily by spokesmen from the Association of Washington Business, counters that basic fairness inherent in traditional tort concepts argues in favor of the consideration of traditional negligence concepts of duty, including the exercise of all due care, and breach of that duty before liability attaches.

The Committee believes that the current Washington test reflects essentially a negligence standard in design and warning/instruction cases; and agrees with the UPLA that the "application of uncertain strict liability principles in the areas of design and duty to warn places a whole product line at risk; therefore a firmer liability foundation is needed." Recognizing that there is not unanimity among those interested in this issue, the Select Committee nevertheless believes that the adoption of a negligence standard will help create this "firmer liability foundation."

(c) Standards of Liability for Non-Manufacturing Product Sellers

There has been general agreement before the Committee that the current liability exposure of the "passive" retailer under current rules of joint and several liability throughout the distribution chain is not justified, and the concept of the limited protection afforded to the non-manufacturing product seller in Section 105 of the UPLA has been adopted by the Committee.

Concern has been addressed regarding in what situations the normal rules of joint and several should be applied to non-manufacturing product sellers. The Association of Washington Business has argued for limited exposure, while the Washington State Trial Lawyers has asked for language which assures recovery in the greatest number of situations where a manufacturer may be "unreachable." The Select Committee has determined that the greatest possibility of leaving a plaintiff without a means of recovery occurs when a potentially liable manufacturer is insolvent, judgment-proof, or not subject to service of process. Further, the Select Committee believes that in those instances in which a non-manufacturing product seller is so intertwined with the manufacturer process or adopts the product as its own, the non-manufacturing product seller has, in a sense, waived his right to immunity and should be subject to a manufacturer's liability. Thus, the Committee has chosen to adopt the concept formulated in the UPLA and agrees with the language used in the Product Liability proposal of the Washington Bar Association's Task Force on Product Liability.

(d) Statutes of Repose/Limitation

Of greatest concern to product insurers is the length of time a product seller is subject to liability for harm resulting from a product defect, and they contend that the potential "long tail" of exposure is the primary factor influencing rate-setting. As a result, insurers have argued for certainty in the length of time of exposure, professing less concern regarding the actual time period selected. The closed claim

survey conducted by the Insurance Services Office during 1975-76 determined that 83.5 percent of injuries from defective products occur within ten years of manufacture, raising questions about the validity of insurers' fears of actual losses. However, an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in rates.

In order to bring some certainty to the issue of exposure but at the same time reflecting its concern in preserving those claims based upon product use which is reasonable in light of its unique characteristics, the Select Committee has determined that a complete bar after an arbitrary time period is not justified, and has instead adopted the approach taken in the UPLA.

By the adoption of a "useful safe life" concept, Washington joins a growing number of states which have chosen to place some limitation upon the ability to bring a product liability action on older products. The Committee approves of the creation of the rebuttable presumption utilized in the UPLA, which may prevent a claim more than twelve years from the date of delivery. Because the Committee believes that the claimant should be given a reasonable opportunity to overcome the presumption, it has chosen to adopt a "preponderance of the evidence" standard, rather than the more difficult "clear and convincing" approach used in the UPLA. In adopting the twelve-year presumption, the Committee recognizes that any period of time it selects will be perceived by some as purely arbitrary, and the Washington State Trial Lawyers Association, on some occasions, has argued against any presumption, believing that the concept of the "useful safe life" provides adequate guidance for the trier of fact. It is the Committee's belief that the adoption of the lesser standard to overcome the presumption mitigates any harshness the twelve-year presumption may impose upon the claimant.

The Committee has carefully selected language relating to the statute of limitation in order to modify the discovery rule announced in *Ohler v. Tacoma General Hospital*, 92 Wn. 2d 507 (1979). Because the discovery of all the essential elements of the cause of action is, practically speaking, beyond the understanding of the average layperson until he chooses to seek legal counsel, the *Ohler* rule unjustifiably extends the period during which an action may be brought. In utilizing the language "time of discovery of the harm and its cause," the Committee intends to recreate a more reasonable and meaningful statute of limitations as to product liability claims.

Comparative Fault

The issue before the Committee here was whether the comparative principles embodied in our Comparative Negligence Act, RCW 4.22, should be applied in all tort actions regardless of the degree of fault involved. The 1973 Comparative Negligence Act was by its terms limited to negligence actions in which contributory negligence on the part of the plaintiff was involved. The primary purpose of the Act was to eliminate the total bar to recovery which plaintiff's contributory negligence had in the past presented. Instead of completely barring any recovery the Act provided the plaintiff's recovery would be reduced in proportion to the percentage of negligence attributable to the plaintiff.

