

NO. A06-1229

State of Minnesota
In Court of Appeals

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff,

vs.

A.P.I., INC.,
Respondent,

vs.

ONEBEACON INSURANCE COMPANY, as successor to
 GENERAL ACCIDENT INSURANCE COMPANY,
Appellant,

vs.

THE HOME INSURANCE COMPANY, FIREMAN'S FUND
 INSURANCE COMPANY, GREAT AMERICAN INSURANCE
 COMPANY, CONTINENTAL CASUALTY COMPANY,
 TRANSPORTATION INSURANCE COMPANY, and
 UNITED STATES FIRE AND INSURANCE COMPANY,
Third-Party Defendants.

**AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS
 LITIGATION ASSOCIATION IN SUPPORT OF APPELLANT
 ONEBEACON INSURANCE COMPANY**

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INTERESTS OF *AMICUS CURIAE*

Amicus curiae Complex Insurance Claims Litigation Association (“CICLA”)

respectfully submits this brief in support of the Appellant OneBeacon Insurance Company.¹ CICLA is a trade association of major property and casualty insurance companies.² CICLA members provide a substantial percentage of the liability coverage written in Minnesota. In so doing, CICLA members have entered into general liability and other insurance contracts in Minnesota, and throughout the nation, similar or identical to those at issue in this appeal. Accordingly, CICLA’s members have a profound stake in the outcome of this appeal.

CICLA believes that the district court, in its jury instructions, improperly applied Minnesota law on the availability of extracontractual damages absent the commission of an independent tort by an insurer, erroneously expanded Minnesota law on the scope of an insurer’s fiduciary duties, and applied the improper standard of proof for lost policies. CICLA seeks to assist this Court in resolving these important insurance questions by providing the Court with a national perspective on the issues presented and demonstrating their importance to the insurance mechanism. Thus, CICLA seeks to fulfill “the classic

¹ Pursuant to Minn. R. Civ. P. 129.03, CICLA certifies that its counsel authored this brief in whole, and that no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

² CICLA submits this brief on behalf of the following members: Chubb & Son, a Division of Federal Insurance Company, Farmers Insurance Group, Selective Insurance Company of America, and Swiss Reinsurance America Corporation. CICLA does not submit this brief on behalf of St. Paul Fire & Marine Insurance Company and The Travelers Indemnity Company, affiliates of which were parties to this action, but have settled all claims with A.P.I., Inc. pursuant to settlement agreements that were authorized and approved by the bankruptcy court. CICLA also does not submit this brief on behalf of AIG Insurance Companies, Liberty Mutual Insurance Group or Zurich American Insurance Company.

role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).³

STATEMENT OF THE CASE

Respondent, A.P.I., Inc. ("API"), was sued by approximately 1200 claimants who alleged bodily injuries sustained as a result of asbestos products distributed and installed by API. API tendered the claims to several of its insurers. Following the tender, St. Paul Fire & Marine Insurance Company sought a declaratory judgment that it was not responsible for defending API in the asbestos actions. API then brought third-party claims against OneBeacon Insurance Company as successor to General Accident Insurance Company ("OneBeacon") as well as several other liability insurers. Neither API nor OneBeacon could locate the insurance policies under which API claimed that it was insured. API settled its claims against all other insurers aside from OneBeacon.

API tried its claims against OneBeacon before a jury in Ramsey County District Court. The district court adopted the jury's special verdict, finding that OneBeacon insured API for liability from 1958 through 1961, 1962 through 1964, and 1964 through 1966. The jury also found that the policies issued during this time contained substantially

³ Recognizing the value of CICLA's contributions, Minnesota federal and state courts have allowed CICLA (formerly the Insurance Environmental Litigation Association) to submit *amicus curiae* briefs on many occasions. See, e.g., *Bituminous Cas. Corp. v. Tonka Corp.*, 9 F.3d 51 (8th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994); *Bureau of Engraving, Inc. v. Fed. Ins. Co.*, 5 F.3d 1175 (8th Cir. 1993); *In re: Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405 (Minn. 2003); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997); *Anderson v. Minn. Ins. Guar. Ass'n*, 534 N.W.2d 706 (Minn. 1995); *SCSC Corp. v. Allied Mut. Ins. Co.*, 533 N.W.2d 603, *clarified* 536 N.W.2d 305 (Minn. 1995); *Minn. Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990).

