Asbestosis Amendment to the Occupational Diseases Act: Palliative or Cure

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I. Introduction

Sixty years have passed since a British doctor discovered the first case of asbestosis[1] in a person who had spent twenty years weaving asbestos textile products.[2] By the mid-1930's, the danger of asbestos as a pneumoconiotic dust[3] was universally accepted.[4] Since World War II, an estimated eight to eleven million American workers have been exposed to asbestos.[5] Consequently, asbestos exposure is likely to result in approximately 1.6 million asbestos-related deaths.[6] In 1982, an estimated sixteen thousand lawsuits involving personal injury as a result of asbestos exposure were pending.[7] During the same year, new asbestos cases were being filed at the rate of four hundred fifty per month.[8]

The United States is currently in the midst of absorbing the emotional and economic devastation caused by asbestos exposure. The insidious[9] nature of asbestos-related diseases, however, has posed a certain problem for many potential claimants in their suits for compensation. Many asbestosis claimants have found that their suits were barred by the applicable state tort statute of limitations. Because asbestosis is a latent disease which usually does not become manifest for twenty to thirty years,[10] claimants are forced to file their lawsuits many years after the statute of limitations period has run. Some courts have ruled that these claims were time barred, even though the plaintiffs were not aware that they had contracted asbestosis until the limitations period had run.[11] Most state

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*Executive Notes and Topics Editor, *Indiana Law Review*.

[1]*See* Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 Brit. Med. J. 147 (1924).

[2]*Id.*

[3]Pneumonconiosis is a chronic disease of the lungs marked by an overgrowth of connective tissue, which is caused by the inhalation of large quantities of dust. 3 Schmidts' Attorneys' Dictionary of Medicine, P-201 (1984).

[4]*See* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1083 (5th Cir. 1973).

[5]Vagley & Blanton, *Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation*, 16 Forum 636, 647 (1981).

[6]*See* 127 Cong. Rec. S10033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

[7]*See* Wall St. J., June 14, 1982, at 1, col. 6.

[8]*Id.*

[9]An "insidious disease" is defined as a disease that "progresses with few or no symptoms to indicate its gravity." Stedman's Medical Dictionary Illustrated 711 (23d ed. 1976).

[10]*See infra* notes 17-29 and accompanying text.

[11]*See, e.g.*, Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979); Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936).

courts or legislatures have corrected this problem and have allowed asbestosis claims after the claimants have first discovered the disease,[12] but a minority of states continue to adhere to an interpretation of their statutes of limitations that bars many asbestosis suits.[13]

Until quite recently, it appeared that Indiana would join the few states which apply traditional tort statute of limitations analysis in asbestosis cases.[13] To correct this injustice, the Indiana legislature recently amended the Occupational Diseases Act[14] to allow workmen's compensation claims by asbestosis victims for up to twenty years after their latest exposure to asbestos dust.[15] Before the passage of this amendment and the recent Indiana Supreme Court opinion in *Barnes v. A.H. Robins Co.*,[16] it appeared that Indiana asbestosis victims would be left without a remedy in the Indiana courts. The purpose of this Article will be to examine the workmen's compensation asbestosis amendment and its potential effect on Indiana law. To help explain why this amendment was necessary to provide a remedy for Indiana asbestosis victims, this Article will analyze the insidious nature of asbestosis and how prior Indiana law could have effectively barred asbestosis claimants from any chance for compensation. Finally, this Article will explore the potential ramifications of the recent asbestosis amendment.

II. The Cause and Nature of Asbestosis

Asbestosis[17] is a disease which is characterized by hardened fibers in the lungs because of the irritation caused by the inhalation of asbestos

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[12]*See* Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978). For a list of cases, *see infra* note 55.

[13]*See, e.g.*, Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936).

[14]Ind. Code § 22-3-7-1, as enacted by Pub. L. 141. This amendment was approved on April 14, 1985.

[15]Ind. Code § 22-3-7-9(f)(4), as enacted, now provides:

> In all cases of occupational disease caused by the inhalation of asbestos dust in which the last date of the last exposure occurs on or after July 1, 1985, no compensation shall be payable unless disablement, as defined in subsection (e), occurs within twenty (20) years after the last day of the last exposure.

[16]476 N.E.2d 84 (Ind. 1985). The Indiana Supreme Court, on a certified question from the Seventh Circuit Court of Appeals in a case involving personal injuries from the use of a Dalkon Shield, ruled that a discovery rule interpretation would henceforth be used under the Product Liability Act statute of limitations in latent disease cases.

