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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.

APPELLANT'S BRIEF

RIDER BENNETT, LLP
Eric J. Magnuson (#66412)
Diane B. Bratvold (#18696X)
Mark R. Bradford (#335940)
33 South Sixth Street, Suite 4900
Minneapolis, MN 55402
(612) 340-8900

HINSHAW & CULBERTSON LLP
Thomas P. Kane (#53491)
Eric J. Strobel (#222434)
3100 Campbell Mithun Tower
222 South Ninth Street
Minneapolis, MN 55402
(612) 333-3434

Attorneys for Appellant OneBeacon Insurance Company

(Additional Counsel Listed on following page)

2006 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

FARICY & ROEN, P.A.
John H. Faricy, Jr. (#140041)
Craig M. Roen (#182916)
Mark A. Gwin (#132251)
Rebecca L. Kassekert (#311558)
Metropolitan Centre
333 South Seventh Street
Suite 2320
Minneapolis, MN 55402
(612) 371-4400

and

MASLON EDELMAN
BORMAN & BRAND, LLP
David F. Herr (#44441)
Margo S. Brownell (#307324)
Jason A. Lien (#0288936X)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Attorneys for Respondent A.P.I., Inc.

GISLASON, MARTIN &
VARPNESS, P.A.
James T. Martin (#68044)
7600 Parklawn Avenue South
Suite 444
Edina, MN 55435
(952) 831-5793

and

WILEY REIN & FIELDING LLP
Laura A. Foggan
John C. Yang
Anthony E. Orr
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Amicus Curiae The Complex Insurance Claims Litigation Association

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STATEMENT OF ISSUES

1. Did the district court err in denying OneBeacon's motions in limine and for judgment as a matter of law on API's claims for bad faith and breach of fiduciary duty when OneBeacon did not control the defense or settlement of claims against API?

The district court improperly submitted API's bad faith and breach of fiduciary duty claims to the jury, contrary to established Minnesota law.

Apposite authorities:

Short v. Dairyland Ins. Co.,
334 N.W.2d 384 (Minn. 1983)

Morris v. Am. Family Mut. Ins. Co.,
386 N.W.2d 233 (Minn. 1986)

Seren Innovations, Inc. v. Transcon. Ins. Co.,
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Miller v. ACE USA,
261 F. Supp. 2d 1130 (D. Minn. 2003)

2. Did the district court err in denying OneBeacon's motion for new trial because the jury instructions on bad faith and breach of fiduciary duty were improper and unsupported by Minnesota law?

The district court erred in instructing the jury on these claims and by submitting them to the jury deprived OneBeacon of a fair trial.

Apposite authorities:

Cherne Contracting Corp. v. Wausau Insurance Cos.,
572 N.W.2d 339 (Minn. Ct. App. 1997)

Short v. Dairyland Ins. Co.,
334 N.W.2d 384 (Minn. 1983)

Morris v. Am. Family Mut. Ins. Co.,
386 N.W.2d 233 (Minn. 1986)

Glass Serv. Co. v. Progressive Specialty Ins. Co.,
603 N.W.2d 849 (Minn. 2000)

3. Did the district court err in denying OneBeacon's motions for judgment as a matter of law and new trial on API's breach of contract claim when API failed to prove that OneBeacon breached the insurance contracts with respect to any particular claim?

The district court improperly allowed the breach of contract claim to go to the jury.

Apposite authorities:

SCSC Corp. v. Allied Mut. Ins. Co.,
536 N.W.2d 305 (Minn. 1995)

Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.,
625 N.W.2d 178 (Minn. Ct. App. 2001)

St. Paul Mercury Ins. Co. v. Dahlberg, Inc.,
596 N.W.2d 674 (Minn. Ct. App. 1999)

4. Did the district court err in denying OneBeacon's motion for judgment as a matter of law where no record evidence establishes that OneBeacon's purported breaches caused API's alleged damages?

The district court erred in allowing the jury to consider API's remote and speculative damages claim.

Apposite authorities:

Lesmeister v. Dilly,
330 N.W.2d 95 (Minn. 1983)

Franklin Mfg. Co. v. Union Pacific R.R. Co.,
311 Minn. 296, 248 N.W.2d 324 (1976)

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146 Minn. 214, 178 N.W. 582 (1920)

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215 F. Supp. 2d 336 (S.D.N.Y. 2002)

5. Did the district court err in denying OneBeacon's motions for summary judgment and judgment as a matter of law based on the statute of limitations, where API alleged OneBeacon wrongfully denied coverage in 1987 and API did not file suit until 2003?

The district court erred in refusing to rule that API's claims were barred by the statute of limitations.

Apposite authorities:

Bachertz v. Hayes-Lucas Lumber Co.,
201 Minn. 171, 275 N.W. 694 (1937)

Guercio v. Prod. Automation Corp.,
664 N.W.2d 379 (Minn. Ct. App. 2003)

Antone v. Mirviss,
720 N.W.2d 331 (Minn. 2006)

Minn. Stat. § 541.05.

