

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,*

and

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.*

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## ARGUMENT

In its opening brief, OneBeacon showed that the law and record in this case do not support the judgment. API's breach of fiduciary duty and bad faith claims are contrary to Minnesota law, and API failed to prove its breach of contract claim, and its claim for damages. While a respondent is entitled to a favorable view of the evidence on appeal, there is no evidence in this record that API sustained *any* direct damages as a result of OneBeacon's decision not to defend or indemnify API in asbestos-related bodily injury lawsuits. API was defended and indemnified in each and every lawsuit and, at the time it filed bankruptcy, API had not incurred any out-of-pocket expenses and had not faced a single unpaid judgment, settlement, or lawyer's bill.

API's response to OneBeacon's opening brief is filled with misleading portrayals of the record. In advancing its damages claim, API states that all of its "damages arose from API's need to settle the asbestos claims against it after being abandoned and left to its own devices by OneBeacon." Resp. Br. at 7. Yet API cannot refer this Court to a single case in which it was in fact "left to its own devices." API simply ignores the uncontroverted testimony of its own representative that it was defended and indemnified in *every* asbestos-related bodily injury lawsuit.

Similarly, in urging this Court to affirm the jury's verdict on its bad-faith and breach-of-fiduciary duty claims, API states that the jury found that OneBeacon "misrepresented facts" regarding the existence of coverage. Resp. Br. at 7. API repeatedly omits, however, any reference to the jury's finding that API did not rely on

any purported misrepresentations. *See, e.g., id.* at 3, 7, 27, 42. API also ignores the legal consequences of that finding.

These and other distortions of the record and omissions of fact discussed below exemplify the deficiencies in API's claims. API cannot prevail without stretching the facts and the law beyond the breaking point.

### **ISSUES RAISED BY ONEBEACON'S APPEAL**

#### **I. API'S CLAIMS FOR BREACH OF FIDUCIARY DUTY AND BAD FAITH WERE IMPROPERLY SUBMITTED TO THE JURY**

Whether Minnesota law recognizes API's claims for breach of fiduciary duty and bad faith is a legal question subject to *de novo* review. *See, e.g., Nelson v. Productive Alternatives, Inc.*, 715 N.W.2d 452, 454 (Minn. Ct. App. 2006) (“[Plaintiff’s] claim hinges on whether Minnesota’s common law recognizes this particular cause of action. This is a question of law that we review *de novo*.”).

Minnesota courts have imposed a fiduciary obligation on insurers to act in “good faith” only where the insurer assumes control of settlement negotiations on behalf of a clearly liable insured. *See Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983); *Miller v. ACE USA*, 261 F. Supp. 2d 1130, 1140-41 (D. Minn. 2003). Nonetheless, API claims that Minnesota courts have never foreclosed the possibility that additional duties might be imposed on an insurer. Resp. Br. at 20-21. This claim is simply wrong. To affirm the judgment for API, this Court would have to dramatically expand Minnesota law.

**A. Existing Law Does Not Allow API's Breach Of Fiduciary Duty And Bad Faith Claims**

Contrary to API's assertions, this Court has refused to impose fiduciary obligations on insurers beyond the context of *Short*. See, e.g., *Seren Innovations, Inc. v. Transcontinental Ins. Co.*, No. A05-917, 2006 WL 1390262 (Minn. Ct. App. May 23, 2006) (unpublished); *Pillsbury Co. v. Nat'l Union Fire Ins. Co.*, 425 N.W.2d 244 (Minn. Ct. App. 1988); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629 (Minn. Ct. App. 1986).

In *Seren Innovations*, this Court recently reaffirmed that, where an insured does not allege facts analogous to those of *Short*, a cause of action for breach of fiduciary duty will not lie:

On appeal, [the insured] . . . fails to identify factual allegations that support a separate cause of action for breach of fiduciary duty apart from the insurer's duty to defend. And [the insured] cites no authority expressly providing for a breach-of-fiduciary-duty claim under the facts alleged. Cf. *Miller v. ACE USA*, 261 F. Supp. 2d 1130, 1140-41 (D. Minn. 2003) (stating that parameters of fiduciary duty established in *Short* provide authority for breach-of fiduciary-duty claim).

2006 WL 1390262 at \*7.

Rather than address—or even cite—this clearly apposite decision, API states that limitations on breach-of-fiduciary duty claims “have never been adopted in any *published* opinion.” Resp. Br. at 21 (emphasis added). This Court had little reason to publish *Seren Innovations*, however, precisely because that decision did not pronounce a new rule of law or even clarify a conflict in the law. Rather, it simply reiterated long-standing Minnesota law that an insurer's fiduciary obligations do not arise until it has undertaken the defense of—and settlement negotiations for—its insured.

API also fails to refute the persuasive analysis set forth by the United States District Court in *Miller*. There, the court thoroughly reviewed Minnesota law, and correctly observed that the fiduciary duty discussed in *Short* and *Kissoondath v. United States Fire Ins. Co.*, 620 N.W.2d 909, 913 (Minn. Ct. App. 2001) arises only where the insurer controls settlement negotiations on behalf of a clearly liable insured. *Miller*, 261 F. Supp. 2d at 1141. The court concluded that “[the insured’s] reliance on the broad language in *Kissoondath*, which arguably implies a general fiduciary duty to insureds from the inception of the contractual relationship, is not supported by the rule of *Short*, on which the *Kissoondath* holding was explicitly based.” *Id.* at 1141 n.4.

API attempts to dismiss the *Miller* decision as a mistaken prediction of Minnesota law. Resp. Br. at 21. Yet API fails to cite a single Minnesota case embracing a broader interpretation of an insurer’s fiduciary obligations than that set forth in *Miller*. That is because no such case exists. API also ignores this Court’s favorable citation to *Miller* in *Seren Innovations*.

API’s bad-faith claim is likewise contrary to existing law. API states that this case involves “egregious insurer conduct,” including “not only the bad faith denial of *thousands* of claims, but also the persistent denial of *the very existence* of the insurance relationship.” Resp. Br. at 25 (emphasis in original). API fails to acknowledge that General Accident’s (and, later, OneBeacon’s) denial of the insurance relationship was the very basis for its denial of coverage. In other words, the allegedly “egregious conduct” at the core of API’s extra-contractual damage claims is precisely the same conduct at the core of API’s breach-of-contract claim. Minnesota law does not recognize a separate

cause of action for breach of the implied covenant of good faith and fair dealing when it arises from the same conduct as a breach-of-contract claim. See *Saltou*, 394 N.W.2d at 633 (“The failure to pay an insurance claim in itself, no matter how malicious, does not constitute a tort; it constitutes a breach of an insurance contract.”).