[17]Asbestosis is one of several asbestos-related diseases. Mesothelioma is a rare cancer which takes thirty to thirty-five years to manifest itself, but is ultimately fatal within two years of manifestation. 4A Gray's Attorneys' Textbook of Medicine ¶ 205C.72 (3d ed. 1980). Bronchogenic carcinoma usually does not become a problem for at least fifteen years after initial exposure. The prognosis for this disease is no different than for other lung cancers. *Id.* ¶ 205C.71. For purposes of this Article, only asbestosis will be considered.

dust.[18] Asbestosis is the result of an irreversible process which causes fiber scarring of the lungs and develops over a long period of time from the inhalation of even a single asbestos fiber.[19] This process usually does not cause noticeable symptoms until it has progressed at least ten years.[20] Generally, however, the disease does not manifest itself until ten to twenty-five or more years after initial exposure.[21] Because asbestosis is the result of many years of latent lung tissue changes, it is medically impossible to pinpoint the date on which the disease actually developed.[22]

The first noticeable sign of asbestosis is often a shortness of breath on exertion by a victim.[23] The disease may progress to cause shortness of breath during normal activity, and ultimately, to shortness of breath when a victim is at rest.[24] A severe case of asbestosis may produce difficulty in breathing in a sitting position.[25] Asbestosis can also cause a chronic cough and increased sputum production.[26] Other symptoms can include decreased expansion of the chest, rapid breathing rate, blueness of nailbeds, lips, and skin, and swelling of the fingers and/or toes caused by problems with oxygen saturation in the blood.[27] Asbestosis can result in death from suffocation or a minor respiratory infection caused by a large amount of already damaged lung tissue.[28] Asbestosis can also cause difficulty in eating and/or loss of appetite which results in wasting associated with anorexia.[29]

III. Effect of a Statute of Limitations on an Asbestosis Claim

In addition to causing physical harm, the insidious nature of asbestosis is problematic for asbestosis victims in a fundamental, legal way. When a typical asbestosis victim first discovers any symptoms of the disease many years after the initial asbestos exposure, the victim may find that the cause of action against an asbestos manufacturer or employer is barred by the applicable statute of limitations. Under traditional tort statutes of limitations, a plaintiff must file suit within a

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[18] *See* Stedman's Medical Dictionary 116, 990 (3d unabr. law. ed. 1972).

[19] Gray's Attorneys' Textbook of Medicine ¶ 205C.21.

[20] *Id.* ¶ 205C.30.

[21] *See* Borel v. Fibreboard Paper Products Corp., 493 F.2d at 1083 (detailed discussion of the effects and history of asbestosis). *See also* Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 Am. J. Med. 487 (1967); Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers in the United States*, 132 Annals N.Y. Acad. Sci. 139 (1965).

[22] Gray's Attorneys' Textbook of Medicine ¶ 205C.72.

[23] *Id.* ¶ 205C.30.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

certain number of years from when the cause of action "accrues."[30] This type of statute is known as an "occurrence" statute, because the limitations period commences at the time of the wrongful act, not when the plaintiff "discovers" the injury from the wrongful act.[31]

The general rule in traditional tort cases is that the defendant's act or omission alone, although constituting a breach of duty to the plaintiff, does not give rise to a cause of action and does not trigger the statute of limitations.[32] Because harm to the plaintiff is essential to most tort actions, the courts have generally ruled that a cause of action does not "accrue" until the wrongful conduct causes an injury.[33] Courts have defined this injury as the initial harmful contact,[34] not the fully matured harm.[35] Consequently, courts have been reluctant to extend the accrual time of a claim because the plaintiff was unaware of the injury.[36] In

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[30]*See, e.g.*, IND. CODE § 33-1-1.5-5, as enacted by Pub. L. 141, § 28 of Acts 1978. This statute provides:

> This section applies to all persons regardless of minority or legal disability. Notwithstanding I.C. 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

[31]For purposes of this Article, a "discovery type" statute is one in which a cause of action accrues when a plaintiff discovers, or in the exercise of reasonable diligence, could have discovered, the disease. An "occurrence type" statute is one in which the cause of action accrues at the time of the wrongful act.

[32]*See* Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936).

[33]*See, e.g.*, Kitchener v. Williams, 171 Kan. 540, 236 P.2d 64 (1951); White v. Schnoebelen, 91 N.H. 273, 18 A.2d 185 (1941).

[34]*See* Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287, 200 N.E. 824 (1936). This was one of the earliest decisions in which injury was defined as "a wrongful invasion of personal or property rights." *Id.* at 300, 200 N.E. at 827. The court dismissed an action against an employer for damages from a lung disease allegedly caused by dirty working conditions because the court held that "[t]he injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust." *Id.* at 301, 200 N.E. at 827. Thus, the action was untimely even though the plaintiff was unaware of the injury until shortly before he brought the action. *See also* Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979) (radiation exposure); Field v. Gazette Publishing Co., 187 Ark. 253, 59 S.W.2d 19 (1933) (lead poisoning); Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597 (1935) (tuberculosis); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962) (foreign object left in patient's body); Brown v. Tennessee Consol. Coal Co., 19 Tenn. App. 123, 83 S.W.2d 568 (1935) (silicosis); Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973) (foreign object left in patient's body).