the same wording as the policy forms used by OneBeacon's predecessor during the period in question. Additionally, the jury found that OneBeacon acted in bad faith, breached its fiduciary duty, and made false representations to API, but that API did not rely on the representations. The jury awarded damages to API of \$27,573,824 for breach of contract, \$10,000,000 for bad faith denial of coverage, and \$15,000,000 for breach of fiduciary duty. OneBeacon files this appeal.

SUMMARY OF THE ARGUMENT

The district court erred in entering judgment on the jury's awards of \$10 million for bad faith and \$15 million for breach of fiduciary duty. Minnesota law does not provide for extracontractual damages in the insurance context absent an insurer's liability for an independent tort. Because the jury did not find OneBeacon liable for an independent tort, the district court erroneously awarded extracontractual damages.

The district court, in its instructions to the jury, also improperly expanded the scope of an insurer's fiduciary duties. Under Minnesota law, special circumstances, aside from the existence of an insurance contract, are necessary to create a fiduciary relationship between an insurer and an insured. The district court's assumption of a fiduciary relationship between API and OneBeacon in its jury instructions thus improperly altered and expanded Minnesota law.

The district court also erred in calculating API's contractual damages. As recognized previously by this Court, an insured's recovery for breach of contract is limited to the amount of its loss. Here, API was not forced to pay its own defense costs

in the underlying litigation, as its other insurers provided for its defense. Therefore, any such loss should not have been considered in the calculation of contractual damages.

The district court also erred in instructing the jury that a preponderance of the evidence standard applied to API's lost policy claims. Minnesota law mandates that proof of lost instruments be made by clear and convincing evidence. To prevent fraud and provide stability to the insurance underwriting process, this same standard is applied to lost insurance policies.

Finally, the district court properly concluded that the insurers issuing occurrence-based policies to API were liable only for damages arising from bodily injury that occurred during their respective policy periods, and that damages arising from continuous, ongoing bodily injury must be allocated over the entire period of injury. Minnesota courts and most courts nationwide have recognized that such pro-rata allocation is required when damage is continuous and intermingled such as in the instant case.

ARGUMENT

I. UNDER MINNESOTA LAW, AN INSURER MAY NOT BE HELD LIABLE FOR EXTRACONTRACTUAL DAMAGES WHERE THE POLICYHOLDER HAS NOT PROVEN THAT THE INSURER COMMITTED AN INDEPENDENT TORT.

The district court committed reversible error when it entered judgment on the jury's awards of \$10 million to API for bad faith and \$15 million for breach of fiduciary duty. Special Verdict Form, Questions 14–17. Minnesota law does not recognize an independent tort of bad faith or breach of fiduciary duty in the insurance context. On the

contrary, an insured may not recover extracontractual damages for the bad faith breach of an insurance contract absent proof of an independent tort, such as fraud. The jury considered and rejected a claim that OneBeacon fraudulently misrepresented material facts to API — the only independent tort alleged — finding that API did not rely on the allegedly false representations. Accordingly, the district court incorrectly instructed the jury with respect to bad faith and breach of fiduciary duty, and should have rejected the jury’s damages awards based on those concepts as a matter of law.

A. Minnesota Law Does Not Recognize Independent Torts Of Bad Faith Or Breach Of Fiduciary Duty.

The district court committed reversible error when it instructed jurors that they could enter extracontractual damage awards for bad faith and breach of fiduciary duty, and further erred by entering judgment on the jury’s assessment of such damages. Under Minnesota law, a policyholder may not recover extracontractual damages for an insurer’s breach of an insurance contract unless the breach is accompanied by an independent tort. *Lickteig v. Alderson, Ondov, Leonard & Sween*, 556 N.W.2d 557, 561 (Minn. 1996); *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979). The accompanying tort must be “independent” in the sense that it arises from a relationship between the parties that would give rise to a legal duty even without enforcement of the contractual promise itself. *Lickteig*, 556 N.W.2d at 561 (citing *Olson v. Rugloski*, 277 N.W.2d 385, 388 (Minn. 1979)); *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997).