STATEMENT OF CASE

In 2002, St. Paul Fire & Marine Insurance Company brought a declaratory judgment action in Ramsey County District Court against its insured, Asbestos Products, Inc. ("API"). (A.1-11.) Beginning in 1983, St. Paul and other insurers had defended and indemnified API in numerous suits alleging bodily injuries caused by exposure to asbestos-containing products distributed and installed by API. (A.4, 8.) St. Paul claimed to have exhausted the liability limits of the policies it issued to API, and sought a declaration that it had no continuing obligation to defend the company. (A.8, 9-10.)

API subsequently filed third-party claims against several other insurance companies, including Fireman's Fund Insurance Company, Great American Insurance Company, and The Home Insurance Company. Nearly a year into the litigation, API added as a party OneBeacon American Insurance Company, as successor to General Accident Insurance Company ("OneBeacon").[1] (A.12-34.)

Although API was fully defended and indemnified in each bodily injury lawsuit, it later claimed these insurers wrongfully denied its tenders of defense. (A.86.) Moreover, despite having been fully defended and indemnified in each lawsuit, API claimed its insurers collectively caused it to file voluntary bankruptcy out of fear that it would not

[1] In various pleadings, the defendant was identified as "One Beacon American Insurance Company," or similar names. The parties stipulated that the correct judgment debtor is "OneBeacon Insurance Company," and that OneBeacon Insurance Company is the successor in interest to General Accident. (A.220-222.)

have liability insurance sufficient to cover future asbestos-related bodily injury lawsuits. (T.170, 176-177.)[2]

With respect to OneBeacon, API alleged that OneBeacon's predecessor, General Accident, issued liability insurance policies to API at some point between 1958 and 1966. (A.75.) Although API never produced copies of any actual policies, it claimed that General Accident breached its insurance contracts by denying API's tenders of defense of the bodily injury lawsuits. (A.86.) API also claimed that, in denying coverage, General Accident acted in bad faith, breached its fiduciary duty, and misrepresented facts to API. (A.87, 89.)

API eventually settled its claims against all insurers except OneBeacon. (A.95-96, 100-01, 110, 137, 204-09.) In the process, API recovered approximately $54,000,000.00 for current and future asbestos-related bodily injury claims over and above what those insurers had already paid to defend and indemnify API.

API's claims against OneBeacon were tried before a jury, the Honorable John T. Finley presiding. OneBeacon moved for judgment as a matter of law on API's breach of contract claim, asserting that API presented no evidence that any of the asbestos-related bodily injury lawsuits were covered under the alleged General Accident policies. (T.717-19.) OneBeacon likewise moved in limine and for judgment as a matter of law on

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[2] The proceedings before the district court were reported in several volumes. Citations in this brief to the trial transcript and post-trial motions (included as part of the trial transcript) are to "T.*." Motions filed before trial, including motions for summary judgment, and motions at the start of trial, including motions in limine, were reported separately. Citations to these transcripts include the date of each hearing.

API's bad faith and breach of fiduciary claims, as Minnesota law does not recognize such claims in the context of an insurer's denial of coverage. (T.58, 11/21/05, 716-17.) (A.141.) The district court denied these motions and allowed all claims to proceed to the jury. (T.841.)

Based on certificates of insurance produced shortly before trial, OneBeacon stipulated that there was sufficient evidence to establish the existence of two policies issued to API between 1958 and 1964, but disputed the terms of those policies. The jury found that General Accident also issued a third liability policy to API from 1964 to 1966. (A.189.) Despite API's failure to provide copies of actual policies issued by General Accident to API, the jury found that the policies would have contained substantially the same terms, provisions, and coverage parts as specimen policy forms introduced during trial. (*Id.*)

Moreover, although API conceded that it had been defended and indemnified in each asbestos-related bodily injury lawsuit, the jury found that General Accident breached its insurance contracts by failing to "defend and/or indemnify" API, and that these breaches caused damages. (A.190-91.) The jury was also allowed to determine that General Accident acted in bad faith and breached its fiduciary duties to API. (A.191.) Finally, the jury found that General Accident falsely represented a past or present material fact, but that API did not rely on that representation. (A.192.)

API asked the jury to award approximately $52 million in damages (T.807), consisting of $40.5 million API claimed it was obligated to pay in the bankruptcy, approximately $5.865 million in bankruptcy attorney fees, and $5.5 million for the

amount by which API compromised an umbrella policy issued by The Hartford Insurance Company ("Hartford") in order to settle a claim for which even API agreed OneBeacon owed no coverage. The jury awarded what API asked for—$52,573,824, including $27,573,824 for breach of contract, $10,000,000 for bad faith, and $15,000,000 for breach of fiduciary duty. (A.191.) The district court issued Findings of Fact, Conclusions of Law, and Order for Judgment pursuant to the special verdict. (A.195-203.) Judgment was entered on January 19, 2006. (A.213.)