In an effort to circumvent this well-settled principle, API observes that Minnesota law recognizes a cause of action for bad faith in “exceptional cases” where the breach of contract is “accompanied by an independent tort.” Resp. Br. at 26. In making this argument, API repeatedly ignores one very fundamental and significant fact—the jury expressly *rejected* the only independent tort claim API advanced in this lawsuit, finding that API did not rely on any alleged misrepresentations. See generally *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 308 (Minn. Ct. App. 1992) (noting that the elements of misrepresentation are “well established” and include reliance on the defendant’s representation). Thus, while API cloaks its bad-faith claim in colorful language such as “egregious insurer conduct,” the fact remains that the jury expressly found that OneBeacon did not commit an independent tort. API’s bad-faith and breach-of-fiduciary duty claims cannot stand on this record.

#### **B. This Court Will Not Expand The Law**

Because its claims are contrary to existing law, API urges this Court to expand the scope of an insurer’s fiduciary obligation to act in “good faith” as a matter of public policy. API argues that it is contrary to public policy to have a rule that insulates an insurer who fails to defend its insured, but punishes an insurer who does defend its

insured and fails to accept a reasonable settlement demand within policy limits. This argument is as misdirected as it is unsupported.

This Court has admonished that it is an error-correcting court and will not create new law or expand existing law. *See, e.g., Engler v. Wehmas*, 633 N.W.2d 868, 873 (Minn. Ct. App. 2001) (“[T]his court would be creating new law in Minnesota if we were to hold that respondent could recover damages for the emotional distress she suffered as a result of witnessing her son’s injuries. . . . Because it is not the function of this court to create new law, we answer the certified question in the negative.”) (internal citations omitted); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987) (“[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.”). But even if this Court were inclined to change or expand existing law, API has failed to articulate a compelling public policy necessitating the dramatic change it desires.

API’s requested change in the law—imposing broad fiduciary duties on insurers from the inception of the contract—ignores sound logic echoed by Minnesota courts for years: an insurer does not have a fiduciary obligation to its insured prior to controlling the defense and settlement because, until that time, the parties do not stand in a fiduciary relationship. *See Short*, 334 N.W.2d at 387 (noting that fiduciary obligations arise when insurer contractually acquires control of the negotiations and settlement); *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. Ct. App. 1997) (“[A] relationship created by an insurance contract necessarily involves competing interests, which often generate litigation between the insurer and insured.”); *see also*

*Miller*, 261 F. Supp. 2d at 1141 (“Where the insurer is not yet acting as advocate for the insured in dealing with a third party, the conflict of interest inherent in settlement negotiations and creating the fiduciary duty is not at issue.”). Minnesota law is well reasoned and should not be changed.

**C. The Record In This Case Does Not Support A Change In Minnesota Law**

The record in this case also does not support a change in Minnesota law. API bore the burden to prove that claims asserted against it were covered under the General Accident policies. *See Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 771 (Minn. Ct. App. 1999). API makes the conclusory statement that, “[b]y 1987, General Accident possessed the CPA audit records confirming that it was API’s CGL insurer.” Resp. Br. at 30. API goes on to argue that, had General Accident disclosed its “CG” and “ICG” policy forms, such information “would have completed the coverage picture.” *Id.* This argument is conceptually flawed.

Beginning with its original tenders in 1987, API presented General Accident with conflicting and indeterminate information regarding the existence of any policies that General Accident may have issued to API. The accountant work papers, for example, listed both General Accident and Bituminous Casualty as issuing Policy No. 304795. (Ex. 74, WG000009, 18; A.346-48, 350.) API’s attorney, John Patterson, recognized this discrepancy in correspondence dated March 26, 1987, stating: “[T]wo insurers, Bituminous and General Accident are listed as having the same general liability policy number. Unfortunately, we have been unable to resolve these discrepancies.” (A.359;

T.314.) Additionally, entries in the accountant work papers identified Policy No. 304795 as a liability policy, while other entries identified it as a workers' compensation policy. (A.325-26.)

These discrepancies were not limited to the accountant work papers. API's tender letters to General Accident also referenced General Accident Policy No. 366219 as a "renewal" of Policy No. 304795, asserting that Policy No. 366219 was a general liability policy. (Ex. 1; A.261; *see also* A.367.) In other documents, however, API identified Policy No. 366219 as a General Accident workers' compensation policy. (A.362.)

In light of the inconsistent information provided by API, General Accident repeatedly requested additional information regarding the *existence* of policies that may have been issued to API. On May 15, 1987, for example, General Accident claims analyst Frank Thorn requested the names of API's insurance agents between 1958 and 1966. (A.266a.) Over the following years, API provided no additional information that showed the existence of the alleged policies. Moreover, API presented no evidence at trial that General Accident withheld any evidence in its possession that showed it actually had issued any policies to API.

The fact is that for decades, API, General Accident, and OneBeacon tried without success to locate information regarding policies that may have been issued by General Accident. OneBeacon's claims examiner, Brooke Green, testified without contradiction that she personally reviewed the company's historic claims file, and found no evidence of any such policies. (T.576-77.) Additionally, Green conducted "as broad a search as possible" on the company's computer database, looking for any and all policies issued to

“Asbestos Products, Inc.” or “API,” or bearing any policy information similar to that provided in API’s tender letters. (T.577-78.) This search likewise yielded no evidence of insurance. (T.578.) Not until April 2005, nearly twenty years after its first tender to General Accident and nearly three years into the litigation, did API finally produce two certificates of insurance authored by one of its brokers, Cathcart & Maxfield, Inc., that referenced liability policies issued by General Accident.

In short, the record demonstrates that, for almost two decades, a legitimate dispute existed as to whether General Accident issued any liability policies to API. Against this backdrop, it is inconsequential that General Accident did not provide API with copies of its specimen policy forms. The specimen forms—which at best showed standard policy terms—did not show that General Accident *actually issued* policies to API. Moreover, because the jury expressly found that API did not rely on General Accident’s purported misrepresentations, there is no basis upon which to conclude that General Accident’s alleged failure to disclose the specimen policy forms would have caused API to do anything differently. This record simply does not support the dramatic shift in Minnesota law that API proposes.

