The Bodily Injury Concept in Liability Policies Revisited, 30 Years On

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I. Abstract: Insurers Are Mounting New Challenges to Old Rulings on the Bodily Injury Concept in Liability Policies, But Will the Challenges be Successful?

“Bodily Injury” is a defined and key concept in many liability insurance policies. Most critically, it affects other important concepts such as trigger of coverage and the applicability of the products hazard and completed operations hazard of the policies. What constitutes bodily injury for liability insurance coverage purposes has been one of the most hotly debated and intensely litigated issues in liability coverage over the past three decades, with the courts of many jurisdictions making important decisions on issues such as trigger of coverage based on what those courts found amounts to bodily injury. On balance, it is fair to say policyholders won more of the early determinations than insurers did.

Today, however, some insurers are mounting a new challenge to the concept of “Bodily Injury.” Those insurers now claim the medical evidence the courts relied upon decades ago in deciding what constitutes bodily injury for liability coverage purposes was at best incomplete and at worst just plain wrong. Some insurers today claim that medical science has progressed and we now have better understandings of how
three states (California, Illinois, and New York) have been convinced to revisit the bodily injury concept, with mixed results.¹

But, will the insurers’ claims succeed? Has the medical evidence changed at all or enough to warrant revisiting the bodily injury concept? Many policyholders will tell you “no,” that even if the medical community’s understanding of how toxic exposures lead to insidious disease has changed since the 1980s and 1990s, nothing about the new understanding merits revisiting well-established law on what bodily injury means in an insurance coverage setting. Many insurers disagree, arguing decades-old court decisions based on incomplete or incorrect facts cannot stand in light of what the insurers contend is new medical evidence.

This paper explores the fascinating concept of bodily injury and how it affects other important parts of liability policies. The paper further explores how the courts have dealt with the bodily injury concept from the 1980s through today, including the most recent challenges insurers have made to older cases interpreting the bodily injury concept. It also explores both sides of the bodily injury science and legal framework to explore the strengths and weaknesses in each, after over 30 years of spirited debate and vigorously contested litigation.

II. Bodily Injury Definition.

“Bodily injury” is defined in many liability policies. The defined term is then used in other key policy provisions, such as the occurrence definition, which bears on trigger of coverage, and the definitions of the products hazard and the completed operations hazard, which affect the limits of liability, or amount of coverage, available in many liability policies.

The starting point for resolution of insurance coverage issues in most jurisdictions is the policy language itself. See, e.g., Armstrong World Indus., Inc. v. Aetna Casualty & Sur. Co., 45 Cal. App. 4th 1, 39, 52 Cal. Rptr. 2d 690, 699 (1996). Many liability policies promise:

[to pay . . . all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . .

“Bodily Injury” in turn is defined as:

bodily injury, sickness or disease, including death at any time resulting therefrom.

The anomaly is that “Bodily Injury” is defined to include “bodily injury.” If only “sickness or disease” were at issue, the bodily injury concept would be relatively easy to handle. Sickness and disease are commonly understood to include some sort of physical impairment. “Bodily injury” is arguably a much broader term. For example, in California, Armstrong interpreted “bodily injury” in the context of asbestos-related disease to include subclinical changes to a cell or impairment of gas exchange in the lungs. The court determined that these events were enough to qualify as an injury under the policies.

As we will see, whether subclinical changes or impairment of gas exchange occur at the time of inhalation is debatable and, even when they do occur, some medical experts question whether they are, in fact, bodily injury.

For these reasons, some insurers now contend rulings such as the one in *Armstrong* are wrong. There is no bodily injury in many cases—even at the subclinical level—contemporaneous with exposure to asbestos, these insurers argue. Instead, insurers contend, based on current medical studies, most people exposed to asbestos are *never* injured. *If* injury results, it only does so many years—often decades—after exposure. This is the basis for arguments being made by some insurers that old bodily injury rulings were wrongly decided based upon an incomplete or incorrect factual record and must be revisited.

### III. The Bodily Injury Concept Affects Other Key Provisions of Insurance Policies and Coverage.

Whether there is bodily injury within the meaning of a liability policy may determine if there is coverage or not under a liability policy. If there is bodily injury, *when* it happens may determine which of several temporally consecutive insurance policies provide coverage. *When* bodily injury is determined to occur may also affect whether claims are subject to the aggregate limits of liability in a policy, or not.

Many liability policies provide coverage for policyholders who are held liable for causing bodily injury to others. For the bodily injury to be covered under the policy, typically the bodily injury must “occur[]” during the policy period.” Many liability policies provide coverage for policyholders who are held liable for causing bodily injury to others. For the bodily injury to be covered under the policy, typically the bodily injury must “occur[]” during the policy period.”

That is, if bodily injury occurs during the policy period, the insurer may cover (subject to other terms and conditions of the policy) the policyholder against the liability for causing that bodily injury. Conversely, if there is no bodily injury during the policy period, there is no coverage available to the policyholder for causing the bodily injury. Courts and insurance coverage lawyers refer to this concept as trigger of coverage. The insurance policies in place before there is bodily injury are not “triggered,” meaning they do not provide coverage; insurance policies in place when there is bodily injury present may be “triggered,” meaning they may provide coverage for the claim. *When* bodily injury occurs, therefore, is critical to *whether* a particular policy provides coverage, or not.

Bodily injury is also a critical concept to the limits of liability in many liability policies. Many liability policies have aggregate limits, or the maximum amount the policy will pay for any particular type of claim. Often the types of claims at issue are products hazard claims or completed operations hazard claims. The products hazard and completed operations hazard involve more than just timing of injury, but timing of injury is a critical component as to whether the hazards apply or not (if they do apply, claims falling within those hazards are typically subject to an aggregate limit in the policies). As we will see, the products hazard in many policies applies only if “bodily injury . . . occurs after physical possession of . . . [the] product has been relinquished to others.” The completed operations hazard in many policies only applies to “bodily injury [that] occurs after . . . operations have been completed . . . .” Thus, when the injury occurs is critical in determining whether these two hazards apply, and whether claims are subject to the aggregate limits of the policy.