The 1973 Act, however, did not address those situations in which a degree of fault higher than simple negligence was involved on either side. For example, what would be the result if either the plaintiff or defendant, or both, were guilty of gross negligence, recklessness, or willful and wanton misconduct or the defendant strictly liable in tort? A literal reading of the statute would seem to limit its application to cases in which the only fault involved was simple negligence (or possibly gross negligence).

Under the case law at the time of the adoption of the 1973 Act, plaintiff's contributory negligence would not bar or diminish recovery where the defendant was guilty of willful and wanton misconduct. *Adkisson v. Seattle*, 42 Wn. 2d 676 (1953). However, plaintiff's contributory willful and wanton conduct would bar

recovery even if the defendant was guilty of the same type of conduct. *Sorensen v. Estate of McDonald*, 78 Wn. 2d 103 (1970).

The effect of adoption of the 1973 Act on most of these situations has not yet been litigated. In the one situation that has, the State Supreme Court has held that a plaintiff's contributory negligence is not a bar or damaging reducing factor in a strict liability lawsuit. *Seay v. Chrysler Corp.*, 93 Wn. 2d 319 (1980).

A major goal of this tort reform movement has been to arrive at a fairer apportionment of fault in tort actions. There has been growing dissatisfaction with the all-or-nothing recovery rules under the prior law. In view of this, there is considerable support for the position that comparative principles should be applied regardless of the degree of fault involved on either side. This is the position taken in the 1977 Uniform Comparative Fault Act (UCFA) and the Uniform Product Liability Act (UPLA).

The Committee has determined that in order to accomplish a fairer apportionment of fault in tort actions the relative fault of all parties to the action should be compared and the plaintiff's recovery reduced by his or her percentage of fault. While it concedes that there may be some conceptual or theoretical difficulties in comparing differing degrees of fault (e.g., comparing the "apples" of contributory negligence with the "oranges" of strict liability, as the argument has often been presented), the Committee does not feel juries will have any practical problem in making such a comparison and that the principle of fairness to all the parties requires that such a comparison be made.

The Committee's position on this issue has been supported by virtually all of the groups participating in the process. It is consistent with the position of the State Bar Association Task Force on Product Liability and Tort Reform as reflected in their draft bill. The only qualified opposition came from the Washington State Trial Lawyers Association who felt that it should be limited to product liability actions and not applied to all tort actions.

Joint and Several Liability

One of the most, if not the most, controversial issue that has been involved in the legislative consideration of product liability proposals in the past three years has been whether the rule on joint and several liability should be completely or partially abrogated. In this state, joint and several liability attaches where two or more tortfeasors have jointly or concurrently committed acts of negligence resulting in a single, indivisible harm to the injured party. The effect of the imposition of joint and several liability is that each tortfeasor is liable for the entire harm caused and the injured may sue one or all to obtain full recovery. This rule was unaffected by the enactment of the Comparative Negligence Act. *Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn. 2d 230 (1978).

The product liability bill considered in the 1979 session would have retained joint and several liability only where parties were acting in concert or in a relationship justifying imposition of vicarious liability or where provided by statute or where plaintiff was free of any contributory fault (ESB 2333 Sec. 2). This provision, and the bill as a whole, was supported by the Association of Washington Business and various representatives of the insurance industry.

Any attempt to even partially abrogate the rule of joint and several liability has been strongly opposed by the State Bar Association Task Force, the Washington State Trial Lawyers, and the Seattle Consumer Action Network. The rule which is clearly designed to facilitate full recovery by the plaintiff for his or her damages is grounded both in practical and policy considerations. See, *Seattle-First National Bank v. Shoreline Concrete*, *supra*, at 234-239.

Retention of joint and several liability has been recommended by the drafters of both the Uniform Comparative Fault Act and the Uniform Product Liability Act. Four states have abrogated the rule as part of their comparative negligence act

(Vermont, New Hampshire, Nevada and Kansas) and two others will not apply it as to defendants whose percentage of fault is less than the plaintiff's contributory fault (Texas and Oregon). The rule, however, continues to be applied in an overwhelming majority of states.

The Committee believes that the rule on joint and several liability should continue to be recognized in this state. It concedes that the effect of this rule may be to require a partially at fault defendant to pay more than his or her share of the joint defendants' liability in certain cases. This unfairness should be ameliorated in most cases by the creation of a right of contribution among tortfeasors. In those cases where it is not, the Committee feels that a defendant rather than the plaintiff should bear the burden of that unfairness.

