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Cole v. Celotex Corp.¹ and Champagne v. Celotex Corp.², two recent Louisiana Supreme Court decisions, address the many issues present in the litigation of asbestosis liability. In asbestos personal injury litigation, several problems plague both litigants and the courts alike because of the long latency period between the exposure and the manifestation of the injury. Cole and its companion case, Champagne, offer answers to those problems.

These decisions do not, however, change the law; they represent a clarification of the law. More precisely, these cases settle several important issues of law prevalent in asbestosis litigation, which have been in conflict in the federal and state courts since the advent of the asbestosis litigation crisis.³ The issues settled in Cole include: when prescription begins to run, whether the doctrine of contributory negligence or comparative fault governs, when the actual injury occurs in an exposure case, and which insurance policies are available to the insureds.

Perhaps the only drawback to the court's decisions regarding asbestosis is that they make it significantly easier for consumers of tobacco products who have developed cancer to sue the manufacturers of those products. The adoption of the exposure theory⁴ as the time at which the actual injury occurs allows smokers to reach beyond the Louisiana Products Liability Act to the protection of Halphen v. Johns-Manville Corp.'s “unreasonably dangerous per se” standard of liability.⁵ This is not to suggest that the decisions are incorrect, but rather, to demonstrate the difficulty in applying jurisprudential tort law to long latency exposure injuries. Nonetheless, while there are strong arguments favoring government regulation of asbestos cases as opposed to judicial resolution, the decisions in Cole and Champagne are the best that a judicial body can do without statutory guidance.

The plaintiffs in Cole were three men who sustained lung damage from long-term exposure to asbestos while employed by Cities Service at its refinery in Calcasieu Parish, Louisiana. The plaintiffs filed suit against the asbestos manufacturers, the executive officers of Cities Service at the time of their exposure, and the Insurance Company of North America (INA), the liability

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¹ 599 So. 2d 1058 (La. 1992).
² 599 So. 2d 1086 (La. 1992).
³ The crisis label has evolved due to the enormous number of asbestosis cases filed across the country.
⁴ The exposure theory is one of several theories which designate at which point in time a person was injured and, thus, when a cause of action arises. Under the exposure theory, the initial exposure to the harmful substance is deemed to be the time that the injury occurs.
⁵ 484 So. 2d 110 (La. 1986).
insurer of the named executive officers. The plaintiffs alleged that the officers had failed to provide them with a safe work environment from the time the plaintiffs began to work in 1945 until 1976. During those years, suits against executive officers were barred by the workers’ compensation provisions.\(^6\)

On the eve of the trial, the plaintiffs settled their products liability action against the manufacturers, leaving INA and the executive officers as defendants. At the conclusion of the trial, the jury found nine of the eleven named executive officers negligent and awarded the plaintiffs $300,000 each. It determined that the executive officers were ninety-five percent at fault and the manufacturers five percent at fault. The result was a final award of $285,000 to each plaintiff. In addition, the trial judge found that INA provided coverage to the executives during their period of negligence, a decision that effectively forced the insurer to pay the entire judgment.

On appeal, the third circuit affirmed the judgment on the issues of the executives’ negligence and the coverage of INA. However, the court amended the decision because it found that pre-comparative fault law applied both to the plaintiffs’ direct claim and to the apportionment of liability among the defendants. The holding that pre-comparative fault law applied to the plaintiffs’ direct claim had no effect in this case because the plaintiffs were not contributorily negligent. However, the ruling was significant as to the apportionment of liability among the defendants because under pre-comparative fault principles, the apportionment of fault was determined by prorating the defendants’ virile shares.\(^7\) Pro rata sharing, coupled with the pretrial stipulation that the manufacturers were negligent, caused the appellate court to reduce the award against INA by the number of shares of the eleven settled manufacturers. The court’s holding that pre-comparative fault principles govern essentially means that the right to contribution between joint tortfeasors arises at the time of the tort, not upon judicial demand.\(^8\)

In explaining its holding that INA provided coverage for the executive officers, the court specifically adopted the exposure theory as the “trigger of coverage.”\(^9\) According to this theory, the injury producing the right to compensation occurs when the injured party first inhales the asbestos fibers, even though the damage is not detectable until many years later. To complement the acceptance of the exposure theory, the third circuit affirmed the trial court’s allowance of horizontal “stacking” of the annual insurance policies issued by

\(^6\) 1989 La. Acts No. 454, § 2 (codified at La. R.S. 23:1032 (Supp. 1992)) (eliminating the employee’s right to sue his employer or officers of the employer for negligence, in exchange for protection under the workers’ compensation laws).

\(^7\) See former La. Civ. Code art. 2103 (1961) (As between the solidary debtors, each is liable only for his virile portion of the obligation.); Ferdinand F. Stone, Torts § 111, in 12 Louisiana Civil Law Treatise (1977) (defining virile share as per capita sharing of the debt).


\(^9\) Id. at 390.
INA over the years covering the plaintiffs' exposures. Horizontal "stacking" allowed the plaintiffs to combine any insurance policies in effect when they were exposed to asbestos so that they, the injured parties, were fully compensated.