[35]The initial harmful contact in an asbestos claim is the inhalation of asbestos fibers, whereas the fully matured harm is the resultant disease of asbestosis.

[36]*See, e.g.*, Garrett v. Raytheon Co., 368 So. 2d 516 (Ala. 1979); Tantish v. Szendey, 158 Me. 228, 182 A.2d 660 (1962); Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973).

other words, a cause of action accrues within the meaning of a statute of limitations when an injury is inflicted by a wrongful act, not when the victim first discovers the injury. The statute of limitations begins to run at the time of the wrongful act which produces injury, not when the injury is discovered, even though the victim may be unaware of the injury.

This traditional rule poses a significant problem for potential asbestosis claimants because the long latency period of asbestosis is inherently unascertainable.[37] Despite the harshness of the interpretation that a cause of action accrues upon the date of the wrongful act, some courts have applied this rule to latent disease cases.[38]

Recognizing the injustice that could occur in requiring plaintiffs to file suit before knowledge of any injury, courts began to develop alternative theories to determine when a cause of action "accrues." One prevalent theory is what is termed the discovery rule. The United States Supreme Court originally approved a discovery rule in a latent disease case in *Urie v. Thompson*.[39] In *Urie*, a railroad fireman contracted silicosis because of his occupational exposure to silica dust from 1910 to 1940.[40] Urie filed suit in 1941 under the Federal Employers' Liability Act[41] against the trustee of the Missouri Pacific Railroad.[42] The railroad argued that the three-year limitations period within the Act commenced in 1910 when Urie was first exposed to silica dust.[43] The Court rejected this argument and held that Urie's cause of action accrued when the effects of the silica dust became manifest in 1940.[44] The Court reasoned that charging a person with knowledge of a latent disease before its manifestation would force him to waive his rights to recovery if he later discovered a disability.[45] Further, the Court was convinced that the Act

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[37]*See* Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978). The long latency period which usually precedes the manifestation of asbestosis is unknowable because there are no discoverable symptoms until the lung tissue changes finally mature into the disease. *Id.*

[38]*See supra* note 34.

[39]337 U.S. 163 (1949).

[40]*Id.* at 165.

[41]45 U.S.C. § 51 (1976). Section 1 of the Federal Employer's Liability Act provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering . . . injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

[42]337 U.S. at 165.

[43]*Id.* at 169.

[44]*Id.* at 170.

[45]*Id.* at 169.

was intended to afford plaintiffs more than a "delusive remedy,"[46] and refused to deny relief because of the plaintiff's "blameless ignorance."[47] The Court also held that Urie could recover damages for the entire period of exposure.[48] With this opinion, the Court revolutionized the traditional interpretation of statutes of limitations by using a discovery rule to afford relief to plaintiffs who suffered injuries years after their initial exposure to harmful substances.

Urie laid the foundation for the rule that, in latent injury claims, a plaintiff's notice of his injury is essential to the accrual of his cause of action. Since *Urie*, courts adopting a discovery rule interpretation have differed as to what constitutes sufficient notice. One approach, suggested by *Urie*, is that a cause of action accrues when the plaintiff discovers the injury. This approach was first used in an asbestos case in *Borel v. Fibreboard Paper Products Corp.*[49] in 1973.

In that case, the plaintiff, Borel, contracted asbestosis and a form of lung cancer as a result of his thirty-year exposure to asbestos as an asbestos insulation worker. He sued several manufacturers in 1969, but his widow was substituted as plaintiff when he died before trial.[50] Relying on *Urie*, the Fifth Circuit Court of Appeals ruled that his action was timely because his cause of action did not accrue until he discovered his injuries in 1969.[51] The court traced the history and insidious nature of asbestosis[52] and cited several cases involving injuries from exposure to other harmful substances.[53]

Today, a majority of courts apply a discovery rule of some sort in latent disease cases. Several state legislatures have statutorily adopted this rule,[54] while in many states the rule has been judicially adopted.[55]

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[46] *Id.*

[47] *Id.* at 170.

[48] *Id.* at 169-70.

[49] 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

[50] *Id.* at 1086.

[51] *Id.* at 1102.

[52] *Id.* at 1083-86.

[53] United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Associated Indemnity Corp. v. Industrial Accident Comm'n, 124 Cal. App. 378, 12 P.2d 1075 (1932); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

[54] *See* ALA. CODE § 6-2-30 (Supp. 1984); CAL. CIV. PROC. CODE ANN § 340.2 (West 1982); FLA. STAT. ANN. § 95.031(2) (1982); OHIO REV. CODE ANN. § 2305.10 (Page 1981); TENN. CODE ANN. § 29-28-103(b) (1979).