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2 This language is typical of the occurrence definition in many liability policies.

3 Emphasis added.

4 Emphasis added.
A. The Bodily Injury Concept Affects Which Trigger of Coverage Applies.

The term “trigger of coverage” is not used in liability policies. Instead, it is shorthand that courts and insurance coverage lawyers have developed and used as they grappled with determining which of several policies in place over a period of time applied to insidious injury resulting from toxic exposures. Common triggers of coverage are the manifestation trigger of coverage, the injury-in-fact trigger of coverage, and the continuous trigger of coverage. These trigger concepts make liability policies in different policy periods potentially responsible for providing coverage for a single claim or group of claims against a policyholder. These three triggers of coverage most often potentially apply when the policyholder is responsible for injury over a period of time longer than the policy period of any one of several policies the policyholder bought. Trigger concepts have been applied most frequently to long-term or long-tail claims, including asbestos bodily injury claims and other injuries from toxic substances, where it is uncertain when a toxic exposure results in injury and to claims where the injuries involved continue to exist and develop long after they began.

It is much easier to understand these trigger concepts through examples than in the abstract. For purposes of illustrating these trigger concepts, assume the following facts. A person named John Smith worked for a company that performed work from time to time at a plant, owned by XYZ Corporation, which used asbestos insulation. John Smith worked at the plant at least one week a year from 1965 until 1975. In 1970, the asbestos John Smith inhaled began to cause slight, but demonstrable, diagnosable injury in his lungs. In 1995, a doctor diagnosed John Smith with mesothelioma (a cancer believed to be caused by exposure to asbestos) and the doctor linked John Smith’s cancer to his asbestos exposure while working at the plant.

John Smith sues the plant’s owner, XYZ Corporation, and alleges that XYZ Corporation is responsible for causing his cancer. XYZ Corporation turns to its insurance companies to defend the company against John Smith’s claim and to pay John Smith’s claim if he wins his lawsuit. But which insurance company or companies are responsible? The answer may depend on the trigger of coverage that applies to the insurance policies. Different jurisdictions apply different triggers of coverage and the result may vary significantly.

1. The Manifestation Trigger.

When a manifestation trigger of coverage applies to the claim, John Smith’s bodily injury is deemed to begin when he has symptoms of disease or the disease has manifested itself. In our example, John Smith

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5 See, e.g., Armstrong, 45 Cal. App. 4th at 39-48, 52 Cal. Rptr. 2d at 699-705. For the sake of completeness, a few courts have employed an exposure trigger of coverage. Id. As the name implies, policies on the risk when a person is exposed to a toxic substance apply and may cover the claim. Since the exposure trigger typically evaluates when a person was exposed to a toxic substance regardless of when injury occurs, the exposure trigger is largely beside the point in the present discussion, which focuses on injury.


7 See, e.g., Armstrong, 45 Cal. App. 4th at 41-43, 52 Cal. Rptr. 2d at 700-702.
worked at the plant from 1965 to 1975. Under this trigger theory, only those liability policies in place when he is actually demonstrating physical symptoms of disease (that is, when the disease manifests itself or is capable of detection) will potentially provide coverage. In our example, those policies will only be those in place after John Smith is diagnosed with mesothelioma: those in effect in 1995 and later. Under the manifestation trigger, no bodily injury is deemed to exist before the appearance of physical symptoms of disease, meaning there is no liability coverage available from policies in place between the time of exposure and 1995.

Since most liability insurance policies began to include exclusions for asbestos liabilities in the mid-1980s, application of a manifestation trigger of coverage would likely mean there is no insurance coverage available to XYZ Corporation for Mr. Smith’s claim. Thus, when disease manifests itself is critical in jurisdictions that apply a manifestation trigger of coverage, because after disease is detectable (has manifested) there may be coverage; before the disease manifests itself, there is no coverage.

2. The Injury-In-Fact Trigger.

In jurisdictions that apply an injury-in-fact trigger of coverage, John Smith’s bodily injury begins when it is shown that he is in fact injured and continues, presumably, until the date John Smith makes a claim or dies, whichever occurs first.\(^8\) The period of John Smith’s injury-in-fact (1970 when slight but demonstrable or detectable injury exists until date of his claim or death, whichever occurs first (assuming injury continues to occur through the period)) is the period of coverage that potentially provides coverage to XYZ Corporation for John Smith’s claim against XYZ Corporation. Thus, under certain court rulings, all policies (otherwise applicable to John Smith’s claim) issued to XYZ Corporation from 1970 until the earlier date of John Smith’s claim or death would potentially provide coverage to XYZ Corporation for the John Smith claim. In our example, the triggered policies are the ones issued to XYZ Corporation from 1970 to 1995.

Since this trigger of coverage focuses so intently on injury itself, it is the one that is arguably the most dependent on when medical science says bodily injury results from toxic exposure. In fact, as will be

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\(^8\) See, e.g., Armstrong, 45 Cal. App. 4th at 41-43, 52 Cal. Rptr. 2d at 700-702.
discussed below, three jurisdictions applying injury-in-fact trigger of coverage (California, Illinois, and New York) have been the ones where insurers have, to date, focused their challenges to older bodily injury rulings.

![Injury-in-fact trigger diagram](image)

**Figure 2**

3. **The Continuous Trigger.**

In some jurisdictions where the continuous trigger (sometimes also called the triple trigger) applies, John Smith’s bodily injury is *assumed* to occur the instant he first inhales asbestos, whether or not he actually suffers injury at that point.\(^9\) It is critical to note, however, that some jurisdictions that have applied the injury-in-fact trigger of coverage determined that the injury-in-fact analysis resulted in a continuous trigger.\(^10\) If a court applying an injury-in-fact trigger of coverage determines, as did the *Armstrong* court, that bodily injury occurs as soon as asbestos is inhaled into the lungs, those courts may apply a continuous trigger because they find, based on medical evidence, that injury in fact occurs immediately upon exposure to a toxic substance and disease continues to progress after exposure.\(^11\)

Thus, there is a key difference between jurisdictions that *assume* injury occurs upon exposure to a toxic substance and those that *find*, based on medical evidence, that injury in fact occurs upon exposure to a toxic substance. In jurisdictions that assume injury happens as soon as a person is exposed to a toxic substance, every liability policy (that otherwise provides coverage for John Smith’s claim) from the date of exposure until the earlier date of his claim or death, potentially provides coverage for his claim because injury is *assumed* to occur the instant asbestos is inhaled. In our example, the policies issued to XYZ Corporation from John Smith’s first exposure to asbestos at the XYZ Corporation plant until John Smith makes a claim or until his death, whichever occurs first, are triggered. Thus, the policies from 1965 to 1995 are triggered. Since this trigger of coverage implicates the greatest number of policies, it is the one many policyholders favor for toxic exposure claims.