The Louisiana Supreme Court, in an opinion written by Justice Hall, accepted all aspects of the third circuit court of appeal's decision and provided additional authorities to support the appellate court's holding. This note proposes that asbestos personal injury cases should not be a matter of judge made tort law. For the sake of the public interest, asbestosis cases warrant some form of legislative regulation; however, the judiciary "does not have the luxury of adjudicating cases on the theory that the legislature will at some point enact protective legislation," and in the absence of such regulation, "a court is responsible for the outcome of the cases before it."

The principles on which the holdings in Cole and Champagne are based demonstrate that the Louisiana Supreme Court has done its best within its vested powers, bearing in mind, as one commentator has stated, that "[a] judicial solution may not be the best solution, but it is often a court's fate to provide second best solutions." The result is that Louisiana courts and federal courts applying Louisiana law to asbestosis cases now have a definitive statement to guide them as they attempt to address the numerous asbestos personal injury cases presently filling court dockets. This note clarifies and provides additional reasoning for the principles established in Cole and Champagne, which may prove valuable for the practitioner. Additionally, this note explains why we are left with the wrong conclusion, although the court gave all the right reasons.

I. PRESCRIPTION IN LONG TERM LATENCY DISEASE LITIGATION

The facts giving rise to most asbestos personal injury suits do not resemble those of the typical tort suit. Most asbestosis suits usually involve a temporal separation between the exposure to the hazard and the appearance of the injury,

10. Id. To "stack" insurance policies is to allow the insured to collect and pool all available policies in order to more fully compensate him for his loss.

11. There were several other issues raised and decided in Cole and Champagne; however, they are not concerned with asbestos litigation and are, therefore, not within the scope of this note. They include 1) whether the defendants could reduce the amount of the plaintiffs' recovery based upon the plaintiffs' pretrial settlements with the manufacturer-defendants since no evidence of such settlements was presented at trial (The supreme court held that no evidence was necessary in light of the parties' stipulation to the manufacturers' fault.); 2) whether pre-judgment interest should run from the date the plaintiffs filed suit in the present case in state court or from the date of the original filing in federal court, which was dismissed (The supreme court held that interest runs from the filing in state court because legal interest is statutory and must be strictly construed.); and 3) whether certain medical records fell within the business records exception to the hearsay rule (The supreme court held that the medical records were within the exception because a proper foundation was laid.).


13. Id.
normally ranging from ten to twenty-five years. Problems with prescription in such situations are inevitable. In contrast, there is no problem in ascertaining the exact date that prescription begins to accrue in a typical personal injury setting because usually a certain event occurs that clearly causes the injury, provides notice to the person that he has been injured, and thereby, starts the running of prescription. In asbestosis litigation, because of the continuing nature of the disease and the length of time between the tortious conduct and the manifestation of the disease, issues involving prescription are complex. The vast majority of persons who suffer from asbestos related injuries would, if normal tort principles were applied, lose their right to compensation for the injuries before they ever knew they had the right. The inequity of such a result has prompted courts across the nation to adopt several judicial exceptions in order to interrupt prescription.

Although the court in Cole explained many important issues with great clarity, it did not address the issue of prescription. Nevertheless, by its silence, the supreme court affirmed the application of the most popular of the equitable creations—the "discovery" rule.

Under the "discovery" rule in common law states, the statute of limitations does not begin to run until the injured party learns or should have learned of his or her injury. Applied to asbestosis litigation, "the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that the injury was caused by the wrongful acts of another." This rule is the most equitable because it avoids prescriptive rules that under other theories operate to extinguish a plaintiff's action. For this reason, many state and federal courts have adopted the "discovery" rule.
Finding equity in the "discovery" rule, courts across the country have moved away from the harsher "traditional" rule under which prescription begins to accrue when the plaintiff experiences an injury. In light of the court's holding in Cole that repeated exposures to asbestos constitute a compensable injury, application of the "traditional" rule in Louisiana would deprive injured workers of compensation because prescription would run long before the disease manifested itself.

There have been several other, albeit less popular, methods of addressing prescription in long-term latency disease cases. One such method suspends prescription until the plaintiff suffers an injury as determined with reasonable certainty by medical evidence. Depending on the circumstances, prescription could start to accrue from the time of the initial exposure, the discovery of the injury, or somewhere in between. Again, the court's adoption in Cole of the exposure theory as the time that the injury occurs could result in nothing more than the application of the "traditional" prescription rule.