API and OneBeacon each brought motions for new trial, for judgment as a matter of law, and for amended findings. (A.210-12, 214-15.) The district court denied these motions in their entirety. (A.224.) API also brought a motion for attorney fees, which the court granted. (A.216-17, 243.) The district court entered a corrected judgment *nunc pro tunc* to reflect the proper identity of the judgment debtor (A.241), and subsequently entered judgment for the attorney fees award. (A.248.) This timely appeal followed. (A.249-58.) API filed a notice of review. (A.259-60.)

STATEMENT OF FACTS

A. History Of API And Asbestos-Related Bodily Injury Lawsuits

Asbestos Products, Inc. was founded in 1948. (T.96.) For twenty-five years, the company distributed and installed asbestos-containing products, including thermal insulation, pipe covering, and cement. (T.96-98.) In 1973, when asbestos-containing insulation was banned in the State of Minnesota, Asbestos Products, Inc. stopped distributing and installing asbestos-containing products, and changed its name to API. (T.96.)

Beginning in 1982, API was named as a defendant in thousands of bodily injury lawsuits arising out of alleged exposure to API's products.[3] (T.117, 693.) Many of these lawsuits asserted injuries that substantially pre-dated the filing of the bodily injury complaint. (T.695, 699-700.) API incurred no out-of-pocket expenses to defend or to settle any of these lawsuits. (T.178.) Rather, API was fully defended and indemnified by one or more of its liability insurers in each lawsuit. (T.176, 178.)

The present litigation arises out of API's demand that additional insurers agree to defend and indemnify API in the underlying bodily injury lawsuits, and API's claim that its insurers sold policies that were not subject to an aggregate limit for bodily injury claims arising out of its operations. (A.78, 84-86.) As counsel for API characterized it,

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[3] At the time this case was tried, API had been named as a defendant in approximately 3,000 lawsuits. (T.103.) The vast majority of these lawsuits had been resolved by API's insurers or were dismissed based on the claimant's inability to prove exposure to API's products. (T.103, 705-06.) The remainder were stayed as a result of API's decision to seek reorganization through a voluntary bankruptcy. (T.702.)

where the insurers claimed to have exhausted the aggregate limits of their policies, API sought to have the limits of those policies "reinvigorated" without any applicable aggregate limits. (T.19, 10/03/05.)

The dispute between API and OneBeacon, as successor to General Accident, involved policies that were purportedly issued by General Accident to API between 1958 and 1966. Despite substantial efforts by API and OneBeacon before and during this litigation, copies of these policies have never been located. (T.120, 576-78.)

B. API's Insurance Policies And Blanket Tenders Of Defense Of Asbestos-Related Bodily Injury Lawsuits

1. API's Initial Tenders Of The Asbestos Cases

When API was first named as a defendant in an asbestos-related bodily injury lawsuit, the company was able to identify four insurers to provide coverage, St. Paul, Fireman's Fund, The Home, and Great American. (T.117.) For several years, API tendered all asbestos-related bodily injury lawsuits exclusively to these four insurers. (*Id.*) These insurers collectively defended and indemnified API in each lawsuit. (T.119-20, 176, 178.)

2. Efforts To Identify Other Insurers

API and its lawyers undertook considerable efforts to locate evidence of other liability policies. API's lawyer, John Patterson, contacted API's insurance brokers[4] and a number of API's previous customers to find such information. (T.302-03, 318.)

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[4] API changed its insurance brokers in the early to mid-1980s, and did nothing to preserve either its own internal insurance records or the records of its previous insurance broker. (T.193-94.)

Additionally, API hired an insurance archeologist to locate evidence of liability insurance. (T.122-23.) These efforts were unsuccessful. (T.123.)

In 1987, API prepared a compilation of possible insurers. (A.367-376.) This compilation was based on information contained in work papers produced by API's accountants, Wilkerson & Guthmann. The accountant work papers were created during API's regular audits. (T.361-62.) API's accountants reviewed the company's records to verify the company's financial statements and made notes regarding their findings. (*Id.*) The accountants did not perform any insurance coverage analysis. (T.388.) Rather, the purpose of audits was to confirm the existence of certain assets and expenses listed on API's financial statements. (T.406-07.)

The accountant work papers contained inconsistent and inaccurate information.[5] For example, the papers listed both General Accident and Bituminous Casualty as having issued Policy No. 304795. (Ex. 74, WG000009, 18; A.346-48, 350.)[6] API's attorney,

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[5] OneBeacon brought a motion in limine prior to trial to preclude admission of the work papers as hearsay. (A.140.) OneBeacon argued that the work papers were rife with errors and lacked any indicia of reliability. Moreover, because the field auditors had no "business duty" to ensure the accuracy of the information concerning the identity of the insurers or the policy numbers (they were only verifying expenditures), no exception to the hearsay rule applied. (A.13; T.34-35, 11/21/05.) OneBeacon also brought a motion to strike these work papers based on API's destruction of the original work papers. (A.97-99.) The trial court denied the motions. (A.163, 168-69.)