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\(^10\) See, *e.g.*, *Armstrong*, 45 Cal. App. 4th at 41-43, 52 Cal. Rptr. 2d at 700-702.

\(^11\) *Id.*
But, there is a critical distinction between jurisdictions that have presumed injury upon exposure to toxic substances versus those that have applied a continuous trigger because the courts found, based on medical evidence, that injury in fact took place upon exposure. When courts assume injury occurs upon exposure, insurers’ factual challenges to those assumptions may be warranted, but require a change in the legal standard. On the other hand, if the courts in the 1980s and 1990s that decided injury in fact occurred based on medical evidence relied on medical evidence that is now obsolete, there is an opening for insurers to challenge those trigger of coverage rulings. If insurers can now show that many (or most) people exposed to toxic substances are never injured from a medical standpoint and those who do develop injuries only do so years or decades after exposure, there may be grounds for challenging older continuous, injury-in-fact trigger rulings that relied upon what insurers now contend was an incomplete or incorrect set of facts.

B. Bodily Injury is Also Key to the Products Hazard and Completed Operations Hazard in Liability Policies, and the Attendant Aggregate Limits of Liability.

The limits of liability in a liability insurance policy are critical to both the insurer and the policyholder. In claims with massive liability at stake (like a catastrophic loss, an environmental claim, or widespread toxic exposure claims), the limits of liability may place a cap on the total amount of coverage the insurer will provide for the loss. Policyholders argue that certain claims are not subject to the aggregate limits of policies, and that they have unlimited coverage for certain claims. See, e.g., Cont’l Cas. Co. v. Employers Ins. of Wausau (Keasbey), 60 A.D.3d 128, 871 N.Y.S.2d 48 (2008).

Coverage for claims alleging exposure to a policyholder’s toxic products or operations typically do, or do not, fall within the products hazard definition of a policy and / or the completed operations hazard of a policy. If the claim meets the definition of the products hazard and / or the completed operations hazard of the policy, the claim is usually aggregated under a liability policy, meaning there is a cap on the total amount the insurer will have to pay for that claim or like claims. On the other hand, if the claim does not meet the definition of the products hazard or completed operations hazard of the policy, the policyholder will have arguments that the claim is not subject to the aggregate limits of the policy, potentially meaning that the policyholder has coverage limited only by the per occurrence limits of the policy and not capped by the aggregate limits.
For bodily injury claims, one of the key determinative factors as to whether the products hazard or completed operations hazard (and, therefore, the aggregate limit of the policy) applies is when bodily injury occurs. Timing of injury, therefore, may determine whether the insurer has a cap on the coverage it owes or whether it arguably has no cap on the total amount of coverage it owes.

1. **The Products Hazard.**

Many liability policies define the term “products hazard.” In many of those policies, if a claim against the policyholder meets the elements set forth in the products hazard definition, that claim and similar claims are subject to an aggregate limit of liability, meaning there is a cap on the total amount of coverage the insurer owes for claims that meet the products hazard definition. When injury takes place is one of the key elements that determines whether the products hazard (and the aggregate limit) applies to a claim or group of claims.

The products hazard is typically defined along the following lines:

PRODUCTS HAZARD: includes all PERSONAL INJURY [Bodily Injury] . . . arising out of the INSURED’S PRODUCTS or reliance upon a representation or warranty made at any time with respect thereto, but only if the PERSONAL INJURY . . . occurs away from premises owned by or rented to the INSURED and after physical possession of such products has been relinquished to others.\(^\text{12}\)

Thus, assuming all other elements of the products hazard definition are met, timing of injury is still critical in determining whether the hazard, and attendant aggregate limit, applies, or not. If injury occurs while the policyholder still has physical possession of the product, policyholders argue that the claim for that injury does not meet the criteria of the definition and, therefore, may not be subject to the aggregate limits of the policy. On the other hand, if the injury occurs after the policyholder has given up physical possession of the product (e.g., it has sold and delivered the product to a customer), policyholders would be hard-pressed to dispute that the claim meets the products hazard definition and is, therefore, subject to the aggregate limits of the policy.

In coverage for toxic exposure claims, the product hazard can be a key term in a liability insurance policy, and timing of bodily injury is one of the most important aspects. For example, if a policyholder is a supplier and installer of a product with toxic qualities, like asbestos, when bodily injury is found to occur can determine whether a claim meets the products hazard definition (and is, therefore, subject to a policy’s aggregate limits). Suppose the policyholder has sold and installed asbestos. A claimant alleges or proves he was exposed to the asbestos as the policyholder was installing the asbestos at a commercial facility. Assuming all the other elements of the definition of the products hazard are met, timing of injury is still key. If a court, based on medical evidence, determines the claimant was injured the second he inhaled asbestos (that is, when the policyholder was still installing it), policyholders would argue that the claim may not meet the products hazard definition because the injury happened before the policyholder relinquished physical possession of the product.

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\(^\text{12}\) Emphasis in italics added.
On the other hand, if the court finds that most people are never injured by asbestos exposure and, those who are injured are only injured many, many years or decades after exposure, then no bodily injury can have occurred until long after the policyholder has relinquished physical possession of the product. Under the products hazard definition (assuming all the other elements of the definition are met), because bodily injury takes place (if at all) only long after exposure, the claim meets the products hazard definition because injury exists only after (long after) the policyholder has relinquished physical possession of the product. Such claims are typically subject not only to the products hazard because they meet the requirements of the products hazard definition but also to the aggregate limits applicable to products hazard claims.