Contribution Among Joint Tortfeasors

Under current Washington law a jointly and severally liable wrongdoer who pays more than his or her proportionate share of the joint liability may not seek contribution from another jointly and severally liable wrongdoer. *Wenatchee Wenoka Growers Assn. v. Krack Corp.*, 89 Wn. 2d 847 (1978). Washington, in other words, is one of the minority of jurisdictions in this country which still does not recognize a right of contribution among joint tortfeasors.

The rule denying a right of contribution among joint tortfeasors which was derived from an 18th century English case, was once almost universally followed in this country. The principal policy argument behind this rule as that the judicial system should not be used by a wrongdoer to seek relief from his or her own wrongdoing. There has been, quite understandably, growing dissatisfaction with the harshness of the rule. It does not seem fair to force one wrongdoer to shoulder the entire liability when another wrongdoer is capable of contributing.

A majority of states have now recognized a right of contribution among tortfeasors. Thirty-four have done so through legislation and four by judicial decision. A majority of those enacting legislation has enacted either the 1939 or 1955 version of the Uniform Contribution Among Tortfeasors Act. These uniform acts have been superceded by the 1977 Uniform Comparative Fault Act. The contribution aspects of that act also served as the basis for the contribution provisions of the Uniform Product Liability Act. The UCFA and UPLA provide for contribution among joint tortfeasors based upon the comparative fault of the tortfeasors. This right may be entered in the original action or a separate action.

The Committee has determined that there should be a right of contribution among joint tortfeasors. There appear to be no persuasive reasons for refusing to recognize such a right. This position has been supported by all of the interest groups throughout the hearing process.

Worker Compensation

The Select Committee considered extensively the relationship between product liability and third party actions under the present worker compensation system during its discussions of the Model Uniform Product Liability Act and during its hearing on June 27, 1980.

The worker compensation system has been described as a compromise between the rights of the employer and the rights of the employee. Employee recovery under the system represents the extent of the employer's liability. The employee, in exchange for relinquishing his common law right to sue his employer, receives a guaranteed sum certain without the expense or delay usually associated with personal injury actions. The employee's recovery from worker compensation is, however, generally less than what a jury or court would find the value to be. The employee, however, is compensated whether or not there is employer fault.

Many workplace injuries involve a product manufactured by a third party and while an employee may not bring an action against his employer, he may seek recovery in addition to that provided by the worker compensation system against the

third party that manufactured or sold the piece of equipment on which he was injured. It is this interface between worker compensation and product liability that the Committee examined.

In Washington, the interaction of product liability and worker compensation results in an at-fault manufacturer of a workplace product being held jointly and severally liable for the entire amount of the employee's injury. The manufacturer has no right to seek contribution or indemnity from the employer as the employer is protected from third party suits by the worker compensation statute. Employee fault is also not a damage reducing factor in Washington in those third party cases based on strict liability. The Department of Labor and Industries and self-insured employers are entitled to recover all or a portion of their lien benefits paid to date from the third party judgment. In the usual case, where the third party action is brought by the worker, the Department may recover its lien after payment of the employee's attorney's fees and costs and then 25 percent of the remaining balance is paid to the employee. If there are sufficient funds remaining, the Department may recover its lien. The worker, after the Department has paid its lien, is then entitled to whatever balance remains. The Department is not obligated to pay future benefits until the accrued amount of such benefits equals the remaining balance. Note that under current law, no determination of employee or employer fault is made.

The Select Committee discussed previous efforts made to amend the third party action statute as well as other states' approaches to dealing with the relationship between product liability and worker compensation. The Select Committee concluded that changes to the worker compensation third party action statute should only be made after a careful analysis of the impact of such changes on the entire worker compensation system. It felt that this analysis could better be performed by the Joint Committee on Workers' Compensation, and the Select Committee recommends that the Joint Committee make such an analysis. The Select Committee will be forwarding a copy of this final report to the Joint Committee and will be available to provided any needed assistance.

SECTION-BY-SECTION ANALYSIS OF DRAFT BILL

Section 1. Preamble

The preamble establishes that this legislation should be viewed as a continuation of the Legislature's attempts "to bring about needed reforms" in the tort law, and specifically "to create a fairer and more equitable distribution of liability among parties at fault."

The bill's reforms touch many aspects of tort law, but, in particular, sections 2 through 7 relate specifically to the product liability tort law issues. Throughout the Select Committee's hearings, spokesmen for product sellers and product liability insurers maintained that the current judicially-created tort system fails to allocate responsibility among those responsible for harm with resulting detrimental costs to consumers particularly and to society generally. While evidence does not support all these concerns, the Select Committee has determined that adjustments are needed within the tort system in particular areas in order "to treat the consuming public, the product seller, the product manufacturer, and the product insurer in a balanced fashion in order to deal with these problems."