[55] To date, at least thirty-four jurisdictions have applied a discovery rule in a latent disease type cause of action. *See* Cazalas v. Johns-Manville Sales Corp., 435 So. 2d 55 (Ala. 1983); Mack v. A.H. Robins Co., 573 F. Supp. 149 (D. Ariz. 1983) (applying Arizona law); Velasquez v. Fibreboard Paper Products Corp., 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979); Ricciuti v. Voltarc Tubes, Inc. 277 F.2d 809 (2d Cir. 1960) (applying Connecticut law); Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (D.C. Cir. 1982) (applying District of Columbia law); Copeland v. Armstrong Cork Co., 447 So. 2d 922 (Fla. Dist. Ct. App. 1984); Anderson v. Sybron Corp., 299 S.E.2d 922 (Ga. App. 1983); Nolan v. Johns-Manville Asbestos, 85 Ill. 2d 161, 421 N.E.2d 864 (1981); Franzen v.

The result has been a clear trend in the United States toward the application of a discovery rule in a latent disease claim.

IV. Indiana Law Prior to the Workmen's Compensation Asbestosis Amendment

A. Pre-Amendment Occupational Diseases Act — Statute of Limitations

Before the passage of the asbestosis amendment to the Occupational Diseases Act, it appeared to the Indiana legislature that Indiana asbestosis victims would be left without a remedy for their injuries under the Occupational Diseases Act and the Product Liability Act statutes of limitations. Before the amendment to the Occupational Diseases Act, asbestosis victims were required by the statute to file their claims for compensation within three years after their latest exposure to the asbestos dust.[56] This limitations period was the traditional tort-type "occurrence"

Deere & Co., 334 N.W.2d 730 (Iowa 1983); Miller v. Beech Aircraft, 204 Kan. 184, 460 P.2d 535 (1969); Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979); Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978); Bonney v. Upjohn Corp., 129 Mich. App. 18, 342 N.W.2d 551 (1983); Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) (applying Michigan law); Much v. Sturm, Ruger & Co., 502 F. Supp. 743 (D. Mont. 1980); Condon v. A.H. Robins Co., 349 N.W.2d 622 (Neb. 1984); Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075 (Nev. 1983); Cinnaminson Township Bd. v. United States Gypsum, 552 F. Supp. 885 (D.N.J. 1982); Levin v. Isoserve Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (1972); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); Gillespie v. American Motors Corp., 277 S.E.2d 100 (N.C. 1981); N.D. Cent. Code § 28-01.1-02 (Supp. 1985); Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151 (6th Cir. 1981) (applying Ohio law); Lundy v. Union Carbide Corp., 695 F.2d 394 (9th Cir. 1982) (applying Oregon law); Neal v. Carey Canadian Mines Ltd., 548 F. Supp. 357 (E.D. Pa. 1982); Murphee v. Raybestos-Manhattan, Inc., 696 F.2d 459 (6th Cir. 1982) (applying Tennessee law); Fusco v. Johns-Manville Products Corp., 643 F.2d 1181 (5th Cir. 1981) (applying Texas law); Locke v. Johns-Manville Corp., 275 S.E.2d 900 (Va. 1981); Sahlie v. Johns-Manville Sales Corp., 99 Wash. 2d 550, 663 P.2d 473 (1983); Pauley v. Combustion Engineering Inc., 528 F. Supp. 759 (D. W. Va. 1981); Hansen v. A.H. Robins Inc., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

[56] *See* former Ind. Code § 22-3-7-9(e), *amended by* Pub. L. No. 224-1985, § 1, which provided:

> (e) No compensation shall be payable for or on account of any occupational diseases unless disablement, as herein defined, occurs within two [2] years after the last day of the last exposure to the hazards of the disease except in cases of occupation diseases caused by the inhalation of silica dust or asbestos dust and in such cases, within three [3] years after the last day of the last exposure to the hazards of such disease: Provided, That in all cases of occupational disease caused by the exposure to radiation, no compensation shall be payable unless disablement, as herein defined, occurs within two [2] years from the date in which the employee had knowledge of the nature of his occupational disease or, by exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

limitations period, which would essentially deny asbestosis victims the very right to recovery that the statute was intended to provide.[57] This conclusion became painfully clear when the Indiana Supreme Court decided *Bunker v. National Gypsum Co.*[58]

In *Bunker*, the plaintiff was exposed to asbestos fibers when he worked for National Gypsum Company from February, 1949, until November, 1950.[59] He was not exposed to asbestos fibers after November, 1950.[60] He underwent exploratory surgery in July, 1976, and was diagnosed as suffering from asbestosis.[61] On June 17, 1978, he applied to the Industrial Board of Indiana for disability benefits under the Occupational Diseases Act.[62] Mr. Bunker claimed that his permanent disability was the result of his work-related exposure to asbestos dust at National Gypsum Co.[63] The Industrial Board ruled that his claim was not compensable because his disability did not arise within three years of the date of his last job-related exposure to asbestos dust.[64] The Indiana Court of Appeals reversed the Industrial Board, finding the statute of limitations unconstitutional.[65]

The Indiana Supreme Court vacated the opinion of the court of appeals and reinstated the ruling of the Industrial Board.[66] The plaintiff argued that it was an unconstitutional denial of due process to rule that the time for claiming the remedy had expired before it could have accrued.[67] The supreme court, nevertheless, affirmed the constitutionality of the statute of limitations.[68] The court ruled that a statute of limitations satisfies due process requirements as long as it provides a reasonable time for the maintenance of an action.[69] The court maintained that it would not infringe on the legislature's sole responsibility to "determine what constitutes a reasonable time for the bringing of an action unless the period allowed is so manifestly insufficient that it represents a denial of justice."[70] To do so, according to the court, would usurp the legislature's constitutionally mandated function.[71] The result of this decision

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[57]*See supra* notes 30-31 and accompanying text.