[6] The accountant work papers introduced at trial were copies of blowbacks of microfilm and difficult to read. They were contained in four three-ring binders. (Ex. 74.) Other exhibits contained excerpts of these documents. Only selected portions of Ex. 74 are included in the Appendix. When referring to a particular work paper not in the Appendix, citations are to the specific page of the exhibit.

John Patterson, recognized this discrepancy in correspondence to counsel for Fireman's Fund dated March 26, 1987:

> A.P.I., Inc. has completed its investigation regarding the identity of its past general liability and umbrella insurers. As you can see from the enclosed lists of insurers, A.P.I. has been able to identify all of its general liability and umbrella insurers from 1952 through 1985. This information was compiled from old prepaid insurance expense ledgers which have been microfilmed by A.P.I. Copies of these ledgers are enclosed for your reference. Please note that the effective dates of some of the general liability policies overlap and that *two 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) (emphasis added.) In addition to these discrepancies, one entry in the accountant work papers identified Policy No. 304795 as a General Accident liability policy, while another entry identified it as a workers' compensation policy. (A.325-26.)

3. Tenders To General Accident

API tendered asbestos claims to all insurers it had identified. Prior to making the tenders, neither API nor its representatives reviewed the allegations of the complaint to determine which of the company's many insurance policies might be implicated. (T.253, 334-35.) Instead, API made tenders to all prospective insurers irrespective of the date each claimant was allegedly exposed to API's products, the date each claimant was allegedly injured, the effective dates of each policy, or the scope of coverage afforded under each policy. (T.334-35.)

At trial, API made no effort to demonstrate that the allegations of any particular complaint fell within the scope of coverage or effective dates of any General Accident policy. (T.253.) Instead, API's corporate representative, Loren Rachey, simply offered

his speculation that he would "find it hard to believe that not a one of them would have touched on [the General Accident policy] period." (*Id.*)

API first tendered defense of asbestos claims to General Accident in 1987. (T.161; Ex. 1.)[7] General Accident responded by requesting additional information, including "copies of any policy under which A.P.I., Inc. is seeking coverage from General Accident or . . . evidence demonstrating the existence of said policy." (A.264, 266.) Although General Accident searched its records, it was unable to find any information indicating that it had issued liability policies to API.[8] As API continued to tender lawsuits to General Accident over the next twelve years, General Accident repeatedly requested that API provide evidence of insurance beyond the limited and conflicting information contained in the accountant work papers. (Ex. 2; T.304-05.)

Representatives of General Accident also discussed the discrepancies in the accounting records with API's lawyer, and noted in internal memoranda that the

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[7] Ex. 1 and 2 were compilations of API's tenders to General Accident/OneBeacon, and the responses to those tenders. Only pages specifically cited from Exhibits 1 and 2 are included in the Appendix.

[8] General Accident and OneBeacon tried without success to locate information regarding policies that may have been issued to API. OneBeacon's claims examiner, Brooke Green, personally reviewed the company's historic claims file, and found no evidence of any insurance policies issued to API. (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.) Finally, Green searched the computer database for policy forms that may have been issued to other insureds between 1958 and 1966. (T.579.) She found only one such policy form and produced it in discovery. (*Id.*)

accountant work papers "indicate WC coverage but ledger also indicates GL coverage." (A.324.)

API stopped tendering claims to General Accident in 1999. (T.161-62.) Despite General Accident's repeated requests from 1987 to 1999, API never provided any additional evidence of insurance during that period of time, and continued to rely exclusively on the conflicting information contained in the accountant work papers to establish coverage. API tendered the same asbestos-related bodily injury lawsuits to General Accident and Bituminous Casualty[9], repeatedly asserting that each carrier issued Policy No. 304795. (T.316, 321-24, 348.) API's tender letters to General Accident also referenced 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 workers' compensation policy. (A.362.)

4. API Is Defended And Indemnified In Every Asbestos Case

From the time of the first tender to General Accident, up to the time API filed its voluntary bankruptcy, API was defended and indemnified by at least one of its insurers in every asbestos claim asserted against it. The insurers who provided a defense and indemnity to API were those for whom API was able to produce a copy of an actual policy of insurance or, at the very least, a certificate of insurance. (T.197-99.) Great

[9] For example, Exhibit 71 (A.344-45) is a tender letter sent by attorney John Patterson to Bituminous Casualty on April 1, 1987, referring to Policy No. ICG304795. On the same date, Patterson sent General Accident an identical letter tendering the same claims to General Accident under the same Policy No. ICG304795. (A.261-62.)