The refusal to pay an insurance claim, no matter how malicious, does not constitute an independent tort — it is only a breach of contract. *Haagenson*, 277 N.W.2d at 652 (“A malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action.”) (citation omitted); *Cherne Contracting*, 572 N.W.2d at 343 (“Under Minnesota law, a party is not entitled to recover tort damages for a breach of contract, absent an ‘exceptional case’ where the breach of contract ‘constitutes or is accompanied by an independent tort.’”) (citation omitted); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629, 633 (Minn. Ct. App. 1986). Although Minnesota courts have recognized that an insurer owes its policyholder a duty of good faith, such duty has never been expressed as a tort duty. *Cherne Contracting*, 572 N.W.2d at 343. Similarly, to the extent that an insurer may be held to owe a fiduciary duty to its policyholder, breach of that duty cannot constitute an independent tort, because the insurer’s fiduciary duty is measured by the standard of “good faith.” *Kissoondeth v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 916 (Minn. Ct. App. 2001) (citing *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983)).

The district court erroneously treated bad faith and breach of fiduciary duty as independent torts for the purpose of assessing extracontractual damages against OneBeacon. In instructing the jury on deciding damages, the court stated:

In deciding damages *for breach of contract*, you will be answering Questions 13, 15, 17 and 27. And you are to determine the amount of money that will fairly and adequately compensate API for damages caused *by the breach of contract*.

Tr. at 134:12–16 (emphasis added). Only Question 13 asked the jury to determine the amounts that would fairly and adequately compensate API “for damages directly caused by the breach of contract.” Question 15 asked the jury to assess damages for bad faith, and Question 17 required a determination of damages caused by the OneBeacon’s alleged breach of fiduciary duty.⁴ These latter questions are, consequently, facially improper, because they permitted the jury to award extracontractual damages for OneBeacon’s alleged breach of contract without requiring proof of an independent tort.

B. The District Court Erred By Entering Judgment On The Jury’s Improper Award Of Extracontractual Damages Because The Jury Concluded That OneBeacon Was Not Liable For The Only Independent Torts Alleged.

The court erred by entering judgment on the jury’s award of extracontractual damages, because API failed to prove that OneBeacon committed an independent tort. Minnesota law is clear that “bad faith” does not stand alone as a tort cause of action. Extracontractual damages are only recoverable if the breach of an insurance contract is accompanied by an independent tort. *Lickteig v. Alderson, Ondov, Leonard & Sween*, 556 N.W.2d 557, 561 (Minn. 1996); *Haagenson v. Nat’l Farmers Union Prop. & Cas. Co.*, 277 N.W.2d 648, 652 (Minn. 1979). The accompanying tort must support the award of extracontractual damages in its own right. *Lickteig*, 556 N.W.2d at 561. If the plaintiff fails to prove an element of the alleged independent tort, no extracontractual damages are available. *Saltou*, 394 N.W.2d at 634.

⁴ Question 27 asked the jury to determine the damages API suffered “as a direct result of relying on the false representations made by [OneBeacon].” As discussed in more detail below, this question related to the only truly independent torts alleged, for which the jury found OneBeacon not liable.

The court instructed the jury regarding the elements of only two independent torts — “fraud by misrepresentation” and “negligent misrepresentation.” Tr. at 135:10–136:13. Although the jury found that OneBeacon knowingly made a false representation of material fact to API, intending that API would rely on that representation, (Special Verdict Form, Questions 18–21), the jury concluded that API did not rely on that false representation (*Id.*, Question 22). Consequently, the jury awarded no damages for these alleged torts. Without proof of an independent tort, the district court erred in entering judgment on jury’s improper award of extracontractual damages.