[58]441 N.E.2d 8 (Ind. 1982).

[59]*Id.* at 9.

[60]*Id.* at 10.

[61]*Id.*

[62]*Id.* at 9.

[63]*Id.*

[64]*Id.*

[65]426 N.E.2d 422, 425 (Ind. Ct. App. 1981), *vacated*, 441 N.E.2d 8 (Ind. 1982).

[66]441 N.E.2d at 9.

[67]*Id.* at 10.

[68]*Id.* at 9.

[69]*Id.* at 12 (citing Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913); Guthrie v. Wilson, 240 Ind. 188, 194, 162 N.E.2d 79, 81 (1959)).

[70]*Id.* (citing Wilson v. Iseminger, 185 U.S. 55, 63 (1902)).

[71]*Id.* at 13.

was that Mr. Bunker was denied workmen's compensation because he did not bring his claim within three years of his last exposure to asbestos dust, even though he probably did not even have asbestosis during those three years.[72]

After *Bunker v. National Gypsum*, it became painfully clear that asbestosis victims were practically without a remedy under the Occupational Diseases Act because of its statute of limitations. It was possible, however, for asbestosis claimants to file lawsuits for compensation in the Indiana courts against asbestos manufacturers, provided the defendants were not employers of the plaintiffs.[73] At that time, however, it appeared that these lawsuits could also be barred under the Indiana Product Liability Act statute of limitations.

B. Product Liability Statute of Limitations

The Indiana Product Liability statute of limitations[74] had not been interpreted by the Indiana courts in a latent disease case before the Seventh Circuit Court of Appeals decided *Braswell v. Flintkote Mines, Ltd.*[75] In *Braswell*, seven former employees of the World Bestos Division of the Firestone Tire and Rubber Company in New Castle, Indiana, filed claims for damages based on their exposure to asbestos manufactured or supplied by several defendants.[76] These diversity actions were consolidated for decision by the United States District Court for the Southern District of Indiana.[77] The first of these actions was filed on November 30, 1979, while the other six actions were filed between January and July of 1981.[78] None of the plaintiffs filed claims within two years of their last exposure to asbestos dust.[79] The trial court granted summary judgment in favor of the defendants, stating that the plaintiffs' claims were barred by the statute of limitations.[80] The trial court ruled that the claims accrued within the meaning of the statute at the time of the

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[72]*See supra* notes 17-29 and accompanying text.

[73]*See* IND. CODE § 22-3-2-6 (1982).

[74]*See* IND. CODE § 33-1-1.5-5 (1982).

[75]723 F.2d 527 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2690 (1984).

[76]*Id.* at 528.

[77]*Id.* at 529.

[78]*Id.* at 528.

[79]*Id.* Plaintiff Orvil Braswell was employed at the plant from 1950 to 1975. He apparently first noticed symptoms in 1972 and was told by his doctor in 1979 that he had an asbestos-related disease. *Id.* Other plaintiffs and their last exposure to asbestos were: James T. Clapp, 1963; Omer T. Rogers, 1969; William M. Baker, 1974; Helen M. Igo, 1979; and Robert E. Godfrey, 1979. *Id.* Plaintiffs Igo and Godfrey filed within two years of their last exposure to asbestos, but their claims were denied on other grounds. *Id.* at 528 n.1.

[80]*Id.* at 533.

wrongful acts, which the court concluded to be no later than the plaintiffs' most recent exposure to the asbestos fiber.[81]

The Seventh Circuit Court of Appeals affirmed the ruling of the trial court in a two-to-one decision.[82] The majority held that the plaintiffs' causes of action accrued at the time of the wrongful acts, not at the time the injuries were discovered or were susceptible of ascertainment.[83] Thus, the court rejected the application of a discovery rule in this case and granted summary judgment against the plaintiffs.[84]

Because there were no Indiana cases on point, the court in *Braswell* analyzed the relevant Indiana case law to determine how the Indiana Supreme Court would interpret the statute if faced with this factual situation.[85] In arriving at its conclusion that the statute of limitations is an "occurrence" statute,[86] the court placed primary reliance on the Indiana Supreme Court opinion of *Shideler v. Dwyer*.[87]