Nonetheless, the "discovery" rule is already part of Louisiana's civilian tradition through the maxim contra non valentem agere nulla currit praescriptio. Contra non valentem "designates the suspension of prescription due to the inability of the party against whom it would ordinarily run to bring an action to interrupt it." Recognition of this doctrine in Louisiana dates at least as far back as 1817, when the Louisiana Supreme Court acknowledged it in Quierry's Executor v. Faussier's Executors. As a principle of equity and natural justice, contra non valentem is treated with the same respect and weight as written law and at one time "was applied so extensively . . . that it threatened to make of prescription the exception rather than the rule." Except for a short-lived period in the late 1860's, in which Louisiana courts abolished contra non valentem as conflicting with the principles of our code, the doctrine has consistently been recognized by Louisiana courts, albeit less frequently in more recent years.
As explained by the supreme court, *contra non valentem* is "a judici
cially created exception to the general rule of prescription"\(^{29}\) and applies in four situations:

1. Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
2. Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
3. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action;
4. Where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.\(^{30}\)

The "discovery" rule sits neatly within the folds of the last application listed by the court in which the plaintiff does not or cannot know of his cause of action. This fourth category, formulated by Justice Tate,\(^{31}\) provides that so long as the disease is dormant, the exposed party, through no fault of his own, is prevented from enforcing his cause of action. Thus, equity requires, by way of the "discovery" rule inherent in the maxim *contra non valentem*, that prescription be suspended.

However, it may not be that simple. What happens to the patient who, through the negligence of his doctor, leaves the operating table with a sponge in his abdomen that is not discovered for three years, at which time the patient dies of infection? Will not the maxim *contra non valentem* and the "discovery" rule prevent the running of prescription until the patient knows or should have known of the doctor's malpractice? For actions occurring after the effective date of Louisiana Revised Statutes 9:5628,\(^{32}\) the patient has no recourse because the legislature, in reacting to the rapidly growing number of medical malpractice cases, made a policy decision. Under this statute, medical malpractice claims are barred after one year from the act or knowledge of the act, but at the latest three years.

\(^{30}\) Corsey v. State Dep't of Corrections, 375 So. 2d 1319, 1321-22 (La. 1979).
\(^{31}\) *Id.* at 1322.
\(^{32}\) La. R.S. 9:5628 (1991) provides:
No action for damages for injury or death against any physician, chiropractor, dentist, psychologist, hospital duly licensed under the laws of this state . . . , whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.
years from the date of the act whether the injured party has knowledge or not. It would appear that the passage of the statute demonstrates a situation in which the public interest as a whole outweighed the interests of the injured patients. In the eyes of the legislature, equity apparently required saving a profession and its insurers from their own negligence in order to protect the public in the end. The problems in asbestosis litigation represent a similar situation. Presently there are over 130,000 asbestosis cases pending in courts across the country, including over 65,000 filings against one manufacturer and fourteen former manufacturers of asbestos in bankruptcy.

In dealing with this mass of litigation, at least one other state has turned to prescription as a tool for limiting access to the courts. In Illinois, the legislature passed, as part of their workers' compensation law, a restrictive prescriptive provision which applies to occupational diseases, including asbestosis. Illinois Compiled Statute, chapter 820, act 310, section 1(f) provides:

No compensation shall be payable for or on account of any occupational disease unless disablement, as herein defined, occurs within two years after the last day of the last exposure to the hazards of the disease, except in cases of occupational disease caused by berylliosis or by the inhalation of silica dust or asbestos dust and, in such cases, within 3 years after the last day of the last exposure to the hazards of such disease . . .

The limitation employed in Illinois seems especially harsh given that the average time span between initial exposure and clinical evidence is seventeen years.

Nonetheless, the Illinois statute is one example that illustrates the difficulties inherent in applying tort law to asbestosis problems. More importantly, by placing a limitations period on the time in which a person may bring an asbestosis action, whether the person has knowledge of his injury or not, this statute demonstrates that this is one area in which the public interest can outweigh the interests of the individual plaintiffs, and that prescription can serve as the method to achieve some form of regulation.

36. 820 ILCS 310/1, § 1(f) (Smith-Hurd Ann. 1993).
II. CONTRIBUTORY NEGLIGENCE OR COMPARATIVE FAULT

Because the latency period in the development of asbestosis is so long, the accrual of a normal cause of action for the contraction of the disease will often span several changes in the law. As a result, the courts are presented with numerous problems in deciding which law to apply.

The major development in the law applicable to Cole and Champagne was the passage of Act 431 of 1979. Effective August 1, 1980, Act 431 represented a major change in Louisiana law with its adoption of comparative fault. Prior to this act, contributory negligence barred a plaintiff’s recovery,3 and pro rata virile share principles controlled defendants’ rights among themselves.4 Such a bar is inequitable in cases involving a plaintiff whose negligence was minimal. In response to this inequity, Act 431 replaced contributory negligence with comparative fault. Under comparative fault principles, a plaintiff found to be partially responsible for his injuries will not lose his right of recovery, rather, any judgment awarded will be reduced in proportion to his percentage of fault.41

Prior to Act 431, pro rata virile share principles governed the rights between joint tortfeasors. Under the prior law, each liable party was counted as an individual share, and the damage awards were divided equally between the number of shares.42 Thus, a defendant only minimally at fault was responsible for the same amount of damages as the primary tortfeasor. To correct this

38. La. Civ. Code art. 2323 provides:

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

39. Former La. Civ. Code art. 2323 (1825) read: “The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently.” See Crum v. Holloway Gravel Co., 273 So. 2d 566 (La. App. 1st Cir.), writ refused, 1276 So. 2d 701 (1973); Williams v. J. B. Levert Land Co., 162 So. 2d 53 (La. App. 1st Cir.), writ refused, 245 La. 1081, 162 So. 2d 574 (1964).