II. THE DISTRICT COURT IMPROPERLY EXPANDED MINNESOTA LAW REGARDING THE SCOPE OF AN INSURER’S FIDUCIARY DUTIES TO ITS POLICYHOLDER.

Basic insurance text recognizes that the relationship between an insurer and a policyholder is contractual. It is not fiduciary in nature. As commentators have made clear, “something more than the mere fact of an insurance relationship is required to establish a fiduciary relationship.” 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 198:7 (3d ed. 2005).

Minnesota law is settled, contrary to the district court’s decision, that the mere fact of an insurance relationship does not create a fiduciary duty. *See Parkhill v. Minn. Mut. Life Ins. Co.*, 174 F. Supp. 2d 951, 959 (D. Minn. 2000); *Stark v. Equitable Life Assurance*, 285 N.W. 466, 470 (Minn. 1939); *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 342-43 (Minn. Ct. App. 1997) (affirming trial court’s decision that “[the insured’s] relationship with [the insurer] was based solely on an insurance contract between two business enterprises and did not rise to the level of a fiduciary

relationship”). Under Minnesota law “special circumstances are required to create a fiduciary relationship between an insurer and an insured.” *Parkhill*, 174 F. Supp. 2d at 959. In *Parkhill*, the United States District Court for the District of Minnesota, applying Minnesota law, found no such special circumstances between the insurer and the policyholder, other than the “normal relationship between an insurer and the insured.” *Id.* at 960. The court noted that the insured’s status as a “long-standing policyholder” was not enough to create a fiduciary relationship when the relationship between the two parties was “always arm’s length in nature.” *Id.* at 959. Moreover, in dismissing the policyholder’s breach of fiduciary duty claim, the court pointed out that the policyholder also engaged in business with several other insurers and agents. *Id.* at 960.

Here, the district court took an improperly expansive view of a liability insurer’s fiduciary duties to its insured in the court’s instructions to the jury:

Now, a fiduciary relationship exists when one person places trust and confidence in another person, who, as a result of having this trust and confidence placed in him or her, assumes a position of superiority or influence.

An insurer and it’s [sic] policyholder hold a fiduciary relationship. And the insurer owes it’s [sic] policyholder a fiduciary duty.

The fiduciary duty owed to the policyholder includes full consideration of the policyholder’s interest; prompt and open communication with the policyholder; fair and complete investigation of the claims; correct interpretation, application and representation of the policy provisions and the coverage; providing timely decisions on the payment or the denial of a loss with a proper explanation to the policyholder of the basis of the coverage decision; viewing claims against the policyholder as if there were no policy limits applicable to the

claim; giving equal consideration for the financial exposure to the policyholder; and full disclosure of material facts.

Now, an insurer acts in bad faith when it breaches that fiduciary duty.

Bad faith includes dishonest or deceitful conduct and an action or a failure to act, which demonstrates a significant disregard for the rights and economic interests of others. An insurer acts in bad faith toward its [sic] policyholder if it fails to perform any of its [sic] fiduciary duties.

Tr. at 139:5–140:8. The district court’s instructions directed the jury to assume a fiduciary relationship between a liability insurer and a policyholder merely by the existence of an insurance contract between them. This is contrary to Minnesota law requiring more than a “normal relationship” and specifically requiring “special circumstances” for the creation of a fiduciary relationship. In its instructions, the district court therefore improperly expanded Minnesota law regarding the scope of an insurer’s duties to an insured.

Moreover, substantively, API provided no evidence that the relationship between it and OneBeacon was based on anything more than an insurance contract between two business enterprises. In its April 7, 2006 Memorandum and Order, the district court relied on OneBeacon’s power to write the policy, interpret the policy, and determine the policy’s meaning to support a fiduciary relationship. Such reliance was misplaced. These capabilities simply reflect a “normal relationship between an insurer and the insured.” They do not constitute the “special circumstances” necessary, under *Parkhill*, to create a fiduciary relationship between an insurer and a policyholder.