**D. The District Court’s Instructions Regarding An Insurer’s Fiduciary Duty To Act In “Good Faith” Do Not Reflect Minnesota Law**

Even assuming the district court did not err in submitting API’s breach-of-fiduciary-duty and bad-faith claims to the jury, the manner in which it submitted those claims to the jury was contrary to existing law and fundamentally flawed. *See Greenbush*

*State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. Ct. App. 1990) (stating that district courts must issue decisions consistent with established law).

Based on its reading of *Kissoondath*, the district court instructed the jury that an insurer and its insured *always* stand in a fiduciary relationship. Specifically, the district court instructed that “[a]n insurer and its policyholder hold a fiduciary relationship and the insurer owes its policyholder a fiduciary duty.” (A.150.) This instruction imposed fiduciary obligations on OneBeacon *before* it assumed control of the defense and settlement. This instruction directly contradicts existing Minnesota law. *See* discussion, *supra* at § I.A. Moreover, this instruction improperly imposed a fiduciary relationship as a matter of law. *See Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (stating that “[t]he existence of a fiduciary relationship is a question of fact”).

API references a patchwork of decisions imposing fiduciary duties on contracting parties outside of the insurance context. But where an *insurer’s* actions are in question, Minnesota law could not be clearer: an insurer’s fiduciary duty arises only when the insurer has assumed a fiduciary role—*i.e.*, where it controls settlement negotiations on behalf of a clearly liable insured.

Further underscoring the flaws inherent in API’s breach-of fiduciary-duty and bad-faith claims was the district court’s failure to distinguish between the two claims. The district court instructed the jury that “[a]n insurer acts in bad faith when it breaches its fiduciary duty.” (A.153, T.825.) This instruction provided that an insurer’s breach of fiduciary duty *is* bad faith, thus allowing API to recover twice for the same conduct.

**E. The District Court Improperly Utilized The Unfair Claims Practices Act To Define The Scope Of An Insurer's Fiduciary Duties**

Finally, despite API's arguments to the contrary, the district court improperly utilized the Unfair Claims Practices Act to define the scope of an insurer's fiduciary duties. As support for its proposed jury instructions, API cited *Short and Kissoondath*, but went on to state: "Further, the Minnesota Unfair Claims Practices Act provides, in relevant part, that the following practices are unfair . . ." (A.151.) API proceeded to list practices that the legislature had identified as constituting unfair claims practices, and concluded that "API's proposed Specific Instruction follows the standards imposed by . . . the Minnesota Unfair Claims Practices Act." (A.152.) The district court adopted API's proposed jury instructions verbatim. The use of the Unfair Claims Practices Act in instructing the jury was improper. *See Glass Service Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849, 852 n.2 (Minn. 2000).

**II. THE DISTRICT COURT ERRED IN DENYING ONEBEACON'S MOTIONS FOR NEW TRIAL AND FOR JUDGMENT AS A MATTER OF LAW ON API'S BREACH OF CONTRACT CLAIM**

**A. No Record Evidence Established That OneBeacon's Alleged Breaches Caused Any Direct Damages**

At trial, API representative Loren Rachey summarized API's breach-of-contract claim as follows: had General Accident defended and indemnified API, "there would have been coverages left from the other primary carriers . . . [who] had to pay those claims that really General Accident should have been paying." (T.249-50.) API did not, however, present any evidence to support this claim, such as the nature and limits of

API's other insurance policies, the amounts that other insurers paid to resolve claims allegedly covered under the General Accident policies, under what coverages those payments were made, and what, if any, policies were actually exhausted.

Moreover, API failed to distinguish between an insurer's defense obligations, on the one hand, and indemnity obligations, on the other. That failure is fatal to API's claim that it was damaged as a result of the conduct of General Accident or OneBeacon.

### **1. Defense Obligations**

Absent express policy provisions to the contrary, the limits of coverage under a liability insurance policy are not reduced by the costs of defending the insured. *See* 12 *Couch on Ins. 3d* § 172:46 (1998) (“[A]lthough an indemnity policy states a certain amount as the limit of the insurer’s liability, the insurer is, in addition to this amount, liable for all expenses incident to the defense of suits brought against the insured to recover for an injury.”); *see also* Allan D. Windt, 1 *Insurance Claims and Disputes 4th* § 4:32 (2001).

As policy limits can only be reduced through the payment of indemnity obligations, the decision of General Accident and OneBeacon not to defend API could not, as a matter of law, have caused any other insurers to prematurely “exhaust” their respective policy limits. Rather, each of API's other insurers had an independent and ongoing duty to defend. *See Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 187 (Minn. Ct. App. 2001) (stating that each insurer has an independent duty to defend a mutual insured) (citing *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 276 Minn. 362, 367, 150 N.W.2d 233, 236-37 (1967)). It is

undisputed that one or more of API's insurers paid *all* of API's defense costs. As a matter of law, API was not damaged by General Accident's (or OneBeacon's) decision not to defend API.

## 2. Indemnity Obligations

There is also no evidence that the decision not to indemnify API under the General Accident policies caused API's other insurers to prematurely "exhaust" the limits of their respective policies. The record is devoid of *any* evidence as to the monetary effect of General Accident's conduct on API's other insurers, much less that such conduct caused API's other insurers to prematurely "exhaust" the limits of their policies.

For example, what amount of money did API's other insurers pay to satisfy claims that should have been paid under the General Accident policies? What effect, if any, did any such payments have on the limits of coverage of API's other insurance policies? Would API's other insurers have exhausted their limits of coverage even if claims were paid under the General Accident policies? There is nothing in the record that answers these questions. The jury had absolutely no basis upon which to conclude that General Accident's hypothetical breaches of contract (as actual breaches were not proven) had *any* effect on API's other insurers.

The only case referenced at trial where another insurer paid a claim that arguably fell within the General Accident coverage was *Gartner v. American Standard, Inc., et al.*, a case API concedes it never tendered to General Accident or OneBeacon. Resp. Br. at 33, n.20. But even as to the *Gartner* case, API presented no evidence establishing which

of its other insurers paid to resolve the claim, and what impact, if any, that payment had on that unidentified insurer's liability limits.

In an effort to salvage its otherwise unsupported damages claim, API argues that "[c]ompetent evidence was admitted showing, at the very least, the existence of claims that arguably fell within coverage of the General Accident policies." Resp. Br. at 34. This "evidence" consisted of the testimony of attorney Tom Thibodeau, who represented API in asbestos-related bodily injury lawsuits beginning in 2001. As API points out, Thibodeau "testified that between fifty and seventy percent of the claims against API alleged exposure to asbestos as a result of API's activities before 1966." *Id.* at 33.