2. **The Completed Operations Hazard.**

The completed operations hazard is similarly significant. If claims meet the elements of the completed operations hazard definition, they are subject to the aggregate limits of many policies. If the claim does not meet the elements of the definition, policyholders may argue that the claims are not subject to the aggregate limits. As with the products hazard, *when* injury occurs is critical.

Many liability policies define the completed operations hazard along the following lines:

**COMPLETED OPERATIONS HAZARD . . .**

Includes PERSONAL INJURY [Bodily Injury] . . . arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the PERSONAL INJURY . . . *occurs after such operations have been completed* or abandoned and occurs away from premises owned by or rented to the INSURED.

[. . . .]13

Thus, timing of injury is also critical in the determination of whether the completed operations hazard applies, or doesn’t. If it does apply, the claims subject to the completed operations hazard are typically aggregated under many liability policies. If the hazard does not apply, the claims may not be subject to the aggregate limits of the policy, opening up arguments on the policyholder side that there is more coverage available than provided for by the aggregate limits. If (assuming all other requirements of the completed operations hazard are met) injury occurs before a policyholder’s operations are completed, arguably any claims arising from those operations are not subject to the completed operations hazard and, therefore, are not subject to the policy’s aggregate limits. On the other hand, if the claims arise from injuries that occur after the policyholder’s operations are completed, the claims may be subject to the completed operations hazard, and aggregate limits of the policy and, therefore, may be aggregated. This is critical because, so goes the insurer-side argument, if a person exposed to a toxic substance medically speaking can only suffer bodily injury many years after exposure to a toxic substance (that is, many years after the policyholder’s operation with the toxic substance is completed), all such claims are subject to the completed operations hazard (and, the attendant limits).

13 Emphasis in italics added.
IV. State of the Medical Evidence in the 1980s and 1990s, and Changes in the Medical Understanding Today.

Several courts heard and evaluated medical evidence in the 1980s and 1990s concerning how asbestos exposure affects the body.\textsuperscript{14} Some courts, including the California, Illinois, and Pennsylvania courts, determined, based on the medical evidence presented to them at trial, that bodily injury in fact resulted immediately upon exposure to asbestos. For example, \textit{Armstrong}, in determining a continuous trigger should apply because injury in fact occurred upon inhalation of asbestos fibers, relied upon several factual findings. \textit{Armstrong} found, based on the medical evidence presented to the trial court, as follows:

We adopt the trial court’s summary of the medical evidence: “Several diseases may result from exposure to asbestos. The most prevalent are asbestosis, bronchogenic carcinoma, and mesothelioma. Asbestosis is a form of lung disease characterized by the permanent deposition of asbestos fibers in the lungs and the resultant scarring of the lungs’ alveoli (air sacs) and interstitium (the membrane through which gas exchange occurs between the alveoli and the blood). In the context of asbestos inhalation, bronchogenic carcinoma (lung cancer) refers to a malignant condition of cells which arises as the result of tissue scarring caused by asbestos. Mesothelioma is, similarly, a cancerous condition. It arises at the site of asbestos-caused scarring within the visceral pleura (the lining which covers the outer aspect of the lung) or the peritoneum (the lining of the abdominal cavity).

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

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

“Fibrosis within the lungs occurs as part of the body’s reaction to the inhalation of foreign particulate matter. The indestructible nature of asbestos fibers which

helped make asbestos such an attractive construction material makes it equally as detrimental to the body once inhaled. Once deposited in the lungs, the fibers tend to remain in the alveolar region and the lungs’ normal clearance mechanisms are ineffective.

“One clearance mechanism—and a key to the fibrotic process—Involves a specialized form of white blood cell known as a macrophage. These cells naturally respond to foreign matter within the body and attempt to eliminate this matter from the body by engulfing (i.e., phagocytozing) and digesting the matter with their own secretions and enzymes. This process occurs on the cellular level, but is frustrated and unsuccessful in the context of asbestos fibers because of the macrophages' inability effectively to engulf and digest the fibers.

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

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

“This process—Inhalation of asbestos fibers, the inflammatory reaction, and the resulting fibrosis—Characterizes the disease asbestosis. When the fibrosis is extensive enough, i.e., when enough alveolar / capillary units have become fibrosed, clinical symptoms of asbestosis become apparent. Although there is no universal threshold for when such symptoms will become apparent, it is estimated that at least 100 million of the 300 million alveolar / capillary units in the human body must be affected for a clinical diagnosis to occur.

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


These, without question, are detailed findings of fact that policyholders have argued, and will continue to argue, justify early decisions equating asbestos exposure with injury that fulfills the bodily injury requirement of liability policies. On the other hand, insurers contend much of the medical science has changed since the courts first grappled with the bodily injury concept in the 1980s and 1990s.
In the 1980s / 1990s, some medical evidence suggested the cancer disease process began upon a person’s first exposure to asbestos. Today, evidence indicates development of cancer is a multi-stage process and that not all (or even most) asbestos exposures result in cancer or other injuries. Any initial reactions to toxic exposure are completely normal defense mechanisms the body employs and are not in a medical sense injury. It further tends to indicate that any early bodily injury (which itself may not occur for many years) is not the same injury for which claimants ultimately seek compensation.

In the 1980s / 1990s, the medical evidence suggested that the body’s natural defense mechanisms were ineffective in clearing inhaled asbestos from the body. Today, medical evidence indicates that the body effectively clears asbestos from the body’s airways in many exposures, meaning asbestos does not necessarily remain in the body even after many exposures.

In the 1980s / 1990s, the role of antioxidants was poorly understood as a defense to toxic exposure. Today, studies indicate antioxidants are an effective defense against asbestos exposure.