III. THE DISTRICT COURT ERRED IN CALCULATING API'S CONTRACTUAL DAMAGES.

The district court improperly measured API's contractual damages when it awarded API \$27,573,824 in damages for OneBeacon's breach of contract since API was defended in the underlying litigation by other insurers. "It is a matter of basic insurance law that an insured is entitled to no more than its loss." *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 186 (Minn. Ct. App. 2001). In *Youngquist*, this Court recognized that an insured's recovery was limited to no more than its out-of-pocket deductible when its general contractor's insurer refused to provide a defense in a personal injury action but its own insurer provided a defense. *See id.* at 182. The Court noted that the insured was not required to "pa[y] its own way"; instead, it was defended by another insurer in the underlying claim and incurred no costs beyond its deductible. *Id.* At 187. In limiting the insured's recovery to its deductible, this Court emphasized that "opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest." *Id.* at 186 (citation omitted).

API was not left to defend itself in the underlying litigation and "pay its own way." Rather, it was defended by its other insurers. API should not be compensated for costs that it did not incur and which exceed its loss. Therefore, the district court erred by not taking other insurers' defense of API into consideration when calculating contractual damages.

IV. THE EXISTENCE AND TERMS OF AN ALLEGEDLY LOST INSURANCE POLICY MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Courts have always been wary of claims of rights based on an allegedly “lost” instrument. The possibility of fraud is at its apex in such cases. Imposing liability in the absence of the document setting forth the parties’ bargain raises a substantial peril of injustice. These concerns are reflected in such familiar principles as the best evidence rule, the parol evidence rule, and the statute of frauds. By insisting on written documents, each of these doctrines protects the courts and the public from fraud.

In addition to these doctrines, courts have taken special precautions where an allegedly lost instrument is the “very foundation of the claim,” as the insurance policy at issue is here. *See Sylvania Elec. Prods., Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965). In such cases, courts repeatedly have held that proof of the document’s existence, as well as of its contents, must be shown by clear and convincing evidence.

In *City of St. Paul v. Dahlby*, for instance, the Minnesota Supreme Court stated that “where the former existence of a deed is denied, proof of its former existence and proper execution must be clear and convincing.” 266 Minn. 304, 315, 123 N.W.2d 586, 592; *see also Kurz v. Gramhill*, 269 N.W.2d 68, 71 (Minn. 1978) (“It has long been the rule in this state that where former existence of a deed claimed to be lost is denied, proof of its former existence must be clear and strong.”); *Perbix v. Hansen*, 419 N.W.2d 101,

104 (Minn. Ct. App. 1988) (“The proponent of a lost deed bears the burden of establishing the deed by clear and convincing evidence.”).⁵

The general rule that a written contract must be established by clear and convincing evidence where the instrument cannot be produced applies equally to insurance policies. Although a specific body of law has developed regarding insurance coverage, the fundamental principles of contracts form the core of insurance law. *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 799 (Minn. 2004) (“The interpretation of insurance contracts is governed by general principles of contract law.”); *see also Bank of the West v. Superior Court*, 833 P.2d 545, 551-52 (Cal. 1992) (determining that “[w]hile insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply”). An insurance policy is a particular type of contract — an insurer agrees to protect a policyholder from certain risks in return for a fee, paid in the form of a premium.

Courts have cited three main reasons for the clear and convincing evidence standard to apply with particular force to claims of a lost insurance policy. First, without a heavy burden being put on the proponent of the lost document, “the road to fraud [would be] made easy and straight.” *Welsh v. Veasley*, 227 S.W. 58, 59 (Mo. 1920). Without the disciplines of the clear and convincing evidence standard, claimants could

⁵ See Barry R. Ostrager & Thomas R. Newman, *Handbook On Insurance Coverage Disputes* § 17.02 (11th ed. 2002) (“In analyzing the burden of the insured in a lost policy case, the case law pertaining to the proof of lost documents is relevant and potentially dispositive.”).

too easily fabricate and exaggerate in describing the existence and alleged scope of coverage under an allegedly lost policy.