American defended and paid many of the claims that API asserted should have been defended by General Accident based on certificates of insurance. (T.118-20.) Although API tendered to a number of insurers based solely on the information contained in the accountant work papers, no insurer defended any claims based solely on that limited information. (T.351.)

C. Secondary Evidence Of Policies Issued By General Accident

Unable to provide the actual policies it claimed to have purchased from General Accident, API relied on secondary evidence to establish coverage at trial. In addition to the accountant records, API introduced two certificates of insurance, and specimen General Accident policy forms.

1. Certificates Of Insurance

In April 2005, nearly twenty years after its first tender to General Accident and three years into the litigation, API finally produced two certificates of insurance reflecting liability policies issued by General Accident to API. (A.313-14.) The certificates were not authored by General Accident, but by API's insurance broker, Cathcart & Maxfield, Inc. They were issued to a Wisconsin utility company, Madison Gas and Electricity, as evidence that API was insured at the time it did work for Madison Gas. The certificates referenced policy periods from April 30, 1958 to April 30, 1961, and from April 30, 1961 to April 30, 1964. (*Id.*)

OneBeacon stipulated before trial that the newly discovered certificates of insurance were sufficient to satisfy API's burden to prove that General Accident had issued liability insurance policies to API between 1958 and 1964. (T.104-06, 11/21/06.)

Nonetheless, OneBeacon disputed that there was any reliable evidence of the terms of those policies.

2. Specimen Policy Forms

API also presented four specimen policy forms at trial. (A.328-343.) These specimen forms were discovered in a defense attorney's file in an unrelated California lawsuit, *Western MacArthur v. General Accident, et al.*, Alameda County Superior Court, Court File No. 721595-7.

The information contained in the specimen policy forms was inconsistent with the information contained in the certificates of insurance. For example, the specimen forms were labeled as "COMBINED COMPREHENSIVE LIABILITY" (A.328, 332, 336, 340), while the certificates stated that the corresponding insurance policies provided "Comprehensive/Blanket Coverage." (A.313-14.) Moreover, the specimen forms did not include "Owner's/Contractor's Protective Liability" or "Elevators." (A.328, 332, 336, 340.) The certificates, on the other hand, included checked boxes indicating that the policies provide the following coverages: "Owner's/Contractor's Protective Liability"; "Premises-Operations"; "Products/Completed Operations"; "Elevators"; and "Contractual." (A.313-14.) Finally, the certificates indicated that the corresponding policies were subject to a $1 million "aggregate" limit, and did not indicate that the limit applied only to the "Products/Completed Operations" hazard. *Id.*

Over OneBeacon's objection (A.141; T.69-71, 11/21/05), the district court permitted API to introduce testimony regarding the specimen policy forms as secondary evidence of coverage. API's expert, Robert Hughes, testified about standard policy

forms that were being used in the insurance industry between 1958 and 1966. (T.431.) Although Hughes was unfamiliar with the forms used by General Accident during the relevant time period, he testified that the exhibit forms were similar to the forms being used in the industry. (T.446-47, 476.) Hughes also testified that "aggregate limits" did not exist generally for operations hazards policies between 1958 and 1966. (T.431.) Finally, Hughes shared his opinion that the specimen policy forms introduced at trial reflected the policies that would have been issued by General Accident during that time. (T.447-50.)

The district court also permitted API, over OneBeacon's objection (T.463-64), to introduce General Accident's discovery responses in the *Western MacArthur* litigation. (*Id.*) In its discovery responses, General Accident had stated that the policies at issue in that case had no aggregate limits. (A.305.)

D. API's Claims for Bad Faith and Breach of Fiduciary Duty

API alleged in its Amended Complaint that General Accident acted in bad faith and breached a fiduciary duty in denying API's tenders of defense of the personal injury lawsuits.[10] API asserted claims for bad faith and breach of fiduciary duty as separate causes of action, notwithstanding the fact that both claims were based on the same conduct.

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[10] In its Third Amended Complaint, API alleged: "General Accident . . . [is] aware of the nature and existence of the policies issued to API, but [has] misrepresented and/or failed to acknowledge the existence of such policies. Based upon such misrepresentations, General Accident . . . [has] refused to provide a defense and acknowledge [its] duty to defend or indemnify API for liability arising from Asbestos-Related Bodily Injury Claims." (A.89.)

To support its claims at trial, API introduced an internal memorandum written by Frank Thorn, a claims analyst for General Accident. That memorandum, dated May 14, 1987, stated in pertinent part:

> I again phoned Atty., John G. Patterson and re-requested material asked for in my 5/6/87 memo. He gave me the impression he was in no hurry but promised to comply. He indicated he had submitted such information to other Insurance Carriers in the past. This would again point out that A.P.I. is being represented and defended. See mine of 4/24/87 – P.2.
>
> What I do not want is to telegraph to the defense attorneys or insured we are eager and in short order they would all be on our back to tender their defense.
>
> P.S. We were off this risk 21 years ago and accordingly we are way down the line.