In the 1980s / 1990s, certain experts believed exposure to any amount of asbestos caused bodily injury. Today, studies indicate the risk of asbestos disease only increases in relation to the amount of asbestos (the dose) a person inhales. The more asbestos inhaled, the greater the risk disease will result.

V. There Have Been Recent Challenges to Old Bodily Injury Rulings.

In the past few years, insurers have contended that the bodily injury rulings and findings the courts employed in the 1980s and 1990s are now demonstrably inaccurate, based on newer medical studies. Courts in at least three states have been asked to, and have, revisited their timing of injury rulings for asbestos bodily injury claims. In Illinois, the court declined to change the trigger of coverage. In New York, the trial court declined to change New York’s timing of injury analysis, but the intermediate appellate court changed longstanding New York law on when asbestos bodily injury takes place for purposes of insurance coverage. As of the writing of this paper, the California courts in two separate actions have been asked to revisit trigger of coverage for asbestos bodily injury claims, but no decisions have yet been rendered.

A. Crane (Illinois) Declined to Change Illinois’s Triple Trigger.

In 1987, the Illinois Supreme Court determined an injury-in-fact trigger of coverage would apply to asbestos bodily injury claims in Zurich Ins. Co. v. Raymark Indus., Inc., 118 Ill. 2d 23, 514 N.E.2d 150, 112 Ill. Dec. 684 (1987). Like Armstrong, the trial court in Zurich heard extensive medical evidence, which the intermediate appellate court and the Illinois Supreme Court adopted. Zurich, 118 Ill. 2d at 34-

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15 Interestingly, Zurich reached a somewhat different result than Armstrong in terms of when bodily injury existed. Id. Zurich determined there was injury-in-fact at exposure, during years the claimant is sick, and through the duration of the disease. Id. Policies in effect during those years are triggered. Id. Zurich, however, held that policies in effect during the latency period, where there was no exposure or disease, were not triggered. Id.
48, 514 N.E.2d at 155-161, 112 Ill. Dec. at 689-695. The court determined the policy language “bodily injury, sickness, or disease” mandated application of the injury-in-fact trigger. Id. The key was bodily injury: if bodily injury in fact existed, there was potentially coverage for that claim. Id.

Twenty years after Zurich was decided, both the insurers and the policyholder asked the Circuit Court of Cook County, Illinois to revisit the trigger issue in John Crane, Inc. v. Admiral Ins. Co., No. 04 CH 8266 (Cir. Ct. of Cook County, Ill.). (The relevant decision is the Circuit Court’s December 20, 2007 Memorandum Opinion and Order (the “Crane Order”).)

The insurers argued a complex “surrogate continuous trigger” should apply. Id. That trigger scheme required one trigger for asbestosis and a different one for malignancies (mesothelioma and lung cancer). Id. The insurers argued the trigger period for asbestosis claims should begin when the claimant first inhales fibers and continues on a pro rata basis until diagnosis (though the insurers argued asbestosis did not begin until the claimant inhaled a threshold amount of fibers). Id. at 8-9. The insurers argued for a similar pro rata trigger period for the six years preceding death for mesothelioma claims and ten years before death for lung cancer claims. Id.

The policyholder, on the other hand, sought to expand the Zurich trigger of coverage further. The policyholder advocated for a continuous trigger, more or less identical to that in Armstrong. Crane Order at 7-8. The policyholder argued Zurich was wrongly decided because a claimant suffers injury not only upon inhalation, but also through the latency period. Id.

After trial, the Circuit Court issued the Crane Order. The Court was plainly frustrated with the evidence the parties put on, finding it conflicting and confusing. Since neither party had shown, based on the medical evidence, that Zurich was wrongly decided, the Circuit Court found no reason to depart from the Zurich trigger. In other words, the Circuit Court found the evidence presented to it was the same as the evidence presented to the Zurich court: bodily injury existed at exposure, when disease developed, and through the duration of the disease. The continuous trigger the policyholder advocated was unjustified because there was no injury shown during the latency period for the diseases. The Court similarly found the insurers had failed to present evidence substantiating its “surrogate continuous triggers.” Thus, both the insurers and the policyholder lost their respective trigger arguments in Crane because, in the opinion of the Court, they failed to prove on the facts that the state of the medical knowledge had changed sufficiently to justify departing from Zurich.

B. Keasbey (New York) Changed Timing of Injury Law Favorably to Insurers.

In Frontier Insulation Contrs., Inc. v. Merchants Mut. Ins. Co., 91 N.Y.2d 169, 173-174, 690 N.E.2d 866, 868, 667 N.Y.S.2d 982, 984 (1997), New York’s high court (the Court of Appeals) tackled the “narrow issue [of] whether the ‘products hazards’ exclusions in the insurance policies . . . relieve . . . insurers of the duty to defend their insured, an asbestos insulation contractor . . . .” Frontier Insulation, 91 N.Y.2d at 173-174, 690 N.E.2d at 868, 667 N.Y.S.2d at 984. The Frontier Insulation court suggested injury resulted upon inhalation of asbestos for purposes of determining timing of injury and whether the products hazard applied. Frontier Insulation, 91 N.Y.2d at 177-178, 690 N.E.2d at 870, 667 N.Y.S.2d at 986. Thus, while not dealing directly with a trigger of coverage, the timing of the asbestos bodily injury was critical to determining the coverage issue involved and Frontier determined injury could be caused upon inhalation (at least in the duty to defend context). Id.
Cont'l Cas. Co. v. Employers Ins. of Wausau (Keasbey), 60 A.D.3d 128, 871 N.Y.S.2d 48 (2008) also involved timing of injury as it applied to the products hazard in the policies. Timing of injury was critical because if asbestos injury always occurred many years after the policyholder relinquished physical possession of its products to a third party, all claims were subject to the exhausted products hazard aggregates of the policies. In Keasbey, the proponents of coverage argued Frontier Insulation controlled and that it required a ruling that asbestos injuries occurred as soon as claimants inhaled asbestos. The Keasbey trial court (the Supreme Court) agreed with the proponents of coverage.