Section 2. Definitions

The definitions contained in this section relate to the product liability aspects of the bill and are taken substantially from the Uniform Product Liability Act (UPLA) as proposed by the Task Force on Product Liability and Accident Compensation of the U.S. Department of Commerce.

(1) Product Seller. Anyone in the regular chain of commercial distribution, other than the occasional seller, is included within the definition of "product seller." The bill, however, establishes a number of exceptions.

The seller of real property is not included in the definition of "product seller" unless the seller is involved in the mass production and sale of standardized dwellings. Recovery may be had, of course, under applicable real estate law and, for example, nothing in this act affects the potential liability of a seller of real estate under any implied warranty of habitability recognized by Washington courts. Sellers of improvements upon real property are included and, for example, the manufacturer of a defective sliding glass door may be liable under this act for harm proximately resulting from it.

A provider of professional services is not included, but recovery could be sought under traditional malpractice or other legal theory.

Those who commercially sell used products are not included unless the product is not "in essentially the same condition as when it was acquired for resale." Whether a product is "in essentially the same condition as when it was acquired for resale" is necessarily a factual determination which must be made on a case-by-case basis. If it is determined that the seller of the used product is essentially a "remanufacturer," the seller will be subject to liability under Section 4 of the act.

(2) Manufacturer. The definition of a manufacturer is a broad one and is intended to include all those who initiate and carry out the process of production. Of significance are one who remanufactures and one who holds himself out as a manufacturer. Consistent with the policy underlying Section 5 of the act, a product seller who performs minor assembly in accordance with the instructions of a manufacturer is not included in the definition as a result of such assembly, and liability may only attach under the provisions of Section 5.

(3) Product. The definition of "product" is intended to be all-inclusive and covers all goods, wares, merchandise, or commodities, and their component parts, capable of delivery for introduction into trade or commerce. A specific exemption is provided for human tissue and organs, including blood, and recovery from harm resulting from their use will be governed by other applicable law.

(4) Product liability claim. An essential element in this act is the consolidation of the various theories under which actions for product liability are brought. The act creates a single cause of action, termed a "product liability claim," and for purposes of pleading, individual theories of liability need not be pleaded separately. Because actions based upon fraud, intentional harm, or a violation of the Consumer Protection Act are not included within the definition of a product liability claim, recovery under those theories will continue to be governed under other applicable law.

(5) Claimant. Recovery may be had under this act by any person or entity which suffers harm, including those not in privity with the product seller, bystanders as well as product users.

(6) Harm. The Select Committee has chosen not to utilize the definition of "harm" contained in the UPLA, and instead has adopted a broad definition allowing for the continued development of the concept through case law. The term does not include direct or consequential economic loss under the Uniform Commercial Code, and recovery for such loss will continue to be governed by the provisions of Chapter 62A RCW. Other types of economic loss, such as wage loss, are included in the term "harm" for purposes of this act.

Section 3. Scope

Existing law is modified only to the extent that it conflicts with the provisions of this act. In light of this, the provisions of the act provide the exclusive remedy for harm resulting from defective products which fall within its scope. For example, recovery for failure to provide adequate warnings or instructions under a theory of strict product liability will no longer be possible since Section 4 (1) provides that

liability in such a case shall be determined under standards of negligence. By the same token, because direct or consequential economic loss traditionally covered by the provisions of the Uniform Commercial Code is specifically excluded from the definition of "harm," the legal standards governing liability for such loss remain unaffected by this act.

Section 4. Liability of Manufacturers

This section establishes the standards of liabilities for manufacturers of defective products. The Select Committee has determined that a distinction should be made between defects resulting from construction and because a product did not conform to the manufacturer's express or implied warranties and those resulting from design or inadequate warnings or instructions.

Subsection (1) of this section establishes a negligence standard where the harm results from defective design or inadequate warnings or instructions. Subparagraphs (a) and (b) and subsection (3) set out those factors which the trier of fact shall consider in determining if liability has been established. The "consumer expectation" test, enunciated in subsection (3) and currently utilized by the Washington court, was criticized in the comments to Section 104 of the UPLA as taking "subjectivity to its most extreme end." Instead, in design cases, the UPLA adopts a test which balances the likelihood and seriousness of the harm against the burden to produce a safer product and the effect of such a design on the usefulness of the product. Factors examined under such a balancing test are similar to those suggested by the Washington court in analyzing the consumer expectation test, *Seattle-First National Bank v. Tabert*, 86 Wn. 2d 145 (1975), and therefore can be harmonized with the consumer expectation test. Thus, both tests are adopted here as relevant considerations which the trier of fact should consider.

Similarly, in cases involving warnings or instructions, the trier of fact is directed to engage in a comparison between the likelihood and seriousness of harm and whether or not adequate warnings or instructions could have been provided. This determination should be made in conjunction with an analysis of the expectations of the ordinary consumer.