Second, a reliable determination of the terms of an alleged agreement is essential before any liabilities are imposed based upon the agreement. As one court explained, “secondary proof of the contents of a written instrument imposing duties or obligations upon the parties thereto should be clear or not of a doubtful character in probative worth.” *Caine v. Briscoe*, 248 P. 774, 777 (Cal. Ct. App. 1926) (applying a heightened standard of proof); see also 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 1005 (1983). The “very foundation” of every claim for insurance benefits is the alleged insurance policy. Moreover, the policy language in each case determines the obligations of the policyholder and the insurer with respect to coverage. Thus, to avoid fabricated or exaggerated claims of coverage, a heightened level of proof of an allegedly lost policy is vital.

Third, courts endorse higher standards of proof because they seek to avoid strategic behavior by the proponent of a lost instrument. If proving the existence and terms of a lost instrument were too easy, then the law would create an incentive to “lose or destroy” documents.

At bottom, legitimate policyholders have a strong incentive to retain their written policies. Moreover, as with other contracts, it is reasonable to expect a policyholder to retain the insurance policies under which future claims may be made. Exposing the insurer to greater risk of fraud or error in lost policy cases is unfair, particularly with

respect to older policies, before computerized imaging and other advances were available.

Additionally, although secondary evidence may be used to prove the existence, terms, and conditions of an alleged lost policy. It is important to establish with specificity the terms and conditions of the policy.⁶ As this Court is well aware, insurers and policyholders have, at times, emphatically disagreed over a single term or nuance in an insurance policy. Consequently, courts must insist on reliable proof of specific policy language or terms before upholding a claim of coverage under a lost policy.

In its Order and Memorandum filed September 27, 2005, the district court opined that API would be required to prove the existence and terms of the alleged OneBeacon policies by clear and convincing evidence. The court stated:

One Beacon claims that they have not provided any insurance policies to API and if they had, API lost them and spoiled the evidence of its policies and its terms and conditions. . . . It is clear that the proponent of the lost instrument (in this case API) must prove the existence of the lost documents as well as its contents. *Evidence must be clear and convincing and strong and conclusive.* In doing so, the proponent of the policy must rely on secondary evidence such as certificates of insurance, memorandum and auditing. . . . It will be API's

⁶ For example, an unsupported allegation that the insurer uses standard forms and the presentation of a potentially relevant form has been found to be insufficient. *McCoy v. Royal Indem. Co.*, 164 A. 77 (Pa. Super. Ct. 1933). Likewise, the "mere mention of a policy number in another document is insufficient to prove the existence or terms of insurance coverage." *Boyce Thompson Inst. for Plant Research, Inc. v. Ins. Co. of N. Am.*, 751 F. Supp. 1137, 1141 n.2 (S.D.N.Y. 1990). Lastly, certificates of insurance alone have been held insufficient. See *UNR Indus., Inc. v. Cont'l Ins. Co.*, 682 F. Supp. 1434, 1443 (N.D. Ill. 1988), amended on other grounds by 1988 WL 121574 (N.D. Ill. Nov. 9, 1988) and 1989 WL 265493 (N.D. Ill. Jan. 11, 1989).

responsibility to establish sufficient facts of the existence of the policy and its terms and conditions.

Order and Memorandum at 28 (emphasis added).

In its instructions to the jury, however, the court instructed the jury to answer questions on the special verdict form in the affirmative:

if it's been proved by a greater weight of the evidence. And you look at the question, look to see who had the burden. And the burden of proof is by a greater weight of the evidence.

If you remember what I told you, the greater weight of the evidence is taking that extra grain of sand, one way or the other, tipping the evidence one way or the other. If they tipped it, then they have proved it by a greater weight of the evidence. It's not beyond a reasonable doubt. It's not clear and convincing. It's the greater weight of the evidence, just a tipping. If they have, then the answer is yes.

Tr. at 133:11–22.