New York’s intermediate court of appeal (the Appellate Division) reversed. The court rejected or distinguished Frontier Insulation on several grounds, among them the medical evidence presented to the trial court in Keasbey. New York’s Appellate Division found that injury existed, if at all, only many years after exposure to asbestos. Importantly, as discussed below, in Keasbey, the Appellate Division placed the burden of proof on the proponents of coverage to establish when injury occurred.

Claimants in the instant case offered no evidence whatsoever that any of them sustained an injury-in-fact in any one of the policy periods arising out of “ongoing operations.” Not surprisingly, since the burden on claimants to prove so would be insurmountable given not only the absence of evidentiary material, but the difficulty if not impossibility of pinpointing when any subclinical tissue damage tipped over into actual impairment. [. . . .]

[. . . .]

Thus, each claimant in the instant case would have to produce medical evidence that the point where asbestos fibers overwhelmed the body's defenses happened in one of the 17 years of the subject insurance policies. Further, and crucial to recovery under non-products / operations coverage, they would have to establish that the injury was sustained before a contracting operation was completed. This means that a claimant would have to show one of two sets of conditions occurred: (1) contemporaneous injury, that is, injury-in-fact stemming from an ongoing operation in the same policy year, but the probability of such a situation appears highly unlikely given the absence of evidence that any Keasbey installation project lasted long enough for the sort of lengthy intensive exposure required for asbestosis to develop in the same year; or, possibly (2) injury-in-fact arising in the policy year but as a result of exposure during an ongoing operation years, maybe decades, prior. [. . . .]

[. . . .]

This would be impossible for claimants who typically were “bystanders,” that is tradesmen and utility workers who worked alongside Keasbey installers during installation projects and then continued working in the plant after operations were completed, and were thus exposed to the installed asbestos.

Indeed, no such evidence was presented at trial for any group of claimants . . . .
Keasbey, 60 A.D.3d at 148-149, 871 N.Y.S.2d at 63-64. Thus, Keasbey is important because (1) it accepted the insurers’ evidence on timing of asbestos injuries in the face of established insurance coverage law to the contrary from New York’s high court and (2) placed the burden of proof on the policyholder to establish when injuries occurred for purposes of determining whether coverage existed.

C. Two California Courts are Considering Whether to Revisit California’s Continuous, Injury-in-Fact Trigger of Coverage.

There are two challenges to the bodily injury / trigger of coverage concepts now pending in the California courts. In Plant Insulation Co. v. Fireman’s Fund Ins. Co., No. CGC-06-448618 (San Francisco, California Superior Court) and In re: Thorpe Asbestos Coverage Cases, No. JCCP No. 4458 (Los Angeles, California Superior Court), challenges to the Armstrong injury-in-fact continuous trigger of coverage are underway. Those issues were tried in the Plant case in the summer of 2012; and are scheduled to be tried in the Thorpe case in early 2013. There have not been substantive rulings on the bodily injury concept or the trigger concept in either case as of the writing of this paper.

As discussed above, the First District of California’s Court of Appeal in Armstrong determined an injury-in-fact trigger of insurance coverage was applicable to asbestos bodily injury (and wrongful death) claims. Specifically, the Court of Appeal affirmed the trial court’s conclusion “that a continuous trigger should apply . . . through an injury-in-fact analysis.” Armstrong, 45 Cal. App. 4th at 43, 52 Cal. Rptr. at 702. The appellate court did not “deem[] asbestos injury to be continuous [but instead] relied upon medical evidence to make factual findings on the physiological processes that actually occur upon inhalation of asbestos fibers and continue until death.” Armstrong, 45 Cal. App. 4th at 44, 52 Cal. Rptr. 2d at 702. The appellate court relied upon “the trial court’s factual findings . . . , made after consideration of extensive medical testimony [that] amply support[s] the conclusion that injury [from asbestos exposure] actually occurs upon exposure and continues until death.” Armstrong, 45 Cal. App. 4th at 47, 52 Cal. Rptr. 2d at 704-705. The appellate court noted that the trial court found “these processes begin almost immediately upon inhalation and deposition of asbestos fibers into the lung, and slowly and continuously impair new portions of the lung tissue throughout one’s life, even after exposure to asbestos ceases.” Armstrong, 45 Cal. App. 4th at 44, 52 Cal. Rptr. 2d at 702, n.13.

Based on the trial court’s factual finding from the medical evidence that asbestos injures the body almost simultaneously with inhalation, the appellate court determined injury existed from inhalation (or very shortly thereafter) and continued to exist (or get worse) until death. Armstrong, 45 Cal. App. 4th at 35-50, 52 Cal. Rptr. 2d at 697-707. From that determination, the appellate court held bodily injury, within the meaning of the third party liability policies, existed from exposure to death. Id. Thus, every policy whose period coincided with injury was triggered for coverage purposes. Id. The injury-in-fact finding, therefore, resulted in a continuous trigger, meaning every policy in place from first exposure to death potentially provided coverage to the policyholder. Id.

In both Plant and Thorpe, time will tell if the insurers are successful in their challenges to what amounts to bodily injury. It remains to be seen how the bodily injury concept and the trigger of coverage concept will fare in the Plant and Thorpe actions in the California courts, based on their challenges to long established precedent set down in Armstrong.
VI. Analysis: Will the Insurers’ Challenges be Successful?

As we have seen, the bodily injury concept in liability insurance policies is critical. Depending on if or when bodily injury is determined to occur, the bodily injury concept controls whether no policies, a few policies, or many policies potentially apply to a long-term toxic exposure injury. The bodily injury concept also may control whether claims are subject to an aggregate limit in a policy or whether there is potentially coverage available beyond the aggregate limit. Did many of the courts get it right in the 1980s and 1990s that asbestos (and, arguably, by extension, other toxic substances) cause injury immediately upon exposure? Or, as many insurers contend, have medical studies since the 1980s and 1990s demonstrated that for most exposed individuals injury never occurs and, if it does, it only happens many years after exposure? At bottom, are there really grounds now to re-evaluate certain prior bodily injury rulings (as many insurers contend) or should those rulings stand (as many policyholders contend)?