A separate paragraph is devoted to the unique situation where a claimant alleges that harm resulted from the manufacturer's failure to provide adequate warnings or instructions after the product was manufactured. In order to demonstrate that the manufacturer was negligent, a claimant is required to show that the manufacturer learned or should have learned about a product's dangerous condition after it was manufactured and that the manufacturer failed to act in a manner which a reasonably prudent manufacturer would have acted. The reasonable expectations of the ordinary consumer should also be considered by the trier of fact in this situation.

A manufacturer will be held strictly liable where a claimant establishes that the harm proximately resulted from a construction or warranty defect. Again, the act sets out factors which the trier of fact must consider in making such a determination. If the factual requirements contained in subparagraphs (a), (b) or (c) are met, when examined in light of subsection (3), liability attaches, regardless of the care exercised by the manufacturer.

An argument may be made that in a particular factual setting an allegation of a design defect is essentially the same as a breach of implied warranty of merchantability under RCW 62A.2-314, and therefore should be evaluated under a strict liability standard. It is the intent of the Select Committee, however, that while the elements of merchantability may be part of a prima facie showing that a design defect exists, liability for harm resulting from such a defect should be controlled by the negligence standards of subsection (1) of this section.

Section 5. Liability of Product Sellers Other Than Manufacturers

One of the complaints most frequently expressed before the Legislature during the whole course of the product liability discussion over the past few years has been the alleged inequity of holding the non-manufacturing product seller liable for product defects over which it had no control by application of the concept of joint and several liability throughout the chain of distribution. This section addresses that concern and relieves a non-manufacturing product seller of such liability except in certain limited situations.

If the non-manufacturing product seller was negligent, it will bear the burden of liability under the standards governing negligence. Further, if such a product seller expressly warranted that a product is safe, it will be subject to liability under Section 4 (2) of the act; however, no independent liability arises for a breach of an implied warranty, which is more appropriately reserved for the manufacturer.

The traditional rules of joint and several liability will be applied, however, in certain situations outlined in subsection (2). As to subparagraphs (a) and (b), it is the intent of the Select Committee that liability will be imputed to the non-manufacturing product seller only if the claimant is unable to reach each manufacturer which otherwise might be liable in the particular circumstances addressed in the relevant subparagraph.

Section 6. Evidentiary Rules

A particularly confusing and unsettled area of the law in Washington and other jurisdictions is the admissibility of certain types of evidence by plaintiff and defendant in meeting their respective burdens of proof. The drafters of the UPLA attempted to resolve this problem through the creation of a set of complex factual determinations and presumptions. The Select Committee has determined, instead, to rely upon the inherent ability of the trier of fact to reach a just decision based upon the greatest amount of evidence available. Therefore, a simple rule is established in this section that the trier of fact may consider evidence of industry custom, technological feasibility, and nongovernmental, legislative or administrative standards.

Section 7. Length of Time Product Sellers are Subject to Liability

This section places limitations on the right to bring a product liability action tied both to the length or time between the date of delivery to the first consumer and the date of injury (statute of repose) and the length of time between the date of injury and the commencement of the action (statute of limitations). It is patterned closely after Section 110 of the Uniform Product Liability Act.

Statutes of limitation are familiar features of our legal system. Statutes of repose, on the other hand, are new concepts developed specifically to deal with problems felt to be peculiar to the product liability area.

Statute of Repose

Product sellers have often expressed concern over the possibility of the imposition of liability based upon an injury caused by an old product. They feel it is difficult to establish the nonexistence of a construction or design defect in a product which may have been manufactured some time in the past. This open-ended situation also affects insurance rates since most product liability insurance is written on a claims-made basis which means that the liability insurer at the time a claim is made is liable regardless of the date of manufacture of the product. Product liability premiums, therefore, must take into account the possibility of claims on products manufactured many years ago.

The limited data available shows that the concern about older products may be exaggerated. The ISO Closed Claim Survey found that over 97 percent of product-related incidents occurred within six years of the time the product was purchased. In the capital goods area, 83.5 percent of all bodily accidents occurred within ten years of the date of manufacture. Nevertheless, there has been considerable interest in placing limitations on the liability of product sellers as to older products.

Of the twenty-six states which have enacted product liability legislation, eight-
een have included a statute of repose to limit a claimant's ability to bring an action on older products. The length of time of the statute of repose varies from five to ten years. In some cases, the running of the period is a complete bar to any action while in others it is a rebuttable presumption of nondefectiveness.