The court did not augment its statement regarding the burden of proof in its instructions on missing policies, stating only:

If the physical policies sold to the policyholder are missing, the policy [sic] may prove the existence and the terms and conditions of the policies with secondary or circumstantial evidence, such as proof that a particular standard form policy was issued to the policyholder.

Tr. at 140:16–21.

The policyholder, here, has only offered sample policy forms, which are examples of allegedly “typical” policies that may have been used at the time, and speculative expert evidence regarding the possible terms and conditions of the policies at issue. Not only does this evidence fall well short of satisfying the clear and convincing standard, it also

fails to prove the existence, terms, and conditions of the alleged policies by even a preponderance of the evidence. This provides an independent basis for reversing the decision below.

Adoption of a lax standard of proof in lost policy cases would disrupt the insurance mechanism. Excessive exposure to claims where no policy can be produced would make it impossible to determine insurers' overall risk exposure. This is particularly true in the insurance context, where the exact language chosen by the parties makes a huge difference in the liabilities that can be imposed on the insurer. It would not take many opportunistic claims in these days of massive liabilities to overwhelm an insurer, to the detriment of all policyholders and the public.

V. THE DISTRICT COURT PROPERLY RULED THAT DEFENSE EXPENSES AND INDEMNITY SHOULD BE ALLOCATED ON A PRO-RATA BASIS WHERE A CAUSE OF LOSS EXTENDS OVER MULTIPLE POLICY PERIODS.

The district court properly recognized that the insurers issuing occurrence-based policies to API were liable only for damages arising from bodily injury that occurred during their respective policy periods, and that damages arising from continuous, ongoing bodily injury must be allocated over the entire period of injury.

A. The District Court Correctly Required Pro-Rata Allocation Between Insurers.

As the Minnesota Supreme Court previously has held, in cases of continuing injury or damage taking place over an extended period of time, "each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period." *Northern States Power Co. v. Fid. & Cas.*

Co. of N.Y., 523 N.W.2d 657, 662 (Minn. 1994) (“*NSP*”). This fundamental rule was reaffirmed in *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733 (Minn. 1997), where the Minnesota Supreme Court concluded that “in those difficult cases in which property damage is both continuous and so intermingled as to be practically invisible” pro-rata allocation applies.

In its Order and Memorandum filed September 27, 2005, the district court properly concluded that this was, as provided for by *Domtar*, a “difficult case”:

The bodily injuries that have occurred continued to occur on a daily basis and cannot be allocated on a per occurrence, injury in fact analysis or manifestation basis [and] therefore the insurer must be liable for the time on the risk. *Domtar* and *NSP* require that time on the risk is the proper allocation in matters of continuous injury because the bodily injury is not triggered by a single occurrence or injury (injury in fact). . . . [T]herefore, allocation is by time on the risk and not by the “actual injury” rule.

Order and Memorandum at 25.

B. This Court and Courts Nationwide Have Required Allocation Over the Entire Period of Injury.

In *Domtar*, the Minnesota Supreme Court allocated damages over the entire sixty-four year damage period. The *Domtar* court held that “[e]ach insurer is liable for that period of time it was on the risk compared to the *entire* period during which damages occurred.” *Domtar*, 563 N.W.2d at 732. The same conclusion was reached in *NSP*, where the Minnesota Supreme Court held that property damage arising from groundwater contamination was to be “regarded as a continuous process in which the property damage

is evenly distributed over the period of time from the first contamination to the end of the last triggered policy (or self-insured) period.” *NSP*, 523 N.W.2d at 664.