(A.327.)

The following day, Thorne wrote attorney Patterson and repeated General Accident's specific requests for additional information regarding policies that may have been issued to API, including the names of API's insurance agents between 1958 and 1966. (A.266a.) Thorne concluded his letter by requesting that API "[k]indly rush the information previously requested . . . as it is of the utmost urgency that we must have this information to act on your April 8, 1987 letter." (A.266b.)

API's tender letters also referenced a policy prefix—"ICG"—that was identified in the accountant work papers. (Ex. 1; A.261.) It is undisputed, however, that General Accident never issued liability policies bearing an "ICG" prefix. (T.584.) General Accident did issue policies with a "CG" prefix and a "1CG" prefix. (T.536.) API argued that General Accident/OneBeacon should have advised API of this information "which

would have enabled API to reconstruct it's [sic] coverage years and years ago." (T.777.) API never explained at trial, however, how the information regarding policy prefixes would have allowed it to do anything more than it in fact did.

OneBeacon brought a motion in limine and a motion for directed verdict to preclude API's claims for bad faith and breach of fiduciary duty. OneBeacon asserted that, under Minnesota law, an insurer's fiduciary obligations to its insured arise only where the insurer controls the defense and settlement negotiations on behalf of the insured. (T.58, 11/21/05; A.141.) Because General Accident never controlled the defense or settlement of claims brought against API, API could not state claims for bad faith and breach of fiduciary duty as a matter of law. The district court denied OneBeacon's motions (A.169; T.841), and permitted API's claims for bad faith and breach of fiduciary duty to go to the jury.

E. Damages

In January 2005, API filed a voluntary petition for bankruptcy reorganization. Although this was a voluntary reorganization, API claimed at trial that its bankruptcy was the result of the conduct of its "insurers, including General Accident." (T.49.) API made no effort at trial, however, to identify any specific conduct on the part of General Accident or OneBeacon that directly caused any of its claimed damages.

Rather, API presented evidence that, in 2001, a Minnesota jury had returned a verdict against it in the amount of $8 million in *Akin v. American Standard, Inc., et al.*, an asbestos-related bodily injury case venued in Ramsey County District Court. (T.151-52.) Although API was fully defended and indemnified in that lawsuit—and API conceded

that General Accident had no obligation either to defend or to indemnify it in that lawsuit[11]—API claimed the *Akin* verdict caused it to question whether it would have liability insurance sufficient to cover future claims. (T.152-54.) Hartford provided umbrella coverage for this verdict, and reached an agreement with API to settle the *Akin* claim post-verdict (and approximately thirty other claims) in exchange for API agreeing to waive the balance of the umbrella liability limits ($5.5 million). (T.156; A.273.)

API claimed that, after the *Akin* verdict, API's insurers were defending the company on a "case-by-case" basis, and API was uncertain how long that coverage would continue. (T.48-49, 169-70, 176-77.) Accordingly, API was concerned about its financial status, and sought bankruptcy protection. (T.48-49.)

API advanced this damage claim despite the fact that it was fully defended and indemnified against every asbestos-related bodily injury claim—including the *Akin* lawsuit—up until the date API filed for bankruptcy. API asserted that, had its insurers, "including General Accident" simply acknowledged coverage in the abstract, then API's bank, bonding company and note holders would not have been "nervous" about API's financial condition, and API would not have felt the need to seek voluntary reorganization through bankruptcy. (T.169-72.) However, it was only *after* the *Akin* verdict that "nervousness" arose, long after API made its first and last tenders to General Accident.

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[11] The *Akin* complaint (A.351-58) alleged exposure to API's products beginning in 1968, long after the dates API claimed General Accident provided coverage.

API also claimed that General Accident had agreed to defend and indemnify API in the bodily injury lawsuits, then the insurance companies who did acknowledge coverage would have had greater coverage available to defend and indemnify API in the *Akin* lawsuit and in other claims. As API representative Loren Rachey put it, "if General Accident had been paying, we would have had more coverage left on those [other] carriers." (T.226.) Nonetheless, API presented no evidence at trial regarding specific bodily injury claims that General Accident should have covered. Likewise, API failed to identify any insurers or particular coverages that would have been affected had General Accident agreed to defend or indemnify API against certain claims, and did not attempt to quantify in any fashion the claimed impact of the actions of General Accident or its other insurers.

API's coverage expert, Robert Hughes, specifically stated that he had no opinion on whether any particular claim was covered by the General Accident policies. (T.499.) Quite the contrary, Hughes testified that he could not identify a single claim that was covered under the General Accident policies. (T.253-54.)