A. Is the Medical Evidence Really New or Changed?

Some insurers contend the medical understanding of the onset and development of insidious disease resulting from toxic exposures has changed significantly since the 1980s and 1990s, when many of the early bodily injury court decisions were fashioned. As noted above, insurers contend that the early bodily injury rulings must be revisited because medical science now understands that not all, or even most, exposures to toxic substances result in bodily injury and that certain bodily defense mechanisms—such as the role of anti-oxidants—were poorly or not understood when the original bodily injury decisions were made.

Policyholders should be expected to contend that the medical evidence is not changed or, if it has, it does not warrant revisiting sound, time-tested legal decisions on what constitutes bodily injury under liability policies. Policyholders can be expected to argue that the insurers’ current arguments are attempts to rehash old arguments the insurers made, with some limited success, in the 1980s. For example, in Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982), the insurers convinced the United States First Circuit, in 1982, to adopt many of the arguments the insurers are seemingly pressing now:

- The common, ordinary meaning of the language in the insurance policies supports a manifestation trigger. See, e.g., Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982). Subclinical injuries resulting from toxic exposure are not “bodily injury” as used in the insurance policies. Id.

- As used in the policies, “bodily injury” is distinguishable from “sickness or disease.” “[B]odily injury” is an injury caused by external violence or impact. Id. While asbestosis or other disease resulting from toxic exposure may be “sickness or disease,” it is not an injury caused by external violence or impact. Thus, because toxic exposure is not in the nature of a violent impact, the argument goes, only sickness of disease can trigger coverage for toxic exposures.

- Moreover, “To state that the disease occurs when these sub-clinical alterations take place, where, as here, the disease does not inevitably or even usually result from the sub-clinical changes, is to subvert the plain meaning of disease and to read the term entirely out of the policy.” Id. at 19-20.

In other words, while some insurers argue strenuously that new medical findings require that courts revisit old bodily injury rulings, policyholders can be expected to argue that there is little or nothing new—and certainly not anything that should require courts to reevaluate longstanding bodily injury rulings.
B. Burden of Proof May Be a Key Issue.

One key issue in the fight over what bodily injury is (and when it occurs) will likely be burden of proof. Insurers will contend that the policyholder must demonstrate when injury occurred to bring a claim within coverage if the policyholder can do so. Policyholders can be expected to argue that, because the insurers are relying upon a restriction on coverage (aggregate limits), the insurers should have the burden of proof to demonstrate when bodily injury occurs. Both the Crane case and the Keasbey case demonstrate just how important the assignment of the burden of proof can be. Armstrong is also instructive. In many cases, the fight over burden will be as important as the fight over the substantive law. The party stuck with the burden of proof will have its work cut out for it.

In Crane, the Illinois trial court found that neither party had met its burden of proof. In upholding the Illinois Supreme Court’s injury-in-fact ruling in Zurich, the trial court expressed its frustration with the medical evidence the insurer and the policyholder put on in the Crane trial:

Quite simply, what this Court expected to have heard was the testimony that what medical science knew during the [Zurich] trial in the 1980’s . . . was so different twenty years ago that the findings of Zurich should be revisited. Such testimony was not produced in this case. If anything, the testimony before this Court supported the triple trigger of the Zurich case.

Crane Order, at 19.

Similarly, burden of proof was an important issue and decision in Armstrong. The court placed a relatively low burden on policyholders to establish that injury existed and then shifted the burden to the insurers to show that the injury did not take place during their policy periods.

For purposes of determining insurance coverage, absolute precision is not required as to when the injury occurred. “[A]ll that is necessary is reasonably reliable evidence that the injury, sickness, or disease more likely than not occurred during a period of coverage . . . .”

Armstrong, 45 Cal. App. 4th at 46-47, 52 Cal. Rptr. 2d at 704 (citations omitted).

After setting the relatively low burden for policyholders, Armstrong then shifted the burden to the insurers to demonstrate the timing of exposure. Armstrong, 45 Cal. App. 4th at 62-63, 52 Cal. Rptr. 2d at 715. The court held:

[A] policyholder’s policies are triggered from the claimant’s first exposure to the policyholder's products. An insurer has no liability if its policy expired before the claimant was exposed to the policyholders product. We emphasize, however, . . . the claimant will be presumed to have been exposed to asbestos products of all defendant-manufacturers, and the burden is on the insurer to prove that the claimant was not exposed to its policyholders product before or during the policy period.

Id. Thus, with respect to when a claimant was exposed to a particular defendant’s product, Armstrong presumes the claimant was exposed during each insurer’s policy period and shifts the burden of proof to
the insurer to show the claimant was only exposed after the expiration of that insurer’s coverage for the insurer to escape a coverage obligation. *Id. Armstrong*, implicitly support the proposition (at least as it relates to individual asbestos bodily injury claims) that the insurer must demonstrate timing of injury that would take claims outside of the policies’ coverage to prevail on trigger of coverage.

Thus, burden of proof could be critical.

C. The Legal Framework: Bringing the Bodily Injury Concept in Insurance Consistent with Other Bodies of Law Versus Coverage Following the Policyholder’s Liability.

Insurers can also be expected to argue that the insurance bodily injury concept needs to be brought into line with other substantive bodies of law on similar issues. For example, in California, when a cause of action accrues for a determination of whether Proposition 51 applies is determined by looking to the date when the claimant’s disease is diagnosed or when the claimant otherwise discovers illness or injury. *Buttram v. Owens-Corning Fiberglas Corp.*, 16 Cal. App. 4th 520, 540, 941 P.2d 71, 83-84, 66 Cal. Rptr. 2d 438, 450 (1997). To determine when a cause of action accrues for statute of limitations purposes, California starts the clock ticking when the claimant discovers or reasonably should have discovered the claimant has a compensable injury. *Buttram*, 16 Cal. 4th at 530-531, 941 P.2d at 77, 66 Cal. Rptr. 2d at 444.