Most courts nationwide have similarly allocated damages throughout the period of injury or damage. *See, e.g., Pub. Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 940 (Colo. 1999) (“We doubt that [the policyholder] could have had a reasonable expectation that each single policy would indemnify [the policyholder] for liability related to property damage occurring due to events taking place years before and years after the term of each policy.”); *Sec. Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107 (Conn. 2003) (applying pro-rata allocation to defense costs); *Mo. Pac. R.R. Co. v. Int’l Ins. Co.*, 679 N.E.2d 801, 806 (Ill. App. Ct. 1997) (endorsing pro-rata time-on-the-risk allocation of damages); *Norfolk S. Corp. v. Cal. Union Ins. Co.*, 859 So. 2d 167 (La. Ct. App. 2003) (noting that proper allocation required a pro-rata approach); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070 (Md. 2002) (holding pro-rata allocation among liability insurers by time-on-the risk applied); *Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61, 69 (Mich. Ct. App. 1998), *aff’d*, 617 N.W.2d 330 (Mich. 2000) (concluding that liability should be allocated across the entire period during which contamination took place); *Owens-Illinois Inc. v. United Ins. Co.*, 650 A.2d 974, 985-86 (N.J. 1994) (adopting pro-rata allocation scheme); *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224 (N.Y. 2002) (“Pro rata allocation under these facts, while not explicitly mandated by the policies, is consistent with the language of the policies. Most fundamentally, the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period. Con Edison’s

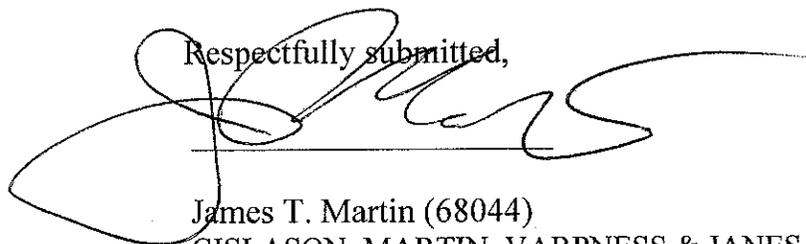
singular focus on ‘all sums’ would read this important qualification out of the policies.”) (internal citations omitted); *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 324 (2d Cir. 2000) (concluding allocation of insurer’s liability across all triggered policies required); *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1224-25 (6th Cir. 1980) (applying pro-rata allocation to defense costs); *Sybron Transition Corp. v. Sec. Ins. of Hartford*, 258 F.3d 595 (7th Cir. 2001) (applying pro-rata time-on-the-risk allocation); *Nationwide Ins. Co. v. Cent. Mo. Elec. Coop.*, 278 F.3d 742 (8th Cir. 2001) (apportioning damages based on time-on-the-risk allocation method); *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 (11th Cir. 1990) (applying pro-rata allocation to defense costs).

These cases, like the Minnesota Supreme Court’s decisions in *NSP* and *Domtar*, recognize the fundamental principle that occurrence-based insurers are responsible for only those damages arising from bodily injury occurring during their respective policy periods. This Court should follow Minnesota precedent and affirm the district court’s decision allocating damages arising from bodily injuries across the entire period of injury.

CONCLUSION

For the foregoing reasons, *amicus curiae* CICLA respectfully requests that the Court reverse those parts of the district court's decision holding OneBeacon liable for bad faith and breach of fiduciary duties, imposing an improper measure of damages against OneBeacon, and requiring API to prove lost policies by only a preponderance of the evidence, and affirm that part of the district court's decision allocating defense and indemnity expenses on a pro-rata basis among multiple insurers.

Respectfully submitted,



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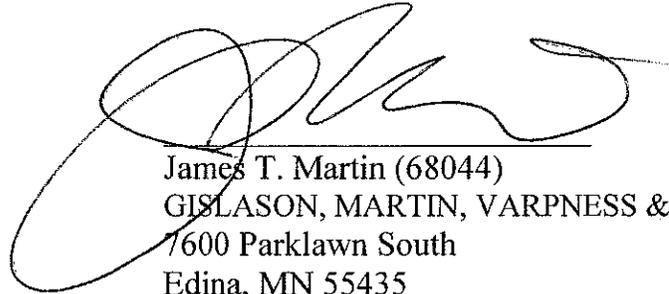
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this *Amicus Curiae* of the Complex Insurance Claims Litigation Association ("CICLA") conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(a)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. The length of this brief is 5668 words, exclusive of cover page, Table of Contents, and Table of Authorities.

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