Even a generous interpretation of this testimony establishes only that an unspecified quantity of unidentified claims brought against API in 2001 and later (Thibodeau could not and did not testify regarding any earlier claims) *may* have triggered OneBeacon's duty to defend API. An insurer's indemnity obligations, however, are not triggered merely by allegations of exposure to asbestos during the insurer's policy period. Rather, indemnity obligations are triggered only where the insured becomes liable for damages that *actually* fall within the policy's coverage. *See, e.g., Milbank Ins. Co. v. B.L.G.*, 484 N.W.2d 52, 56 (Minn. Ct. App. 1992).

Thibodeau testified without contradiction that many claims asserted against API were ultimately dismissed due to the particular claimant's inability to prove exposure to API's products. (T.705-06.) For those claims, there was simply no indemnity obligation to breach. The jury was given no basis from which to determine the number and extent of those claims. In the absence of such evidence, the jury had no basis at all upon which

to determine the amount of damages, if any, API suffered from General Accident's decision not to indemnify API.

Finally, API's "exhaustion" theory presumes that each of its other insurance policies was subject to an aggregate limit and, hence, could in fact become "exhausted." In its Brief, however, API states: "Many, if not all, of the claims against API alleged injury as a result of API's installation operations and are, therefore, not subject to any aggregate limits. The [other] insurers' improper allocation of the claims against API had the effect of prematurely 'exhausting' available coverage." Resp. Br. at 16, n.13. Neither General Accident nor OneBeacon is responsible for other insurers' alleged misallocation of indemnity payments.

### **3. API's Other Claimed Damages**

API makes the broad statement that all of its damages "arose from API's need to settle the asbestos claims against it after being abandoned and left to its own devices by OneBeacon." Resp. Br. at 38. But API cannot refer this Court to a single asbestos-related bodily injury lawsuit in which it was "left to its own devices," or in which it incurred any out-of-pocket expenses. This is because API was fully defended and indemnified in *every* such lawsuit. (T.86.)

API relies on this Court's decision in *Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102 (Minn. Ct. App. 2005), for the proposition that it incurred "damages" despite being defended and indemnified by other insurers. Resp. Br. at 35. API's reliance on this decision is misplaced. In *Kroiss*, this Court observed that legal fees incurred in a

declaratory judgment action are damages arising out of an insurer's breach of the duty to defend. 694 N.W.2d at 107.

API's claims at trial did not include a claim for attorney fees incurred in the declaratory judgment action.<sup>1</sup> Rather, in stark contrast to *Kroiss*, API sought "damages" allegedly resulting from payments that other insurers made on its behalf. Nothing in *Kroiss* contradicts the general rule, however, that an insured cannot recover from one insurer defense and indemnity payments made by another insurer. *See, e.g., Youngquist*, 625 N.W.2d at 186 (concluding that an insured's damages cannot include judgments, attorney fees, and costs paid by another insurer). API does not discuss—let alone refute—this Court's decision in *Youngquist*.

**B. The Consequential Damages Awarded To API Are Contrary To Law And Unsupported By This Record**

API either misapprehends or chooses to misstate the issue on appeal regarding consequential damages. OneBeacon does not, as API claims, challenge the legal standard for contract damages. *See* Resp. Br. at 36. Rather, OneBeacon's argument is that, as a matter of law and on this record, the bankruptcy damages awarded to API are entirely too remote and speculative to be recoverable in this action. *See* App. Br. at 40-47; *see also Independent Grocery Co. v. Sun Ins. Co.*, 146 Minn. 214, 216-17, 178 N.W. 582, 583 (1920) (holding that damages consisting of an insured's financial insecurity based on the insurer's failure to pay a claim were too remote as a matter of law), *overruled in part* by

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<sup>1</sup> After trial, API sought and recovered a separate award from the district court for attorney fees incurred in this action. (A.216-217.)

*Olson v. Rugloski*, 277 N.W.2d 385, 389 (Minn. 1979) (“to the extent” *Independent Grocery* holds insured may recover only policy amount plus interest).

In an effort to show that “bankruptcy” was within the contemplation of the parties at the time of contract formation—in 1958—API cites a single sentence contained in the General Accident specimen policy forms that reads: “Bankruptcy or insolvency of the insured or of the insured’s estate shall not relieve the company of any of its obligations hereunder.” Resp. Br. at 39. This provision in no way establishes that General Accident and API contemplated that API would file bankruptcy in the event of a denial of coverage. Rather, this is a standard policy provision intended to prevent insurers from inducing their insureds to file petitions for bankruptcy in an effort to avoid coverage obligations. *See Jeppesen v. Swanson*, 243 Minn. 547, 558, 68 N.W.2d 649, 655 n.10, n.11 (1955) (discussing purpose and text of Minnesota statute requiring insurers to include this standard bankruptcy provision in liability policies).

API also cites a trio of decisions from California and Louisiana for the proposition that the insured’s “economic ruin” is a foreseeable consequence of an insurer’s denial of coverage. Resp. Br. at 40-41. Notably, though, each of these cases involved the financial consequences of an insurer’s refusal to pay an actual loss or judgment that no other insurer had agreed to pay. *See Reichert v. Gen. Ins. Co. of Am.*, 428 P.2d 860, 864 (Cal. 1967) (insurer’s failure to pay \$424,000 fire loss caused insured hotel owner to file bankruptcy) *vacated*, 442 P.2d 377 (Cal. 1968); *Wooten v. Cent. Mut. Ins. Co.*, 182 So.2d 146, 150 (La. Ct. App. 1966) (insurer liable for excess judgment against insured where it failed to settle within policy limits); *Venturi v. Zurich Gen. Accident & Liab. Co.*, 57 P.2d

1002, 1003 (Cal. Ct. App. 1936) (insurer failed to pay judgments against insured, forcing insured into bankruptcy).

This case does not present similar circumstances. Rather, the issue in this case is whether it was foreseeable in 1958 that General Accident could be made solely responsible for API's decision to file bankruptcy more than forty years into the future based on General Accident's unwillingness—and the unwillingness of API's other insurers—to unqualifiedly acknowledge unlimited coverage for asbestos-related bodily injury lawsuits, particularly where API was fully defended and indemnified in each of those lawsuits and did not face a single unpaid judgment, settlement, or lawyer's bill, and where API filed bankruptcy to avail itself of the benefits of a statute that did not exist until 1994. Understandably, API cannot direct this Court to a decision from any jurisdiction deciding a similar issue in the affirmative.