40. Former La. Civ. Code art. 2103 read:

When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article[s] 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.


42. See supra note 40.
inequity, the legislature passed Act 431 providing that joint tortfeasors are liable among themselves only in proportion to their fault.\(^{43}\)

The exposures giving rise to the causes of action in both *Cole* and *Champagne* occurred prior to the passage of Act 431. However, the court was not presented with this issue with regard to the plaintiffs' causes of action because Act 431 specifically provides that "[t]he provisions of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective."\(^{44}\) The "events" are the "repeated tortious exposures resulting in continuous, on-going damages"\(^{45}\) that occurred prior to the effective date of the statute.\(^{46}\) Moreover, in this instance, as in most asbestosis cases in which the plaintiff employee is injured while in the work environment, the plaintiffs were found free of fault.\(^{47}\) So while the application of pre-Act contributory negligence can be significant, it is not likely to have much effect on a plaintiff's action for personal injury due to asbestos.

The more troublesome issue involved a determination of which law defined the defendants' rights among each other. At the time of trial in *Champagne*, several manufacturers remained, while in *Cole*, there was only one potentially liable defendant remaining when trial began. Nonetheless, in *Cole*, INA wished to reduce its liability through contribution based on the virile shares of the eleven manufacturers that had previously settled. Thus, this argument was vigorously argued in both *Cole* and *Champagne*.\(^{48}\) In view of the change in Act 431, the specific issue was when the right of contribution between joint tortfeasors arises. If the right does not vest until judicial demand is made upon a defendant, then comparative fault principles apply. If however, as the supreme court held, the right becomes vested at the time of the harm, then pre-Act pro rata virile share principles apply. The latter application and holding best comport with the theory of contribution.

Contribution is "an attempt to redistribute the common burden among those who have contributed to that burden."\(^{49}\) Originally, the injured party was "the lord of his action,"\(^{50}\) and joint tortfeasors were not afforded any recourse against one another during litigation. The supreme court held that the negligent

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46. The plaintiffs in both *Cole* and *Champagne* alleged that the exposures to asbestos began in 1945, when they first became employed. The exposures were alleged to have occurred up to the filing of the suits.
50. Id. at 151.
act provided no liability between the tortfeasors, and courts refused to provide a joint tortfeasor with an action to include his fellow tortfeasor in the suit. Decisions such as these left the tortfeasors' liability solely in the hands of the injured party. The injured plaintiff was free to decide which of several obligors to sue, a decision that rendered the obligor liable without any recourse against the other tortfeasor until after judgment. Such applications completely disregarded the principles of Louisiana Civil Code articles 2103 and 2324, which, to at least one commentator, were included in the Civil Code "to grant a substantive right of contribution to a solidary debtor such as the joint tortfeasor who pays more than his part and portion of the debt."

The courts continued to disfavor contribution despite legislative action designed to remove this power from the whim of the plaintiff. During the late 1950s, a jurisprudential rule evolved that the right to contribution arose not at the commission of the delictual act, but rather when joint tortfeasors were cast in judgment in solido. Furthermore, a cause of action did not vest until one defendant paid the entire judgment.

In direct response to this evolving rule, the legislature again amended Civil Code article 2103 in 1960, and this time it specifically provided that "[a]s between the solidary debtors, each is liable only for his virile portion of the obligation." Moreover, the amendment made available third-party practice to defendants, which illustrated the legislature's intent to provide joint tortfeasors a right of action against each other at the commission of the tort.

This historical view of contribution provides authority for the court's conclusions in both Cole and Champagne that at the commission of the tort, there arises one cause of action and two rights of action. The plaintiff is provided a cause of action and a right of action in tort, and the joint tortfeasors share a right of action between themselves for contribution.

Additionally, the holding respects the well-recognized civilian principle of subrogation, the source of contribution. Subrogation, as provided in Article 1829 of the Louisiana Civil Code, occurs by operation of law "[i]n favor of an
obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment."

Plainly stated, the joint tortfeasor is subrogated to the rights of the plaintiff and can have no more rights than the injured party. Thus, when the plaintiff’s cause of action arises at the time of the tort, by operation of law the right to contribution also arises between the responsible parties.

As illustrated by Justice Hall, the confusion in the lower courts over when the right to seek contribution arises stems from a misreading of the decision in *Brown v. New Amsterdam Casualty Co.* In *Brown*, the Louisiana Supreme Court stated that "it is only after judicial demand has been made on one of two or more solidarily obligated tort feasors [sic] that he can have any possible interest in seeking contribution." This language was read in *Lanier v. T. L. James & Co.* to mean that the right to contribution arose at judicial demand rather than at the commission of the tort. However, this reading is incorrect. Contribution has its origin in subrogation which occurs by operation of law irrespective of when judicial demand is made. Thus, it appears that the view enunciated in *Cole* and *Champagne* is correct.