In *Shideler*, the beneficiary of a provision in a will sued the attorney who had drafted it because the provision was later declared invalid. The will was executed in October, 1973, and the testator died on December 14, 1973.[88] The will was admitted to probate on December 21, 1973.[89] When the beneficiary did not receive the expected payment under the will, she filed suit on November 13, 1974, asking the probate court to construe the will.[90] The provision was declared invalid by the probate court on June 30, 1975, and the beneficiary instituted suit against the attorney on June 29, 1977.[91]

The defendant contended that the two-year statute of limitations[92] barred the suit because the cause of action accrued and the damage occurred when the testator died in 1973.[93] The plaintiff-beneficiary maintained that the statute did not begin to run until the probate court declared the provision invalid, because she had sustained no damage from the defendant's acts or omissions until the court invalidated the

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[81] *Id.* The court also ruled that IND. CODE § 33-1-1.5-5 did not deny the plaintiffs due process or equal protection under the fourteenth amendment. *Id.* at 531. Although the court interpreted IND. CODE § 33-1-1.5-5, the court also applied the same reasoning to IND. CODE § 34-1-2-2, which applied to all but two plaintiffs. *Id.* at 529.

[82] *Id.* at 528. Senior Circuit Judge Swygert filed a dissenting opinion. *Id.* at 533.

[83] *Id.* at 532.

[84] *Id.* at 533.

[85] *Id.* at 532.

[86] *Id.*

[87] 417 N.E.2d 281 (Ind. 1981).

[88] *Id.* at 284.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 288. The statute at issue was IND. CODE § 34-1-2-2, which presently contains the same language.

[93] 417 N.E.2d at 290.

provision.[94] The plaintiff contended that she was unaware of the legal injury which she sustained at the testator's death because the probate court could have upheld the validity of the provision at issue.[95]

The *Shideler* court granted summary judgment against the plaintiff-beneficiary under this statute, and held that the two-year period of limitations had expired because the damage occurred upon the testator's death, not on the date that the probate court declared the will's provision invalid.[96] In rejecting a discovery rule for the accrual of a cause of action, the court held that a plaintiff's ignorance of the damage does not affect the running of the statute of limitations.[97] The court maintained that the plaintiff misunderstood the term "damage" as a requisite element of any tort and "damages" as a measure of compensation.[98] According to the court, "For a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred."[99] Thus, the statute of limitations begins to run from the time when liability for a wrong has arisen, even if the plaintiff is ignorant of the existence of the wrong or injury.

The Indiana Supreme Court in *Shideler* supported its conclusion by citing with approval two New York opinions. In *Schwartz v. Heyden Newport Chemical Corp.*,[100] a medical malpractice action accrued when a radioactive and carcinogenic substance was placed in the plaintiff's sinuses, not when the carcinoma which the substance produced was discovered fifteen years later.[101] In *Schmidt v. Merchants Dispatch Transportation Co.*,[102] the court ruled that an asbestosis claim accrued when the plaintiffs inhaled the dust, not at the time when the dust resulted in the disease more than three years after the inhalation of the dust.[103]

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[94] *Id.* at 288.

[95] *Id.*

[96] *Id.* at 290.

[97] *Id.* at 289.

[98] *Id.*

[99] *Id.*

[100] 12 N.Y.2d 212, 237 N.Y.S.2d 714, 188 N.E.2d 142, *amended on other grounds*, 12 N.Y.S.2d 896, 190 N.E.2d 253, *cert. denied*, 374 U.S. 808 (1963).

[101] 417 N.E.2d at 289.

[102] 270 N.Y. 287, 200 N.E. 824 (1936). *See also supra* note 34.

[103] 270 N.Y. at 301, 200 N.E. at 827. Additionally, the *Shideler* court quoted with approval a passage from *Schmidt*:

> That does not mean that the cause of action accrues only when the injured person knows or should know that the injury has occurred. The injury occurs when there is a wrongful invasion of personal or property rights and then the cause of action accrues. Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.

417 N.E.2d at 290 (quoting 270 N.Y. at 300, 200 N.E. at 827).

After analyzing these cases, the *Braswell* court ruled that the Indiana courts would probably reject the application of a discovery rule in a latent disease case,[104] primarily because the *Shideler* court quoted with approval *Schmidt*, the New York asbestos case.[105] The Seventh Circuit reached this conclusion even though the Indiana courts had never interpreted the statute of limitations in an asbestosis claim before *Braswell*.[106] The court noted, however, that it would have preferred a discovery rule interpretation, but declined to make this ruling because of *Shideler*.[107] In fact, in a footnote, the *Braswell* court maintained that if it were free to write on a clean slate, it might have adopted the discovery rule, which has a growing number of adherents.[108]