### **III. THE APPLICABLE STATUTE OF LIMITATIONS ON API'S CLAIMS EXPIRED LONG BEFORE API SUED ONEBEACON**

API's representative testified that General Accident breached its insurance contracts in 1987, when General Accident first declined to defend API. (T.226-27.) API commenced this litigation in 2003, some sixteen years after General Accident's denial of coverage, and well after the six-year statute of limitations applicable to its damage claims had expired. API advances three primary arguments in an unpersuasive effort to justify its untimely claims.

**A. OneBeacon Preserved The Statute Of Limitations Issue For Appeal**

API first argues that OneBeacon did not object to the absence of a statute of limitations question on the special verdict form, and therefore did not preserve the statute of limitations issue for appeal. Resp. Br. at 41. In order to preserve an issue with respect to the special verdict form, however, all that is required is the submission of a proposed verdict question before the jury retires. See Minn. R. Civ. P 49.01; *Wormsbecker v. Donovan Const. Co.*, 247 Minn. 32, 47-48, 76 N.W.2d 643, 653 (1956). OneBeacon did just that. (A.170-176.) OneBeacon also raised the statute of limitations issue in its motion for new trial. See *Kaiser-Bauer v. Mullan*, 609 N.W.2d 905, 912 (Minn. Ct. App. 2000) (“To preserve a substantive issue for appeal, a party is required only to raise the issue at trial and make the appropriate post-trial motion.”).

Moreover, OneBeacon’s challenge is not limited to the absence of a question on the special verdict form. OneBeacon appeals from the district court’s denial of its motions for summary judgment on the statute of limitations issue. (A.129-30; 249-250.) Accordingly, the statute of limitations issue is properly before this Court. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 310 (Minn. 1995) (reviewing denial of summary judgment after trial on the merits).

**B. API Did Not Prove Any Misconduct On The Part Of General Accident Or OneBeacon Sufficient To Toll The Six-Year Statute Of Limitations**

Next, API asserts that “[t]he jury unambiguously found that General Accident and OneBeacon made false representations to API.” Resp. Br. at 42. API stresses that “[t]his

finding is significant because fraudulent concealment tolls the statute of limitations under Minnesota law.” *Id.* API again ignores the jury’s express finding that API *did not rely* on any of the alleged misrepresentations—a finding that API does not challenge on appeal.

Moreover, in order to toll a statute of limitations, there must be an affirmative concealment of a cause of action. *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. Ct. App. 1992) (“To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action.”) API did not allege—let alone prove—that General Accident or OneBeacon concealed a cause of action from API. Quite the contrary, API representative Loren Rachey testified unequivocally that API believed General Accident breached its contract obligations in 1987. API attorney John Patterson further testified that, by 1991, General Accident had all the information it needed to acknowledge coverage but still declined to do so. (T.347-48.) Despite this information, API waited until 2003 to pursue any relief against General Accident.

API also argues that “a party’s continuing wrongful conduct tolls any statute of limitations until the misconduct ceases.” Resp. Br. at 43. This Court should not be persuaded. In *Davies v. West Publishing Co.*, 622 N.W.2d 836 (Minn. Ct. App. 2001), this Court rejected a similar argument on analogous facts. There, the plaintiff sought to toll the statute of limitations based on West Publishing Company making a series of improper distributions over a period of sixteen years. *Id.* at 839. The Court refused to apply the “continuing violation” doctrine, reasoning that the doctrine, most commonly

invoked in discrimination cases, generally applied to tort claims, not contract claims. *Id.* at 841. Further, the Court noted that the conduct complained of was not a continuing violation, but a series of separate acts insufficient to toll the statute of limitations. *Id.* at 841-42.

Here, General Accident is alleged to have breached its insurance contracts as early as 1987, when it declined to defend or indemnify API in asbestos-related bodily injury lawsuits. *See Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176, 275 N.W. 694, 697 (1937) (stating that a cause of action for breach of contract accrues when the terms of the contract are breached). The fact that General Accident subsequently denied additional claims on this same basis does not constitute a “continuing violation.” At best, General Accident’s subsequent denials only added to API’s damage claim. But, as the supreme court recently confirmed in *Antone v. Mirviss*, 720 N.W.2d 331, 336 (Minn. 2006), the fact that additional damage might later accrue does not prevent the statute of limitations from beginning to run.

### **C. The Six-Year Statute Of Limitations Applies To API’s Damage Claims**

Finally, despite the fact that API asserted damage claims against OneBeacon for breach of contract, breach of fiduciary duty, bad faith, and misrepresentation (and was awarded in excess of \$52 million), API concludes that “this is a declaratory judgment action” not subject to a statute of limitations. Resp. Br. at 43. Under API’s proposed rule of law, presumably *any* action for damages could be commenced years after an otherwise

applicable statute of limitations had run, so long as the complaint contained a claim for declaratory relief. This Court should not endorse such a nonsensical result.

For more than a century, Minnesota courts have rejected attempts to evade otherwise applicable statutes of limitation by mischaracterizing the nature of the lawsuit. In *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 92 N.W. 340 (1902), the plaintiff sought to obtain possession of certain property. Because the time to challenge the allegedly fraudulent transfer had passed, the plaintiff brought an action in ejectment. The Minnesota Supreme Court held that the statute of limitations could not be circumvented in this fashion: “Had [appellant] brought an action direct for the express purpose of procuring a decree of the court canceling the alleged fraudulent conveyance, he could not have maintained it, because of the bar of the statute; and there is no sound logic or reason in permitting him to effect that result in this indirect manner.” *Id.* at 343. API cannot simply unite stale damage claims with a declaratory judgment claim and assert that “because this is a declaratory judgment action” the statute of limitations does not apply.

## **ISSUES RAISED BY API’S APPEAL**

### **I. INDEMNITY OBLIGATIONS FOR FUTURE ASBESTOS-RELATED BODILY INJURY CLAIMS SHOULD BE ALLOCATED PRO-RATA BY TIME ON THE RISK**

#### **A. Standard Of Review**

API challenges the district court’s determination that indemnity obligations for future asbestos-related bodily injury claims should be allocated among all of API’s insurers and API pro-rata by time on the risk. A district court’s allocation determination is reviewed under an abuse of discretion standard. *See In re Silicone Implant Ins.*

*Coverage Litig.*, 667 N.W.2d 405, 417 (Minn. 2003) (“*Silicone IP*”). Here, the district court’s decision is amply supported by case law, by the undisputed nature of asbestos-related bodily injuries, and by the unequivocal testimony of API’s own expert.