So, where do defendants embroiled in asbestosis litigation now stand in Louisiana? With the adoption of the far-reaching exposure theory as the time the injury gives rise to a plaintiff’s right of action, it is likely that most asbestos personal injury actions will be deemed to have vested prior to the effective date of Act 431. The result is that the cases will not be decided using comparative fault principles. Rather, the typical plaintiff’s action will now be deemed to have arisen long before the effective date of the change in the law, and through contribution by way of subrogation, so will the defendants’ rights. The result should be that courts will apply pro rata virile share principles between joint tortfeasors.

### III. ADOPTION OF THE EXPOSURE THEORY

Perhaps the most significant of the several issues decided in *Cole* and *Champagne* is the adoption of the exposure theory. Typically, the exposure theory is used to determine the time at which an insurer is bound to provide coverage.

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64. 243 La. 271, 142 So. 2d 796 (1962).
65. *Id.* at 276, 142 So.2d at 798.
66. 148 So. 2d 100 (La. App. 1st Cir. 1962).
However, the Louisiana Supreme Court went beyond the insurance language and adopted the exposure theory as the time at which an injured party's right of action vests: "We conclude that the key relevant events giving rise to a claim in long-latency occupational disease cases are the repeated tortious exposures resulting in continuous, on-going damages, although the disease may not be considered contracted or manifested until later." To understand the impact of this language, one first must understand the principles behind the exposure theory.

Determining at what point an insurer of a manufacturer becomes obligated to provide coverage to the manufacturer's employees who have been injured due to asbestos exposure is another problem in applying tort law principles to asbestos personal injury litigation. Courts across the country have been split on this issue ever since the Fifth Circuit defined the liability of asbestos manufacturers in the landmark case of *Borel v. Fibreboard Paper Products Corp.*

In dealing with this unique problem, the courts have adopted three separate theories: the *exposure* theory, in which coverage is triggered upon the initial exposure; the *manifestation* theory, in which coverage results when the disease becomes apparent; and the *triple-trigger* theory, in which coverage is activated by manifestation, initial exposure, as well as continuing exposure. Commentary analyzing each theory is extensive, yet many courts remain in conflict. Several characteristics of these theories, however, are settled. With near unanimity, insurers favor the manifestation theory and plaintiffs prefer the exposure theory. The exposure theory appears to be the better option in light of the reasons provided by the supreme court in *Cole*.

The Louisiana Supreme Court provided three reasons in support of its holding that the exposure theory applies in Louisiana. The first is that such an application "best comports with a literal construction of 'bodily injury,'" as
used in the insurance contracts. The commercial general liability contracts at issue in Cole and Champagne were standard form contracts, which at the time were used across the country and generally provided that the insurer would pay "all sums which the insured shall be legally obligated to pay as damages because of . . . bodily injury . . . caused by an occurrence." The ambiguity of the terms "bodily injury" and "occurrence" is the root of the problem. Construed literally, however, there is no problem with finding that exposure is equivalent to injury in light of medical evidence—universal in agreement—that tissue damage begins shortly after the inhalation of asbestos fibers. The damaging process was described by the United States Fifth Circuit Court of Appeals:

Once in the lung, the particles cannot be coughed out and remain there permanently. The noxious effect of these rock particles causes the body to set up an inflammation until eventually fibrosis occurs. Through fibrosis the body lays down scar tissue in the lung surrounding the asbestos fibers. With a large concentration of the fibers lodged in the lung cavities, scar tissue eventually replaces most of the healthy lung tissue . . . .

Despite the medical consensus that exposure produces injury, it is this aspect of the exposure theory that advocates of a manifestation theory choose to attack. The tenor of such contrary arguments is that exposure is only a predicate to the eventual injury, and that the injury is not "compensable" until the disease manifests itself. This line of reasoning was refuted by the Sixth Circuit:

The manufacturer here paid for protection from bodily injury resulting in liability. It should make no difference when the bodily injury happens to become compensable. Put another way, we see nothing in the policy which requires that the underlying plaintiffs' cause of action accrue within the policy period. There exists a clear distinction between when bodily injury occurs and when the bodily injury which has occurred becomes compensable.

76. Insurance Co. of N. Am., 633 F.2d at 1218.
77. Id. at 1217.
79. Id. at 1133.
80. Agrawal, supra note 72, at 1502.
82. Id. at 1223.
This reasoning seems to better reflect the intent of the parties. It would be illogical to argue that the insured paid premiums only intending to cover those injuries sustained and manifested during the existence of the policy. Surely the insured intended to cover any liability which might arise from injuries sustained during the policy period, whether they manifest themselves during that time or not.

A plaintiff will not likely receive a favorable judgment prior to manifestation because he will not be able to prove damages. Thus, perhaps Justice Hall’s reasoning as applied to the issue of contribution rights between joint tortfeasors could dispose of this issue as well. In effect, an asbestosis plaintiff’s cause of action would vest at the time of exposure, but would become actionable only upon manifestation.