The advantage of the statute which sets an absolute cutoff date is fairly obvious. It establishes a date certain after which a claim on a product may not be brought. The problem is that the length of the statute of repose may not bear any relation to the useful life of the product. The reasonable expected life of the product will necessarily vary considerably.

To accommodate this variety of useful expected life, the Committee's statute of repose is tied to a useful safe life concept. The useful safe life begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. The act does contain a twelve-year presumption on useful safe life. This means that the product is presumed to be beyond its useful safe life twelve years from the date of delivery. That presumption, however, may be rebutted by the claimant with the burden of proof being a preponderance of the evidence.

The Committee selected a burden of proof to a preponderance of the evidence rather than the UPLA's higher clear, cogent and convincing evidence to equalize the burden as to product sellers and claimants in this section. It will be noted that the burden of proof on a product seller to prove a useful safe life of twelve years or less is also a preponderance of the evidence. Had the UPLA's approach been followed they would have been unequal. The use of a rebuttable twelve-year presumption of usefulness should create a degree of certainty in the law without depriving the claimant of the ability to demonstrate that, in fact, the product was still in a useful condition at the time of the injury.

A significant concept in the useful safe life area is the term "time of delivery." As to new products, it refers to the time of delivery of a product to its first purchaser or lessee who is not engaged in the business of either selling such products or using them as component parts of another product to be sold—in other words, to the first consumer. The act also addresses the remanufactured product. In those cases where a manufacturer will modify or update a product to such an extent that it can be considered a remanufactured product, the time of delivery runs from the delivery of that remanufactured product to the first consumer.

The draft act provides for situations where a product seller may be liable for harm caused beyond a product's useful safe life. The first is if the product seller warranted that the product could be used safely for a longer period of time, in which case the warranted period would establish the statute of repose time period. The second situation is if the seller intentionally misrepresented facts about the product or concealed information and that conduct was a proximate cause of the claimant's harm. There is no good reason to protect a product seller in this situation since his actions have denied the consumer important information which may put him on guard against potential problems presented by older products. The third situation is where the harm was caused by prolonged exposure to defective products. The clear est case covered by this exception would be harms caused by prolonged exposure to radiation, chemicals or drugs. This exception is, however, broad enough to cover other situations where harm is caused by prolonged exposure to products with hidden defects.

Statute of Limitation

Product liability actions must be brought within three years of the date of discovery of the harm and its cause. This discovery rule is intended to modify the discovery rule pronounced in *Ohler v. Tacoma General Hospital*, 92 Wn. 2d 50 (1979), which stated that the date of discovery meant the discovery of all of the

essential elements of the cause of action, including duty, breach, causation, and damages. The concern about the *Ohler* formulation is that in practical terms it could mean that the statute of limitations would not begin running until the claimant consulted with an attorney since concepts of duty, breach and causation are uniquely legal concepts which a layperson would not ordinarily be expected to appreciate.

A special provision is made so that the time periods of the section do not include the period under which a claimant is under a legal disability as defined by RCW 4.16.190. This would protect minors during the period of minority and persons under a guardianship, as well as others covered by that statute.

Section 8. Effective Contributory Fault

This is the first of several sections dealing with tort law in general. The mandate of the Committee as set out in the study resolutions in 1979 and 1980 clearly directed the Committee to consider the need for changes in tort law in general and changes in product liability law, which is a subdivision of tort law. While the impetus for the formation of the Committee in 1979 was the controversy over the product liability bill considered that session, it is often forgotten that that bill was not limited to product liability law and, in fact, proposed rather substantial changes in tort law in general. This is not to say that the connection between the two subjects is altogether arbitrary. The remaining sections of this bill deal with the subject of comparative fault and contribution among tortfeasors, subjects which are frequently involved in product liability actions.

This section would replace the current comparative negligence statute, RCW 4.22.010, which was enacted in 1973. Prior to the 1973 act, a plaintiff whose own negligence contributed to the injury was completely barred from recovering any damages against a negligent defendant. In other words a plaintiff who was not at fault could recover all his damages while a plaintiff who was, for example 10 percent at fault could recover nothing. That act was intended to correct this all-or-nothing feature of the law.

The 1973 act, however, did not address those situations where degrees of fault other than negligence were involved, degrees of fault such as gross negligence, recklessness, willful and wanton misconduct and strict liability. For example, would the comparative principles be applied if the plaintiff was contributorily negligent but the defendant was reckless?