**B. Asbestos-Related Bodily Injuries Are Continuing In Nature And Do Not Arise From A Discrete, Identifiable Event**

The Minnesota Supreme Court has expressly endorsed allocation by time on the risk in situations where, as here, damage occurs continuously over multiple policy periods, thereby triggering more than one policy and making it impractical (if not impossible) to establish with any certainty what damage occurred in any given policy period.<sup>2</sup> *Northern States Power Co. v. Fid. & Cas. Co.*, 523 N.W.2d 657, 663 (Minn. 1994) (“*NSP*”).

The essence of allocation “is that each insurer is held liable for only those damages which occurred during its policy period.” *Id.* 662. Each triggered policy “bears a share of the total damages proportionate to the number of years of coverage triggered.” *Id.* at 663. If, however, damages “are the result of a single discrete event, only the policies on the risk at that time are triggered and it is not necessary to allocate damages.” *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46, 59 (Minn. Ct. App. 2002)

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<sup>2</sup> Minnesota follows the “actual injury” rule. Under this rule, the occurrence “is not the time when the wrongful act was committed, but rather, it is the time when the complaining party was actually damaged.” *Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 261-62 (Minn. 1997). All policies in effect when the bodily injury or property damage occurred are triggered.

(“*Silicone I*”), *rev’d on other grounds*, 667 N.W.2d 405 (Minn. 2003); *see also SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305 (Minn. 1995).

To determine whether allocation is appropriate, the court must first determine whether the injuries at issue are continuous (*i.e.*, occur over multiple policy periods). If they are, the court must next determine whether the continuous injuries arise out of a discrete, identifiable event. *See Silicone II*, 667 N.W.2d at 417-18. If the court cannot identify a single, discrete event from which all injuries flow, allocation is warranted.

**1. Asbestos-Related Bodily Injuries Are Continuing In Nature**

API concedes that asbestos-related bodily injuries progress continuously over time. *See Resp. Br.* at 44 (noting that undisputed medical evidence establishes that asbestos-related injuries are “continuing in nature”); *see also id.* at 46 (“Both experts agreed that *multiple* injuries occurred over time, on a continuous and ongoing basis.”) (emphasis in original). Accordingly, the first inquiry of the *NSP* analysis favors allocation.

**2. Asbestos-Related Bodily Injuries Do Not Arise From A Discrete, Identifiable Event**

Where multiple events contribute to cause continuous injuries—and the injuries cannot readily be attributed to any particular one of those events—allocation is appropriate. In *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 300 (Minn. 2006), the supreme court stated: “[I]f the extent of coverage is to turn on whether damages result from a single discrete occurrence or a series of repeated events, the burden will fall to the insured to prove not only that damage was the result of a single

discrete occurrence, but during which particular policy period the occurrence took place.”

API does not even begin to meet this burden.

API asserts that “the asbestos-related bodily injuries and death at issue in this case were caused by many *discrete, separate events, any one of which is a substantial contributing factor to injury or death.*” Resp. Br. at 46 (emphasis in original). API continues: “These discrete events are the *repeated* ingestion of asbestos fibers and the repeated injuries caused by fibers lodged in the body.” *Id.* (emphasis added). These observations only underscore the indivisibility and indeterminacy of the injuries’ origin and epitomize the circumstances necessitating allocation.

For example, assume a particular claimant alleges repeated ingestion of asbestos fibers over a period of ten years, resulting in continuous injuries and culminating in a diagnosis of asbestosis. What portion of this claimant’s injuries is attributable to inhalation of asbestos fibers in 1960, when General Accident was allegedly on the risk? What portion is attributable to inhalation that took place in 1968, when insurers other than General Accident were on the risk? It is impossible to know. The deposition testimony of API’s own expert, Dr. Edward Gabrielson, confirms this impossibility:

Q: And with regard to clinical diseases caused by asbestos, including asbestosis, nonmalignant pleural diseases, and asbestos-related cancers, if there are discrete identifiable events that contribute to those injuries, would it be fair to state that all of those discrete and identifiable events are so intermingled as to be practically indivisible?

A: I think more or less that all of the individual events are, first of all, contributory to the end result, and they – they occur at intervals that can certainly not be determined retrospectively or even prospectively, and there is no technology that would allow us to

divide them into discrete events. Theoretically, they are individual events, but from a practical sense there is no way to divide them into individual events.

(RA.92.) Another expert, Dr. Howard Freeland, reached the same conclusion during his deposition. (RA.109.)

Asbestos-related bodily injuries cannot be attributed to a single, discrete identifiable event. Rather, as Dr. Gabrielson concluded, a series of events contribute “to the end result,” and it is not scientifically possible, either “retrospectively or prospectively,” to divide these events into discrete injury-causing events. (R.A.92.) These circumstances necessitate allocation.

API attempts to analogize the present case to *Silicone II*. Resp. Br. at 46. This Court should not be persuaded for one very basic reason: the continuous cellular injuries at issue in *Silicone II* originated from a single, discrete, non-recurring event—namely, the surgical implantation of the silicone product. In *Silicone II*, the court stated:

Here, the district court labeled the time of implant as the beginning of the continuing injury process. The implantation, therefore, is a readily identifiable discrete event from which all of the plaintiffs’ alleged injuries arose. Such implantation is more akin to a *single* spill that led to continuing soil damage in *SCSC* than it is to the situation in *NSP* or *Domtar* where “contamination could not be apportioned among causes.”

667 N.W.2d at 422 (quoting *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 730 (Minn. 1997)) (emphasis added).

In contrast to *Silicone II* (and the single, discrete environmental spill that led to continuing damages in *SCSC*), API is unable to identify a discrete, originating event from which all ensuing asbestos-related bodily injuries flow, much less identify the policy

period in which that event took place. Indeed, as Dr. Gabrielson testified, “there is no technology that would allow us to divide [the causes of asbestos-related bodily injuries] into discrete events.” (RA.92.)