The second reason given for the acceptance of the exposure theory is premised on the theory of contra proferentum through which insurance coverage is maximized. If the manifestation rule is accepted, the insurance companies that provide insurance to the manufacturer during the exposure, but that are not insuring the manufacturer at the time of the manifestation, will escape liability. Moreover, manufacturers eventually would be unable to secure insurance because insurers today either refuse to provide such coverage or provide such coverage only subject to prohibitive deductibles. Today most insurance policies contain an “asbestos exclusion clause,” and when such insurance is available, the premiums are oppressive. In 1985, premiums rose to 9.1 billion dollars—a sixty percent increase from 1983. In contrast, the exposure theory would provide coverage for every year in which the manufacturer “[was] conscientious enough to obtain insurance.”

Perhaps the best illustration of the desire to afford the maximum amount of coverage to injured parties is found in one commentator’s analysis of the decision in Eagle-Pitcher Industries, Inc. v. Liberty Mutual Insurance Company, a case that adopted the manifestation approach. The author points out

83. This statement is strictly limited to a cause of action based on contraction of asbestosis or a related disease. Manufacturers may still be liable for an action based on a fear of cancer. For a general discussion of this recent type of action, see Dennis, supra note 45. See also Devlin v. Johns Manville Corp., 495 A.2d 495 (N.J. Super L. 1985); Mauro v. Raymark Indus., Inc., 561 A.2d 257 (N.J. 1989).

84. Contra proferentum is used in connection with the construction of written documents. The effect of this theory is that an ambiguous provision in such a document is construed most strongly against the person who selected the language. In virtually every asbestos personal injury case, the insurance contracts were written by the insurance companies.

85. Layton, supra note 71, at 181.


87. Id.

88. Layton, supra note 71.

89. 682 F.2d 12 (1st Cir. 1982), cert. denied, 460 U.S. 1028, 103 S. Ct. 1279 (1983).

90. Agrawal, supra note 72, at 1505.
the possible basis for the court's conclusion that the manifestation theory expressed the true intent of the parties. The article discloses the underlying fact that the manufacturer being sued was uninsured throughout most of the plaintiffs' exposure period. Thus, faced with a choice that would likely have left the injured plaintiffs uncompensated given the financial condition of the corporation, the court chose to refute the exposure theory. The effect of adopting the manifestation theory on the availability of insurance to manufacturers and the resultant likelihood of uncompensated plaintiffs seem to insure that the exposure theory will provide the maximum amount of coverage.

The final reason given by the court to support adoption of the exposure theory is that application of the theory "honors the contracting parties' intent by providing for consistency between the insured's tort liability and the insurer's coverage . . . ." In the words of one commentator, "Since the manufacturer's liability is based on the worker's exposure, the parties must have intended their insurance coverage to mirror the manufacturer's liability."

However, adoption of the exposure theory does more than trigger insurance coverage. It establishes a specific point in time at which a person was injured, thereby forcing courts to apply the substantive law as it applied at the time of the injury. In light of Louisiana's liberal products liability history, the exposure theory allows plaintiffs to escape the conservative Products Liability Act and instead grants them access to the generous pre-Act jurisprudence.

Although Champagne is the companion case to Cole, a major factual difference distinguishes the two cases. At the time of the trials, Cole was a suit in negligence against the executive officers of the corporation, while Champagne was a products liability action against the manufacturers themselves. This distinction is important because when the court designated the repeated exposures as the acts giving rise to the injured parties claims, it effectively placed long-term exposure suits against the manufacturers back into the coverage of Halphen

91. Id. at 1507.
92. For a general overview of the effect that asbestos litigation has had and its likely future effects on the insurance industry, see Alvin L. Arnold, Insurance: Asbestos Claims Covered Under Liability Policy, 23 Real Estate Law Report 1 (1992); Stephen F. English & Madeleine S. Campbell, Self Insurers and Risk Managers: Case Comment on California Asbestos Insurance Coverage Cases, 24 Tort and Ins. L.J. 505 (1989); David Worthen, Asbestos Abatement (The Insurance Crisis): A Solution Is Still Up In the Ambient Air, 38 Syracuse L. Rev. 1343 (1987); and Adjudicating Asbestos Insurance Liability, supra note 12.
94. Agrawal, supra note 72, at 1507.
95. There were numerous manufacturing defendants in each case. However, the only manufacturers at trial were those named in the Champagne case. The application granted by the Louisiana Supreme Court in Champagne was prepared by the GAF Corporation and the Quigley Company.
Accordingly, Hallphen's theory of "unreasonably dangerous per se" is revived. 97

Under the "unreasonably dangerous per se" theory, "liability may be imposed solely on the basis of the intrinsic characteristics of the product irrespective of the manufacturer's intent, knowledge or conduct." 98 In simpler terms, the Hallphen court established that a manufacturer will be held liable for the injuries caused by its product whenever the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. The effect of this holding affects products liability actions outside asbestosis litigation. This high standard of liability, paired with the exposure theory, builds a much stronger case for the smoker who has developed cancer and has filed suit against the cigarette or tobacco product manufacturer.

Suits against tobacco product manufacturers by smokers who have developed cancer are not new. The cancerous damage caused by smoking is a result of long-term exposure and development, 99 much like asbestosis. As such, these cases fit neatly within a Cole-Champagne exposure analogy.