By way of example, a possible attack on *Armstrong* might be to argue insurance coverage is triggered only upon discovery of disease or when the claimant should have determined the claimant has a compensable injury, as California law does with Proposition 51 and statute of limitations issues. As *Buttram*, a California Supreme Court case decided in 1997, cautioned:

> it is important to note that such a cause of action [relating to asbestos bodily injuries] may be viewed in the eyes of the law as “accruing” for different purposes on different dates, depending on the purpose for which the accrual determination is sought.

For example, in the context of third party liability insurance coverage, some courts have invoked a relatively early accrual date, *i.e.*, the “injury-in-fact” “trigger of coverage,” which looks to a subclinical injury, proved in retrospect by medical testimony to have existed at the relevant time, as the point at which third party liability insurance coverage is triggered under a liability insurance policy. *(See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 676–677, fn. 16, 42 Cal. Rptr. 2d 324, 913 P.2d 878; American Home Products Corp. v. Liberty Mut. Ins. (2d Cir.1984) 748 F.2d 760, 766.)*

*Buttram*, 16 Cal. 4th at 530, 941 P.2d at 77, 66 Cal. Rptr. 2d at 444. That notwithstanding, some insurers contend that the standard for statutes of limitations ought to apply to insurance coverage issues, such that things like subclinical injury do not trigger liability policies’ coverage, and that bodily injury should be a consistent concept in the law.

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16 Proposition 51 limited liability for non-economic damages to the proportion of damages equal to the defendant’s percentage of fault.
Policyholders, however, will contend liability insurance coverage should follow liability. Policyholders will likely argue that they are stuck with difficult liability standards under tort law, but that is the reason they bought liability insurance. In other words, liability insurance should follow the liability the insurance was purchased to protect against. The reasons for this are tied up in tort causation doctrine. For example, under California law, a plaintiff suing on a strict products liability theory for asbestos disease need not even show that a particular defendant’s product caused the disease. *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 982-983, 941 P.2d 1203, 1223, 67 Cal. Rptr. 2d 16, 36 (1997). Instead:

[i]n the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendants defective asbestos-containing products, [note omitted] and must further establish in reasonable medical probability that a particular exposure or series of exposures was a “legal cause” of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant’s product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendants product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiffs or decedents risk of developing cancer.

Thus, it is enough in a strict products liability action that the plaintiff show an increased risk of disease resulting from exposure to the defendant’s product. Note well, the plaintiff need not show actual bodily injury, sickness, or disease resulting from the defendant’s product to recover in tort.

Insurers, on the other hand, will argue that the standard for insurance coverage is very different. The insurance contract (the policy), when applied as written, insures against bodily injury, sickness, or disease, *not risk of those things*. Thus, when the question turns from tort to insurance coverage, the analysis changes from risk to a physiological reaction. All that is found in the tort action is increased risk (not bodily injury, sickness, or disease) and risk does *not* trigger insurance coverage under the contract (policy), which requires bodily injury.

Thus, insurers will argue, it does not necessarily follow that a defendant held liable in tort for its asbestos product is entitled to insurance coverage because the defendant can be held liable if it only increased the risk to the plaintiff. There is no requirement that the plaintiff prove that a particular defendant caused that plaintiff’s injury, as long as the plaintiff proves the defendant’s product was a substantial factor in the development of the plaintiff’s disease. This is plainly not the coverage standard where a plaintiff must prove actual bodily injury, sickness, or disease under *Armstrong*, not simply risk.

In sum, many insurers will argue, as they have for decades, that only “Bodily Injury” is covered and that insurance law should be brought into line with other bodies of law such as statutes of limitations. Policyholders will argue, as they also have for decades, that liability insurance coverage follows the liability the courts foist upon them in tort actions and that many of the earlier bodily injury coverage decisions got it right.
D. Are the Bodily Injury Arguments Anachronistic and Obsolete?

Whether bodily injury and trigger issues such as these are still relevant—or will long remain relevant—is a valid question. After all, and as is evident from this paper, most of the jurisprudence on this issue arose from insurance coverage litigation over asbestos liabilities. While it is foolhardy to hazard a guess on how much longer asbestos litigation will last, the topic remains relevant, though the science will have to adapt to the underlying liabilities.

Predictions that asbestos litigation will end because of the downward side of the bell curve of asbestos exposures resulting in disease have abounded since the 1980s. Prediction after prediction of the endpoint for asbestos litigation has missed the mark. Since asbestos tort litigation is arguably driven by a moneymaking business model as opposed to medical realities of exposure and related disease, as long as there is money to be made by bringing asbestos claims, it is probable they will continue to be filed.

Even if asbestos tort litigation ended tomorrow, the bodily injury concepts, including how they affect trigger of coverage and the limits of liability in liability insurance policies, will continue to be relevant. The insurance coverage issues were likely litigated in the asbestos context because there was—and still is—so much money at stake. The lessons learned and the principles developed by the courts, however, may well have broader application. There are still insidious disease claims resulting from alleged exposure to silica, benzene, lead, September 11, 2001 exposures, etc. The list goes on and on. Thus, in the improbable event that asbestos litigation ends tomorrow, the bodily injury concepts debated, litigated, developed, and decided—mainly in the context of insurance coverage litigation over asbestos liabilities—will continue to be relevant for decades to come.

VII. Conclusion: The Final Chapters on the Bodily Injury Debate Are Yet to be Written.

What constitutes “Bodily Injury” under the meaning of a liability policy has vexed parties and the courts for three decades. There have been, almost without question, changes in the medical understanding as to how and when toxic exposures result in insidious disease. Whether those changes warrant courts to reevaluate decisions bearing on the bodily injury analysis made, in some cases, decades ago, is at the heart of the current bodily injury dispute. While some insurers contend the medical science now shows that many—maybe most—toxic exposures never result in disease—and, by extension, compensable injury, policyholders argue, as they always have, that the purpose for which they bought liability coverage was to protect against liability and that insurers should defend and indemnify against the claims policyholders are subject to under tort law. There are, in the final analysis, issues the courts must still decide as to what bodily injury is, when it occurs, and how it affects the application of liability coverage to toxic exposure claims. The final chapters wait to be written.