It is also notable that Dr. Gabrielson’s opinions have led at least one other court to conclude that such injuries trigger multiple policy periods and necessitate allocation by time on the risk. *See Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Porter Hayden Co.*, 331 B.R. 652, 664-665 (D. Md. 2005) (adopting allocation by time on the risk for asbestos-related bodily injuries and referencing, in detail, an affidavit from Dr. Gabrielson for the conclusion that “[t]he undisputed medical evidence in this case establishes that exposure to and inhalation of asbestos fibers begins a cumulative process in which the body suffers virtually continuous injuries”).

Finally, API ignores numerous decisions from other jurisdictions concluding that allocation by time on the risk is appropriate in the context of asbestos-related bodily injuries or property damage. *See, e.g., Nat’l Union Fire Ins. Co.*, 331 B.R. at 664-65; *In re The Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004); *Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107 (Conn. 2003); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070 (Md. Ct. App. 2002); *Sybron Transition Corp. v. Security Ins. Co. of Hartford*, 258 F.3d 595 (7th Cir. 2001); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995).

In *Sybron Transition Corp.*, the United States Court of Appeals for Seventh Circuit articulated the rationale underlying these decisions: “Courts have adopted the time-on the risk method because it is impossible to tell whether fibers of asbestos inhaled

in a given year caused any given asbestos-related disease.” 258 F.3d at 601. The court continued: “Instead of trying to pursue this will-o’-the-wisp, courts allocate liability to all periods of exposure because they contain the likely causes, [and] to periods of manifestation because they contain the consequences (and are most closely associated with the injury that would mark the ‘occurrence’ or ‘accident’ triggering coverage in a standard policy).” *Id.*

The expert testimony in this case establishes that it is impossible to attribute asbestos-related bodily injuries to a discrete, identifiable event. The district court’s allocation determination was correct and clearly not an abuse of discretion.

**C. Allocation By Time On The Risk Is Not Inconsistent With The Alleged Terms Of The General Accident Policies**

API next claims that allocation is “inconsistent with the insurance contract.” Resp. Br. at 47. First, API argues that, because the specimen policy forms obligate General Accident to pay “all sums which the insured shall become obligated to pay,” General Accident cannot pay only for those damages attributable to injuries occurring during its policy periods. *Id.* In the context of allocation, however, API’s “all sums” argument has been considered and decidedly rejected by a number of courts, including the Minnesota Supreme Court. *See, e.g., Domtar*, 563 N.W.2d at 732 (“[W]e [previously] rejected the very same ‘all sums’ policy language argument advanced by Domtar in this case.”); *Security Ins. Co. of Hartford*, 826 A.2d at 121 (“[W]e conclude that applying the pro rata method of allocation does not violate the reasonable expectations of the parties to the insurance contracts.”).

In *Owens-Illinois, Ins. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994), the Supreme Court of New Jersey offered the following assessment of the same “all sums” argument advanced by API in this case:

The [“all sums”] language was never intended to cover apportionment when continuous injury occurs over multiple years. In addition, the argument that all sums to be assessed because of long-term exposure to asbestos could have been established in any one of the policy years is intuitively suspect and inconsistent with [the] developing jurisprudence in the field of toxic torts.

*Id.* at 989. In contrast to this authority, API references several decisions from foreign jurisdictions. Resp. Br. at 47. The court in *Domtar*, however, considered and rejected these very decisions. 563 N.W.2d at 733, n.5. This is hardly compelling authority for adoption of the rule API advances.

API next argues that General Accident’s specimen policy forms do not include express language providing for allocation of damages. This argument can easily be disposed of. The Minnesota Supreme Court developed the allocation-by-time-on-the-risk framework based not on the language of the insurance policies at issue, but as an equitable means of apportioning damages to policy periods where, as here, it would otherwise be impractical (if not impossible) to do so. *See, e.g., Domtar*, 563 N.W.2d at 733-34 (stating that allocation “offers a practical solution in the face of uncertainty”).

**D. Liability Is Pro-Rated From When A Particular Claimant Was First Exposed to Asbestos-Containing Products To When A Claim Is Made Or The Particular Claimant Dies, Whichever Occurs First.**

Finally, API argues that, if allocation is warranted, the allocation period should not include periods in which its insurance policies contained exclusions for asbestos-related

bodily injuries. API asserts that, after 1984, its liability policies excluded coverage for asbestos-related bodily injuries. Resp. Br. at 48-49. Yet API cites no record evidence establishing that asbestos-related coverage was “unavailable” after 1984. *See Wooddale Builders*, 722 N.W.2d at 298 (refusing to conclude on appeal that coverage was unavailable to insured and observing that “the record does not indicate why Wooddale had no such coverage after November 2002”).

To the contrary, the district court observed that “[t]here was no asbestos exclusion attached to the policies for the years 1985-86, 1991-92, and 1992-93.” (A.111.) Likewise, API cites no record evidence establishing that other market alternatives were unavailable. *See Sybron Transition Corp.*, 258 F.3d at 599-600 (concluding that coverage for asbestos-related risks was not “unavailable” in the mid-1980s, and that higher-cost coverage was simply economically unattractive to asbestos companies).

Further, it is inappropriate to thrust the bulk of liability on OneBeacon simply because some of the policies API purchased during the mid-1980s (presumably at a lower premium) may have been subject to asbestos exclusions. The United States Court of Appeals for the Seventh Circuit reached a similar conclusion in *Sybron Transition Corp.*:

To require Security to pay extra because Sybron did not find it cost-effective to purchase coverage during 1986 to 1988 would be the economic equivalent of requiring Security to furnish *free* coverage during 1986-88 (for Sybron does not propose to pay the going premium retroactively). Why an underwriter who furnishes low-price coverage during a period before the magnitude of the risk became apparent should be required to furnish, for nothing, an additional period of high-price coverage escapes us.

*Id.* at 600 (emphasis in original). In light of this sound logic, and in the absence of record evidence supporting API's argument, there is no basis to conclude that the district court abused its discretion.

## **II. NEITHER THIS COURT NOR THE DISTRICT COURT SHOULD ARBITRARILY IMPOSE FINDINGS REGARDING THE LIMITS OF COVERAGE FOR THE 1964-1966 POLICY PERIOD**

### **A. Standard Of Review**

API also challenges the district court's denial of its post-trial motion for amended findings of fact. A trial court's denial of a post-trial motion for amended findings of fact will not be disturbed absent an abuse of discretion. *See Zander v. State*, 703 N.W.2d 845, 857 (Minn. Ct. App. 2005).