The holdings of Cole and Champagne, coupled with recent holdings of the United States and the Louisiana Supreme Court, illustrate this point. In Cipollone v. Liggett Group, Inc., 100 the United States Supreme Court addressed whether the Federal Cigarette Labeling and Advertising Act of 1965 101 and the Public Health Cigarette Smoking Act of 1969 102 preempted products liability suits in state courts against tobacco product manufacturers. The Cipollone court found that the federal legislation did preempt state claims based on a failure to warn, but that actions based on other theories of liability were still available. Thus, a suit based on the "unreasonably dangerous per se" theory of liability should survive Cipollone. 103

The second case of importance is Gilboy v. American Tobacco Co. 104 In Gilboy, the Louisiana Supreme Court held that the Louisiana Products Liability Act does not apply retroactively. Because of this holding and Cole's holding that the injury occurs at exposure, courts will be bound to apply pre-Act Hallphen products liability law to cases in which the plaintiff began smoking prior to the enactment of the Louisiana Products Liability Act.

The result should be that a plaintiff in a smoker case need only prove that the tobacco product fits within the concept of "unreasonably dangerous per se,"

96. 484 So. 2d 110 (La. 1986).
97. Id. at 113-14.
98. Id.
100. 112 S. Ct. 2608 (1992).
104. 582 So. 2d 1263 (La. 1991).
that he was exposed to such product, and that he has sustained damage. Although in *Gilboy* the court stated that the jury decides whether a tobacco product is "unreasonably dangerous per se," Justice Watson's opinion strongly hinted at what the court's position is by stating, "Since normal use of cigarettes causes lung cancer, the risk from smoking cigarettes is enormous, while its utility is virtually nil."\footnote{105}

 Nonetheless, once these elements are established, the plaintiff is not likely to encounter many defenses that are able to overcome the high standard of liability imposed. The most likely defense to be raised by the tobacco manufacturers will be something similar to contributory negligence under the law of comparative fault. This defense was held to apply to some strict products liability cases in *Bell v. Jet Wheel Blast*\footnote{106}. Applied in the context of the smoker cases, this defense appears to have merit. Warnings which state the possibility that tobacco products can cause cancer have been in existence for some time. Nonetheless, comparative negligence in products liability will reduce an award only by the percentage of fault attributable to the plaintiffs, leaving the remainder of the award to be paid by the manufacturer. Because the product at issue will be labeled "unreasonably dangerous per se," thereby triggering the purest form of strict liability, it seems doubtful that a court would allocate one hundred percent of the fault to the injured plaintiff.

 That tobacco products are addictive may also weaken any argument that the plaintiff's own negligence should reduce the amount of recovery. Could this characteristic serve to vitiate all allocation of fault to the plaintiff? Comparative fault applies to strict products liability in only some cases\footnote{107}, and an argument can be made that the addicted plaintiff is exempt because he is not truly in control of his behavior. Moreover, the supreme court stipulated that comparative fault will apply to strict liability cases where the threat of a reduction in recovery based upon the plaintiff's own fault will serve to encourage safer use of the products.\footnote{108} Again, given that there is no "safer" way to use tobacco products, it would seem that these smoker cases do not even fit within the purview of those strict products liability cases in which comparative fault is a defense. Such arguments insure, at the least, a nominal allocation of fault to the stricken smoker.

 The adoption of the exposure theory is a fair judicial solution to the asbestos personal injury problem. However, applied to smoker litigation, it may result in much more long-term latency disease litigation in the Louisiana courts. Moreover, *Cole* and *Gilboy* may allow smokers, who arguably injured themselves, to circumvent the Louisiana Products Liability Act and find relief in pre-Act jurisprudence.\footnote{109}

\footnote{105}{Id. at 1264.}
\footnote{106}{462 So. 2d 166 (La. 1985).}
\footnote{107}{Id. at 171.}
\footnote{108}{Id.}
\footnote{109}{For a scholarly analysis of the present status of tobacco litigation in Louisiana, see William}
Another issue decided by the court in Cole and Champagne was the horizontal stacking of separate insurance policies. "Stacking is the aggregation of all available coverages in order to create a greater pool from which the insured may be compensated for his or her loss, a result that is favored under general principles of insurance law." The supreme court allowed the plaintiffs to stack available policies issued over the years because stacking provided the greatest amount of coverage and was most compatible with the intent of the contracting parties. This concept of stacking is not new to Louisiana jurisprudence, and recognition of the same is but a clarification of the law.

The policy of stacking seems fitting when it is understood that each exposure is an injury that, upon manifestation, will give rise to a separate cause of action. Because the trigger is exposure, the exposures occurring during different policy periods must trigger distinct policies. To find otherwise would again overlook the obvious intent of the manufacturer-insured—that its coverage mirrors its liability.

This holding, allowing the horizontal stacking of insurance policies so as to cover fully the plaintiff's injuries, is supported by the general trend in insurance law. More importantly, stacking appears compatible with the principles behind the exposure theory, which now applies in Louisiana. To hold otherwise would be to overlook both the true intent of the parties and the established policy of favoring coverage.