Before the passage of the asbestosis amendment to the Indiana Workmen's Compensation statute, if the Indiana courts had followed the *Braswell* decision, the result would surely have been that Indiana asbestosis victims would be left without a remedy for their injuries. If an asbestosis claimant happened to file suit under the Product Liability Act against a manufacturer within two years of the claimant's last exposure to the asbestos dust, the claimant faced almost certain summary judgment.[109] At that point, while there may be asbestos "bodies"[110] or fibers in the claimant's lungs, it is relatively certain that these fibers have not progressed into asbestosis.[111] Even though there would be an invasion of the claimant's body by asbestos fibers, in the absence of the manifested disease, there would be no damage, and hence, no cause of action.[112] If a claimant filed suit ten years after his last exposure to asbestos dust, because that is the time at which his symptoms first became noticeable, the defendant-manufacturer would certainly prevail on summary judgment. A court would be forced to rule that the claim was barred because it was not brought within two years of the plaintiff's last inhalation of asbestos dust. Because of this, Indiana asbestosis victims would be forced to bring suit within two years of ingestion of the dust and continue their cases as long as possible, clog the courts, and wait for the manifestation of the disease, which may not even occur.[113] The effect would surely have been that asbestosis victims in Indiana would

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[104]723 F.2d at 532.

[105]*Id.*

[106]*Id.*

[107]*Id.*

[108]*Id.*

[109]*See Braswell,* 723 F.2d at 529.

[110]Asbestos "bodies" are small particles of various shapes found in the lungs of patients afflicted with asbestosis. These bodies initiate the progression of the disease. 1 SCHMIDT'S ATTONEYS' DICTIONARY OF MEDICINE A-308 (1984).

[111]*See Borel*, 493 F.2d at 1083-86.

[112]*See Braswell*, 723 F.2d at 532.

[113]*See Borel*, 493 F.2d at 1083-86.

be left without a remedy for the negligent conduct of the defendant-manufacturers.

V. Workmen's Compensation Asbestosis Amendment

To remedy the injustice that would flow to Indiana asbestosis victims because of the *Bunker v. National Gypsum Co.* decision, and because it was possible the Indiana courts would follow *Braswell*, the legislature amended the Occupational Diseases Act.[114] The amendment allows workmen's compensation claims by asbestosis victims within twenty years after the last day of their last exposure to asbestos dust if their last exposure occurred on or after July 1, 1985.[115] Any claimants whose last exposure to asbestos dust in the workplace occurred before July 1, 1985, are required, under the amendment, to file their claims within three years from their last exposure.[116]

To recover compensation under this amendment, asbestosis claimants must be disabled within the meaning of the amendment.[117] For those claimants eligible for compensation, the statute provides that compensation shall be computed from average weekly wages which are set by the statute.[118] In addition, the statute sets a maximum dollar amount that any claimant can receive for disabilities.[119]

Recognizing that there would be many claimants whose claims have lapsed in spite of the new amendment, the amendment also established a Residual Asbestos Injury Fund.[120] Under this section, employees who have become permanently and totally disabled and are not eligible for compensation because their claims have lapsed can now receive benefits if their claims are filed before January 1, 1986.[121] Presumably, this fund

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[114]*See supra* note 15 and accompanying text. The amendment became effective July 1, 1985.

[115]*See* Ind. Code § 22-3-7-9(f)(4) (Supp. 1985).

[116]*Id.*

[117]Ind. Code § 22-3-7-9(e) defines disablement as:

> . . . the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment, and "disability" means the state of being so incapacitated.

[118]*See* Ind. Code § 22-3-7-19 (Supp. 1985).

[119]*See, e.g.*, Ind. Code § 22-3-7-19(e), which provides, "The maximum compensation with respect to disability or death occurring on and after July 1, 1986, which shall be paid for occupational disease . . . may not exceed ninety-five thousand dollars ($95,000) in any case."

[120]The legislature enacted a new chapter to the Indiana Code at § 22-3-11-1.

[121]*See* Ind. Code § 22-3-11-3 (Supp. 1985), which provides:

> (a) An employee who:
>
> (1) becomes totally and permanently disabled:
>
> (A) on or after July 1, 1985, from an exposure to asbestos in employment before July 1, 1985; or

was established to compensate those asbestosis victims, like the plaintiff in *Bunker v. National Gypsum Co.*, who were not eligible for benefits under the prior statute.

VI. Ramifications of the Occupational Diseases Act Asbestosis Amendment

The Occupational Diseases Act asbestosis amendment is an important and necessary change in Indiana law. Prior to the enactment of this amendment, asbestosis victims were practically left without any chance for workmen's compensation. Asbestosis is a crippling and often deadly disease.[122] Medical bills can be staggering for those workers inflicted with asbestosis. The Occupational Diseases Act was intended to provide compensation for victims of asbestosis,[123] but the prior three-year statute of limitations effectively denied this remedy to asbestosis victims.[124] Because asbestosis is an insidious disease which usually does not become manifest for many years, asbestosis victims under the prior statute found that their workmen's compensation claims were barred by the three-year statute of limitations.[125]