Attorney Tom Thibodeau, who represented API in asbestos-related bodily injury lawsuits beginning in 2001, identified only one specific claim that allegedly arose during the claimed policy period of the General Accident policies.[12] His "best estimate" was that fifty to sixty percent of the claims against API involved alleged exposure to API's

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[12] *Gartner v. American Standard, Inc., et al.* (A.315-23.) The *Gartner* complaint was dated October 31, 2002, and was not tendered to General Accident.

products before 1966. (T.695, 699.) Thibodeau had no idea what portion of those claims alleged exposure solely before the claimed inception of General Accident's first policy period in 1958. (*Id.*) Thibodeau also testified that many of the complaints alleging exposure to API's products were eventually dismissed without any payment because the underlying claimants could not prove their allegations. (T.705-06.) He gave no estimate as to the number or percentage of claims that were resolved with no indemnity payment. Finally, Thibodeau testified that he was never asked to perform any analysis of what policy periods may have been implicated by a particular complaint. (T.707-08.)

F. Statute Of Limitations

API Treasurer and corporate representative, Loren Rachey, testified at trial that he considered General Accident to have first breached its insurance contracts in 1987, when General Accident failed to defend API in the bodily injury lawsuits. (T.226-27.) Likewise, API attorney John Patterson testified that, by 1991, API had provided General Accident sufficient evidence of coverage. (T.347-348.) Nonetheless, API did not commence this action against General Accident/OneBeacon until April 29, 2003. (A.33.)

Before trial, OneBeacon moved for summary judgment, asserting that the six-year statute of limitations precluded API's claim that General Accident/OneBeacon wrongfully denied coverage for asbestos-related bodily injury lawsuits. (A.102-03.) The district court denied OneBeacon's motion, concluding that the six-year statute of limitations did not apply to declaratory judgment actions. (A.107, 129-30.) At trial, the district court likewise denied OneBeacon's renewed motion for judgment as a matter of

law on the statute of limitations issue, refused to include a statute of limitations question on the special verdict form, and denied OneBeacon's related post-trial motion. (T.841.)

ARGUMENT

API convinced the trial court to allow the jury to consider API's claims of bad faith and breach of fiduciary duty, when those claims are not recognized under Minnesota law in the circumstances presented by this case. OneBeacon did not control the defense or settlement of any claim against API, and as a matter of law cannot be held liable for bad faith in this case. Moreover, the district court ignored the failure of API to prove that there was coverage under the General Accident policies for any particular asbestos claim, and the fact that API never showed what impact, if any, General Accident's actions had on API's other insurance coverage. The breach of contract finding cannot stand.

The damages API sought were also remote and speculative as a matter of law. API claimed its insurers should have acknowledged unlimited coverage for asbestos-related bodily injury lawsuits. If they had, API argued, the company's banks would have been less "nervous" about its financial position and API would not have had to file voluntary bankruptcy. But API failed to prove any connection between a specific breach of a specific policy and its decision to file bankruptcy. Moreover, in 1958, no one could have foreseen that more than 45 years later, API would file a voluntary bankruptcy petition to resolve thousands of asbestos claims, past and future, and then assert that its insurers, "including General Accident," were required to pay for that re-organization.

Finally, API considered General Accident to have breached its insurance contracts in 1987, but API did nothing to pursue a claim against General Accident or OneBeacon until 2003. Any claims that API might have were time barred.

The judgment against OneBeacon must be set aside.

I. THE DISTRICT COURT ERRED IN DENYING ONEBEACON'S MOTIONS IN LIMINE AND FOR JUDGMENT AS A MATTER OF LAW ON API'S CLAIMS FOR BAD FAITH AND BREACH OF FIDUCIARY DUTY

A. Standard Of Review

Motions for judgment as a matter of law raise purely legal questions and are reviewed *de novo*. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). On appeal, this Court will apply the same standard as the district court, and will enter judgment in favor of the appellant where the evidence presented does not state a *prima facie* case. *Macho v. Mahowald*, 374 N.W.2d 312, 314 (Minn. Ct. App. 1985). While all evidence must be considered in the light most favorable to the prevailing party, judgment as a matter of law is proper where a jury verdict has no reasonable support in fact or is contrary to existing law. *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990) ("granting JNOV is also proper when the jury's findings are 'contrary to the law applicable in the case.'"); *Wong v. Am. Family Ins. Co.*, 576 N.W.2d 742, 746 (Minn. 1998) (holding insurer entitled to JNOV where court erred in jury instruction on what law applied and insurer was not liable under any applicable law).

B. API's Claims For Bad Faith And Breach Of Fiduciary Duty Were Contrary To Established Minnesota Law

The Minnesota Supreme Court has long held that an insurer owes its insured a fiduciary duty to act in "good faith" only in specific circumstances. In *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983), the court articulated the limited scope of an insurer's fiduciary duty.

> In Minnesota, a liability insurer, *having assumed control of the right of settlement of claims against its insured*, may become liable in excess of its undertaking under the terms of the policy if it fails to exercise "good faith" in considering offers to compromise the claim for an amount within the policy limits. This duty to exercise "good faith" includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured.

(Internal citations omitted; emphasis added.)