The courts have answered only a few of these questions. Under two pre-1973 act cases, which may still be good law, plaintiff's contributory negligence would not bar or diminish recovery where defendant was guilty of willful and wanton misconduct, *Adkisson v. Seattle*, 42 Wn. 2d 676 (1953), but plaintiff's contributory willful and wanton misconduct could bar recovery even if the defendant was guilty of the same type of misconduct. *Sorensen v. Estate of McDonald*, 78 Wn. 2d 103 (1970). More recently in *Seay v. Chrysler Corp.*, 93 Wn. 2d 319 (1980), the court held that plaintiff's contributory negligence is not a damage reducing factor in a strict liability lawsuit.

This bill essentially extends the comparative principles of the current comparative negligence statute to all tort actions involving contributory fault. The comparative principles will be applied whether or not the contributory fault was a bar or a damage reducing factor under the prior law.

Doctrines such as the last clear chance doctrines which were sometimes used to come the complete bar of contributory fault are eliminated since contributory fault is no longer a bar. In these cases, the comparative principles would be applied regardless of who might have had to absorb all of the loss under prior law.

Section 9. Definition of Fault

This section defines the key term "fault" which is used in the preceding section on contributory fault, the contribution sections and elsewhere in the act. It is based on the Uniform Comparative Fault Act definition with some modifications.

The definition is intended to encompass all degrees of fault in tort actions short of intentionally caused harm. This would include negligence, gross negligence, recklessness, willful and wanton misconduct and strict liability. Additionally it includes misuse of a product, breach of warranty, unreasonable assumption of risk and unreasonable failure to avoid an injury or to mitigate damages. The idea is to permit the trier of fact to consider all the conduct short of what would be considered an intentional tort and make a reduction of the plaintiff's recovery for his or her share. In making its determination the trier of fact may take into consideration both the nature of conduct and the causal relationship between that conduct and the harm. This will mean, for example, that plaintiff's contributory negligence may not reduce recovery as much in a strict liability action as it would in a negligence action.

Section 10. Nonimputation of Fault Between Spouses

This section of the draft act amends the second section of the 1973 Comparative Negligence Act which was designed to abrogate the common law rule imputing the negligence of one spouse to the other so as to bar the latter's action for damages against a third party. The purpose of this amendment is to conform this section to the expansion of the comparative negligence law to cover comparative fault situations.

The amendment also clears up an ambiguity in the original act as to whether the negligence could not be imputed to "bar" or "diminish" a recovery in an action by the other spouse. The original act read that negligence could not be imputed to bar recovery which would seem to be a superfluous provision since contributory negligence would no longer be a bar to recovery under the preceding section. The presumed intent of this provision, then, was that negligence could not be imputed to diminish recovery and this amendment so provides.

The amendment also makes the section apply to actions for damages to property.

Finally, the amendment does permit imputation of fault in a wrongful death action. This is appropriate since wrongful death actions are in a sense derivative actions and the contributory fault of the decedent spouse should be taken into account in determining the amount of the surviving spouse's recovery.

Section 11. Nature of Liability

This section codifies the current rule on joint and several liability. The rule on joint and several liability has long been recognized and followed in this state. *Seattle-First National Bank v. Shoreline Concrete*, 91 Wn. 2d 230 (1978). A primary purpose of the tort law is to ensure full recovery for an injured party from parties at fault. The rule of joint and several liability is a key provision in protecting that purpose. The claimant's own fault will affect the total recovery by the operation of the contributory fault reduction principle in Section 8. The claimant's right to recover from any of the jointly and severally liable defendants, however, should be facilitated. Apportionment of liability among defendants will be accomplished through the contribution sections which follow.

Section 12. Right of Contribution

This section creates a right of contribution between or among two or more persons who are jointly and severally liable to a claimant. Washington is one of the minority of states which has not abrogated the common law rule denying a right of contribution among multiple tortfeasors. The State Supreme Court has refused to abandon the rule against contribution on the grounds that the recent cases in which the alternative was presented to the court did not comprehensively address all of the various issues that need to be addressed in establishing a right of contribution. *Wenatchee Wenoka Growers Assn. v. Krack*, 89 Wn. 2d 847 (1978). This section and the following section provide the rules necessary to guide the court in setting up a procedure.

entered into. Furthermore, it requires parties desiring to enter into such releases to give five days notice to all other parties of the terms of the release. A special provision allowing the court to shorten that notice period for good cause is included to accommodate eve of trial settlements. The potential release party must also secure court approval that the amount paid for the release was reasonable.

The release granted to one party does not discharge any other parties liable upon the same claim unless the release so provides. Under current Washington law, the release of a concurrent tortfeasor does not release other concurrent tortfeasors unless 1) the claimant intended to release all tortfeasors, or 2) the release constituted a satisfaction of the entire obligation. *Callan v. O'Neill*, 20 Wn. App. 32 (1978). The release of one joint tortfeasor, however, releases all tortfeasors regardless of an expressed reservation in the release that it shall not apply to other tortfeasors. *White Pass Co. v. Saint John*, 71 Wn. 2d 156 (1967).