In enacting the asbestosis amendment, however, the legislature did not enact the best possible limitations period for asbestosis workmen's compensation claims. The new twenty-year statute of limitations should not be a bar to many claims, but there will be some claimants who will be barred under the new statute as well. The evidence on asbestosis is clear that many victims do not become afflicted until more than twenty years have passed since their last exposure to asbestos dust.[126]

(B) before July 1, 1985, from an exposure to asbestos in employment and files a claim under this chapter before January 1, 1986;

(2) is unable to be self-supporting in any gainful employment because of the disability caused by the exposure to asbestos; and

(3) is not eligible for benefits under IC 22-3-7;

may be eligible for benefits from the fund if the employee is not entitled to other available benefits from social security, disability retirement, or other retirement benefits or third party settlements equal to or greater than sixty-six and two-thirds percent (66⅔%) of the average weekly wage, as defined in IC 22-3-7-19, at the date of disablement. An employee's eligibility shall be determined by the board by rule adopted under IC 4-22-2.

(b) If the employee has other available benefits but they are less than sixty-six and two-thirds percent (66⅔%) of the average weekly wage at date of disablement, the employee is eligible to receive from the fund a weekly benefit amount not to exceed the difference between the other available benefits and sixty-six and two-thirds percent (66⅔%) of the average weekly wage on the date of disablement for a period not to exceed fifty-two weeks (52) weeks.

[122]*See supra* notes 17-29 and accompanying text.

[123]*See, e.g.*, Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir.), *petition dismissed*, 317 U.S. 702 (1942).

[124]*See supra* notes 58-72 and accompanying text.

[125]*Id.*

[126]*See supra* notes 17-29 and accompanying text.

Moreover, under the new statute, asbestosis claimants must become disabled within the meaning of the statute within twenty years after exposure before they are eligible for workmen's compensation.[127] While many claimants will become aware of their disease within twenty years of their last exposure, it is likely that many of these victims will not become disabled until after the twenty-year period has elapsed.

An excellent example of how an asbestosis victim can remain without a remedy under the new amendment is presented by *Bunker v. National Gypsum Co.*,[128] the very case which motivated the legislature to revise the statute. Mr. Bunker did not discover his disease until twenty-six years had passed from his last exposure to asbestos dust.[129] Under the new amendment, if Mr. Bunker's last date of exposure had occurred after July 1, 1985, and if he failed to discover his disease twenty-six years later, the new amendment would also bar his claim.

The best possible solution to the asbestosis problem would have been the enactment of a discovery rule with a short limitations period.[130] In that way, if an asbestosis victim does not become aware of his disease until twenty-five years after his latest exposure, he would have two or three years in which to file his claim after he discovers, or should reasonably have discovered, his disease.

The legislature did not adopt a discovery rule provision for asbestosis claims, however, presumably as a compromise with employers and insurance companies. The legislature chose a twenty-year period as a reasonable length of time for the manifestation of many cases of asbestosis. The legislature was aware of the discovery rule possibility, because the same statute contains a discovery rule for victims of radiation exposure.[131] The reasons for providing a discovery provision in cases of radiation exposure are the same for adopting a discovery provision for asbestosis cases. Both are latent diseases which usually do not become manifest for several years after exposure to the harmful substance.

The new amendment will also be problematic for some asbestosis victims in another way. The claimants who find their claims barred under the new amendment because their disease did not appear within twenty years have no other remedy to receive compensation from their

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[127]*See supra* note 117 and accompanying text.

[128]*See supra* notes 58-72 and accompanying text.

[129]*See* 441 N.E.2d at 10.

[130]For instance, the amendment could have provided:

> In all cases of occupational disease caused by the inhalation of asbestos dust, no compensation shall be payable unless disablement, as defined in subsection (e), occurs within two years from the date on which the employee had knowledge of the nature of his occupational disease or, by the exercise of reasonable diligence, should have known of the existence of such disease and its causal relationship to his employment.

[131]*See* IND. CODE § 22-3-7-9(f)(2) (Supp. 1985).

employers. The Occupational Diseases Act provides the exclusive remedy for employees in their claims for compensation from employers.[132] After *Barnes v. A.H. Robins*,[133] these claimants should have the benefit of a discovery rule under the Product Liability Act in their suits against manufacturers of asbestos,[134] but will not have the benefit of a discovery rule under the Occupational Diseases Act in their claims for compensation against their employers.

VII. Conclusion

The new asbestosis amendment to the Indiana Occupational Diseases Act will help remedy an unjust situation for many asbestosis victims. The amendment will provide compensation for many claimants who otherwise would not have received compensation for their injuries. The asbestosis amendment, however, was not the best solution for asbestosis claimants under the Occupational Diseases Act because many claimants will remain without a remedy from their employers for their injuries. The Occupational Diseases Act was intended, however, to compensate these victims as well and will not realize this objective.

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[132]*See* Bunker v. National Gypsum Co., 406 N.E.2d 1239, 1241 (Ind. Ct. App. 1980).
[133]476 N.E.2d 84 (Ind. 1985).
[134]*See id.*