V. CALL FOR LEGISLATIVE REGULATION

Every month approximately 2,000 new asbestos related lawsuits are filed. At present, over 130,000 asbestos suits are pending. Estimates of substantial exposures across the country range from four to seventy million. Predictions range as high as 265,000 asbestos related deaths by the

110. Dennis, supra note 45, at 6.
114. Dennis, supra note 45.
116. Solomon, supra note 33.
year 2015. If this rate, the result may be that each manufacturer, and many insurers of those manufacturers, will follow manufacturers such as Johns-Manville, Amatex, UNARCO, Eagle-Picher, Raymark, and Celotex, down the path of bankruptcy. If indeed the insurers follow the manufacturers into bankruptcy, then eventually injured persons will not be compensated for their asbestos related injuries.

These problems could be solved by government regulation. The government has previously intervened in similar situations when public concern warranted legislative action. Creation of the Black Lung Fund is one example. After medical evidence established that long-term employment in coal mines resulted in deadly health hazards, the federal government established the Black Lung Fund in an effort to protect the coal industry from financial ruin, as well as to guarantee future compensation to the diseased miners and their dependents.

Another example is found in the Louisiana legislature’s passage of Act 808 of 1975, which establishes a three-year limitations period for medical malpractice actions, regardless of the discoverability of the injury. Still another example is identified in the Illinois legislature’s passage of the Workers' Occupational Diseases Act, which imposes a similar three-year limitations period on asbestos claims. These examples demonstrate that the proposed idea is neither new nor untested.

Without legislative regulation, the growth of asbestosis litigation threatens the entire judicial process in this area. According to one commentator, “the only real beneficiaries of this system are the lawyers on both sides who litigate these claims.” For every dollar a plaintiff receives, litigation and insurance costs are estimated to be $2.71. One manufacturer, prior to filing for bankruptcy, was spending 2.5 million dollars a month in attorneys' fees alone, while another paid 6.3 million dollars in litigation costs in its final year before filing for bankruptcy.

121. As announced in the *Federal Coal Mine Health & Safety Act of 1969*:
It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled... and to the surviving dependents of miners whose death was due to such disease; and to insure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.
122. *See supra* text accompanying note 32 (regarding the Louisiana Medical Malpractice Act).
124. *See supra* text accompanying note 36 (regarding Illinois prescriptive statute for asbestos litigation).
127. *Id.*
The American Bar Association has also recognized the shortcomings of judicial solutions to asbestosis litigation.\textsuperscript{128} Recognizing that such cases simply are not amenable to different applications in each state, the ABA has petitioned Congress to intervene.\textsuperscript{129} Perhaps even more significant are the many proposals that have come before Congress specifically calling for some type of regulation.\textsuperscript{130} These bills suggest establishing a fund that would serve to compensate the injured parties without the necessity of prolonged, expensive litigation.\textsuperscript{131}

Of these proposals, Representative Fenwick's bill of 1978 may be the best approach because it provides that the other parties involved in the supply and distribution of asbestos share in the responsibility, including the United States government. Manufacturers and their respective insurers are presently carrying the entire weight of the asbestos crisis, but they are not the only responsible parties. That asbestos represented a health hazard was generally known as far back as the 1930s,\textsuperscript{132} yet the United States government continued to use asbestos extensively in the manufacture of its warships throughout World War II and military specifications mandated inclusion of asbestos in products sold to the government until 1976.\textsuperscript{133} As stated by the Second Circuit Court of Appeals during the litigation of the Agent Orange class action, "It would be anomalous for a company to be held liable by a state or federal court for selling a product ordered by the federal government . . ."\textsuperscript{134}

Despite the government's complicity, the attempt by one manufacturer to third-party the United States government demonstrates the characteristic futility of suing an unwilling sovereign.\textsuperscript{135} Taking all of this into account, Representative Fenwick's bill provides that the federal government would also contribute to the compensation fund. Moreover, the proposal requires contribution from asbestos miners as well as suppliers who continued to supply asbestos long after its detrimental effects were made known. Present litigation has allowed these other participants to escape unscathed, while an entire manufacturing industry heads toward bankruptcy.


\textsuperscript{129} \textit{Id.}


\textsuperscript{131} \textit{Id.}


\textsuperscript{133} Mansfield, \textit{supra} note 37, at 871.


VI. CONCLUSION

Cole and Champagne provide all the right answers. The opinions are based on authoritative reasoning and sound civilian theory. The decisions represent the most equitable holdings that a judicial body could make. However, although the Louisiana Supreme Court's answers are correct, the social problem remains unsolved. Continuing to subject asbestosis cases to jurisprudential tort law will only force the remaining asbestos manufacturers into bankruptcy. At that point, the plaintiffs in these cases will simply sue new parties involved in the asbestos chain. Instead of witnessing a reduction in the number of asbestos personal injury cases filed, the judicial process will slow down as courts attempt to resolve the new issues created by this new twist. The movement for regulation is not new. The subject has been urged by many legislators and commentators who recognize both the present and future injustice caused by judicially resolving asbestos related disputes. Regulation by way of a public fund, financed by all liable parties, is needed before an entire manufacturing industry is in bankruptcy and asbestos victims are left uncompensated.

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