Section 15. Applicability

In order to avoid the question of retroactive versus prospective application of the act, this section clearly states that the act applies to all claims accruing on or after the effective date of the act. An exception to this rule is a partial retroactive application in the case of actions for contribution involving actions which have not gone to trial as of the effective date of the act. In these cases, a right of contribution would still exist except as to a party which has obtained a release prior to the effective date of the act.

Section 16. Legislative Directive

The act will be codified in two different parts of the Revised Code of Washington. Sections 2 through 7 which deal only with the product liability area will be codified in Title 7 which concerns special proceedings and actions. Sections 8 and 9 and 11 through 14 will be codified in Chapter 4.22 RCW which is the current comparative negligence chapter.

MOTION

On motion of Senator Clarke, the Senate resumed consideration of Senate Bill No. 3000.

SECOND READING

SENATE BILL NO. 3000, by Senators von Reichbauer, Clarke, Bottiger, Hayner, Sellar, Goltz, Talmadge and Jones (by request of Senate Select Committee on Confirmation of Appointments):

Modifying provision relating to confirmation of gubernatorial appointees. The Senate resumed consideration of Senate Bill No. 3000. Earlier today the committee amendment was not adopted. Senator Gould had moved adoption of an amendment.

There being no objection, on motion of Senator Gould, the amendment was withdrawn.

Senator Gould moved adoption of the following amendment:

On page 17, following line 26, add a new section as follows:
 "NEW SECTION Sec. 22. There is added to chapter 43 RCW a new section to read as follows:

The appointments by the governor to the Pacific Northwest Electrical Power and Conservation Planning Council created pursuant to chapter 43 RCW (sections 1 through 5, chapter (ESSB 3041), Laws of 1981), shall be subject to the advice and consent of the senate."

Renumber remaining sections consecutively.

The Committee believes that with the creation of the right to contribution a party defendant will be able to join another party who may be liable for contribution in the original action under current Civil Rule 14, relating to third party practice. This means that a defendant will not be bound by the plaintiff's choice of defendants. It is in the interests of judicial economy to have all of the liability issues determined in one action. The judge will naturally continue to have authority to require separate trials as to issues or parties where justice requires.

This section also essentially eliminates the doctrine of implied indemnity between active and passive tortfeasors. Under current law where the active/passive analysis can be applied, the entire liability can be shifted from the passive tortfeasor to the active tortfeasor. *Rufener v. Scott*, 46 Wn. 2d 240 (1955); *Nelson v. Sponberg*, 51 Wn. 2d 37 (1957). The implied indemnity doctrine thus is another form of the "all-or-nothing" rule which is being departed from in this bill which favors comparative fault principles.

A party who settles with the claimant is entitled to seek contribution from other liable parties if in settling with the claimant the liability of party against whom contribution is sought has been extinguished and to the extent that the amount paid in settlement was reasonable at the time of settlement.

Section 13. Enforcement of Contribution

This section sets out the procedure for enforcing the right of contribution against another liable party. It addresses both the situation where the comparative fault of the two parties involved has previously been established by the court and where the comparative fault of the two parties has not been previously established. In those cases where it has been established, the parties seeking contribution must commence the contribution action within one year after the judgment which established the comparative fault has been rendered. In those cases where the comparative fault has not already been established, the party may enforce the right of contribution whether or not a judgment has been rendered against the parties seeking contribution or the party against whom contribution is sought. This means that neither party need have a defendant in the lawsuit brought by the claimant. All that is required to start an action for contribution is that the party must allege that he has paid more than his proportionate share of the fault. The party seeking contribution must have either discharged the common liability within the statute of limitations and commenced an action for contribution within one year of that payment, or have agreed while the action was pending to discharge that liability and within one year both paid the claimant and commenced this action for contribution.

Section 14. Effect of Release

This section differs from the Uniform Comparative Fault Act in that the final judgment of the claimant is reduced by the amount paid for a release (unless the amount paid was unreasonable at the time the release was granted) instead of the comparative fault of the released party as determined in the lawsuit. This approach was decided upon in order not to discourage parties from settling with claimants. It was a concern of the Committee that if a released party could not be guaranteed that he would not be subject to additional liability at some point in the future depending upon some comparative fault apportionment, it would discourage parties from entering into such releases.

The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Legislature. The reasonableness of the release will depend on various factors including the provable liability of the released parties and the liability limits of the released party's insurance.

There is a legitimate concern that claimants will enter into "sweetheart" releases with certain favored parties. To address this problem, the section requires that the amount paid for the release must be reasonable at the time the release was