### **B. The District Court's Refusal To Amend Its Findings Of Fact Was Not An Abuse Of Discretion**

While the jury expressly rejected API's claim that the limits of coverage for the 1964-1966 policy period were \$300,000 per person, \$1 million per occurrence, and \$1 million aggregate, API argues that it is entitled to a finding as a matter of law that this policy had minimum limits of \$100,000 per person, \$300,000 per occurrence, and \$300,000 aggregate for the product/completed operations coverages. This argument should be rejected.

Under Minnesota law, "[t]he primary right of a purchaser of a contract of insurance is the right to payment when a loss signals the insurer's liability within the limits of the policy of insurance." *Short*, 334 N.W.2d at 387. Because the right to payment belongs to the insured, it is the insured that bears the burden of proof to

establish the terms of payment. *See, e.g., Boedigheimer v. Taylor*, 287 Minn. 323, 329, 178 N.W.2d 610, 614 (1970) (“It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy.”). The amount of potential coverage available is a fundamental term of any insurance contract. Where the insured fails to meet its burden of proof to establish this fundamental term, it fails to prove its claim for coverage.

Here, in an effort to establish the amount of coverage available during the 1964-1966 policy period, API asserts that the trial testimony established that “API always maintained CGL policies in accordance with the insurance requirements of its contract customers and, at the very least, the minimum limits required by its customers.” Resp. Br. at 51. This testimony does not necessitate amended findings of fact.

In its Second Amended Proposed Special Verdict Form, API specifically requested the question on the special verdict form regarding the amount of coverage available under the 1964-1966 policy. API did not request an alternative question, and cannot seek relief from this Court simply because it is dissatisfied with the jury’s decision on the question it proposed.

Second, for each of two prior policy periods, API introduced certificates of insurance illustrating the amount of coverage available. It failed to do so for the 1964-1966 policy period. The finder-of-fact could have concluded that API did not meet its burden of proof to establish the amount of coverage available under this purportedly lost instrument. *See Perbix v. Hansen*, 419 N.W.2d 101, 104 (Minn. Ct. App. 1988) (stating that the proponent of a lost instrument bears the burden to establish the instrument’s

terms). As API did not meet its burden to establish the basic terms of the alleged contract, it failed to prove its claim for coverage under the 1964-1966 policy. The district court's decision not to amend its findings of fact was not an abuse of discretion and should be affirmed.

### **III. THIS COURT SHOULD NOT RE-WRITE THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER**

Finally, API requests that this Court re-write the district court's summary judgment order. API brought a motion for summary judgment requesting that the district court declare, as a matter of law, that each and every asbestos-related bodily injury claim was covered under the "operations" coverage of API's policies, as opposed to the "products-completed operations" coverage. The district court denied API's motion, reasoning that the specific coverage provision triggered by an injury is a fact-intensive inquiry and "the facts of each case may be different." (A.118.) The court proceeded to provide a series of hypothetical scenarios underscoring this conclusion.

It is apparent that the intent of the district court was to demonstrate that the issue of "operations" coverage versus "products-completed operations" coverage was not amenable to resolution on summary judgment. Rather, each individual case would have to be decided on its particular facts. The hypotheticals may have explained the district court's reasoning, but they are not binding determinations and are not subject to reversal on appeal. *Cf. Weigel v. Miller*, 574 N.W.2d 759, 760 (Minn. Ct. App. 1998) (dismissing appeal that sought only to challenge interstitial findings, which were not binding on subsequent proceedings). It is worth noting, however, that the district court was

compelled to provide hypothetical examples precisely because of the very deficiencies that now undermine API's case on appeal—API did not present any evidence of *actual* claims asserted against it.

## CONCLUSION

Nearly fifty years ago, when General Accident purportedly issued its first policy to API, being an insulation supplier and contractor appeared to be a relatively low-risk proposition. Twenty-five years later, API was first named as a defendant in an asbestos-related bodily injury lawsuit. Even then, API concluded it had sufficient insurance to cover these lawsuits, as the claims against it were typically resolved for nominal amounts. It was not until 2001 that API first believed it was at risk of having inadequate insurance because, in API's own words, the value of asbestos-related bodily injury claims increased substantially after the *Akin* verdict.

For years, API blamed all of its insurers—not just General Accident and its successor, OneBeacon—for the possibility that it might be inadequately insured. API claimed that all of its insurers that were defending and paying asbestos claims were allocating payments to the wrong coverages, and that those insurers were wrongfully claiming that their policies were exhausted. API filed bankruptcy when it still had claims against most of its insurers. It settled those claims, and then asserted that the entire responsibility for its bankruptcy—which it filed despite being fully defended and indemnified—fell on General Accident and OneBeacon.

As a matter of law, there can be no bad faith or breach of fiduciary duty here. If not barred by the statute of limitations, these claims are not recognized under Minnesota

law. Likewise, no breach-of-contract recovery can stand where API failed to prove the specifics of the claimed breaches, and failed to offer *any* proof that it was directly damaged by the alleged breaches.

Finally, the claimed bankruptcy damages are, as a matter of law, too remote and speculative to be allowed. It was simply not foreseeable in 1958 that, in 2005, API would seek bankruptcy protection when not a single unpaid claim existed against API, based on API's claim that the conduct of "its insurers, including General Accident" made it nervous about its future financial condition, and that API would claim that General Accident alone was responsibility for this nervousness.

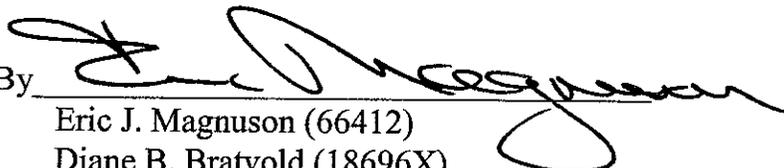
The judgment in favor of API and against OneBeacon cannot stand. It must be vacated, and the case remanded with directions to enter judgment in favor of OneBeacon.

Respectfully Submitted,

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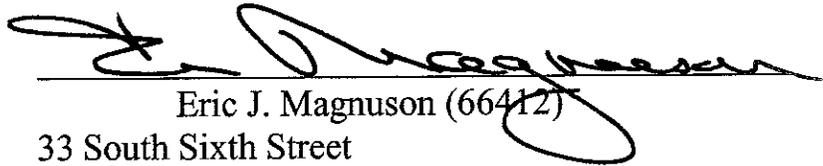
Dated: January 16, 2007

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

Proportional serif font, 13-point or larger.

The length of this brief is 9,318 words. This brief was prepared using Microsoft Word 2000.

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