In the wake of the *Short* decision, Minnesota courts have expressly and consistently declined to recognize bad faith or breach of fiduciary duty claims against an insurer in circumstances where, as here, the claims are based on the insurer's conduct in denying coverage. *See Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986); *Pillsbury Co. v. Nat'l Union Fire Ins. Co.*, 425 N.W.2d 244 (Minn. Ct. App. 1988); *R.L.B. Enters., Inc. v. Liberty Nat'l Fire Ins. Co.*, 413 N.W.2d 551 (Minn. Ct. App. 1987); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629 (Minn. Ct. App. 1986); *Seren Innovations, Inc. v. Transcon. Ins. Co.*, No. A05-917, 2006 WL 1390262 (Minn. Ct. App. May 23, 2006) (unpublished); *see also Miller v. ACE USA*, 261 F. Supp. 2d 1130, 1140 (D. Minn. 2003).

In *Morris*, the supreme court observed that Minnesota adheres to the traditional rule that even a "bad faith" breach of contract does not convert a breach of contract claim into an independent tort. 386 N.W.2d at 237. The court specifically declined to permit the recovery of tort damages based on a wrongful denial of insurance coverage. *Id.* at 238.

Following *Morris*, this Court has also refused on many occasions to recognize an independent tort of bad faith or breach of fiduciary duty based on an insurer's denial of

coverage. In *Pillsbury*, for example, this Court rejected an insured's claim that its insurer denied coverage in bad faith, stating: "'The insurer's duty of good faith is breached in situations in which the insured is clearly liable and the insurer refuses to settle within the policy limits and the decision not to settle within the policy limits is not made in good faith and is not based upon reasonable grounds to believe that the amount demanded is excessive.'" 425 N.W.2d at 249-50 (quoting *Short*, 334 N.W.2d 384, 387-88 (Minn. 1983)). The Court continued, "[a]ppellant . . . asks us to create the new tort of bad faith denial of an insurance claim. We believe this request is but a restatement of appellant's argument that malicious breach of a contract constitutes an independent tort." *Id.* at 250. Accordingly, this Court dismissed the insured's claim for bad faith.

In *Saltou*, the Court stated in no uncertain terms: "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." 394 N.W.2d at 633. Most recently, in *Seren Innovations*, this Court affirmed the dismissal of an insured's claims for bad faith and breach of fiduciary duty arising out of a denial of coverage. "Although Minnesota law recognizes that the implied covenant of good faith and fair dealing is included in every contract, including insurance contracts, Minnesota law does not recognize a separate cause of action for breach of the implied covenant of good faith when it arises from the same conduct as a breach-of-contract claim." *Seren Innovations*, 2006 WL 1390262 at *8 (internal citations omitted). This Court reiterated that an insurer's fiduciary obligations arise only where the insurer controls the defense of its insured and settlement negotiations. *Id.* at *7 (citing *Short* 334 N.W.2d at 387-88).

API's purported bad faith and breach of fiduciary duty claims are premised on General Accident's (and, subsequently OneBeacon's) position that API provided insufficient evidence of coverage, its refusal to defend or indemnify API in the absence of such evidence, and its failure to "openly communicate" with API. (T.777.) Minnesota courts have, however, consistently refused to recognize claims for bad faith and breach of fiduciary duty in circumstances such as are presented in this case. *See Miller*, 261 F. Supp. 2d at 1140 ("[S]ummary judgment is nonetheless appropriate because [the insured] bases his claim for breach of the duty of good faith and fair dealing on the same facts he asserts to support the breach of contract claims, namely, [the insurer's] refusal to provide defense and indemnification.").

API and the district court relied heavily on the statement in *Kissoondath v. United States Fire Ins. Co.*, 620 N.W.2d 909, 915 (Minn. Ct. App. 2001) that "an insurer owes its insured a fiduciary duty to represent the insured's best interests." Based on this language, API contended that an insurer's fiduciary obligations are not limited to settlement negotiations. That argument is simply wrong.

First, until an insurer assumes control of the defense of a claim, there is no fiduciary relationship between the insurer and the insured. In *Cherne Contracting Corp. v. Wausau Insurance Cos.*, 572 N.W.2d 339 (Minn. Ct. App. 1997), the Court specifically rejected the general notion that an insurer stands in a fiduciary relationship with its insureds. "The reality is that a relationship created by an insurance contract necessarily involves competing interests, which often generate litigation between the insurer and insured." *Id.* at 343. That statement applies with full force here, where from the very

first tender, API and General Accident/OneBeacon clearly had adverse positions regarding coverage, rather than a fiduciary relationship.

Second, like *Short*, *Kissoondath* addressed the actions of an insurer *after* it undertook a defense of—and settlement negotiations for—its insured. *Kissoondath*, 620 N.W.2d at 913. It is apparent, then, that this Court was not pronouncing a new rule of law in *Kissoondath*, but was reiterating the holding in *Short*—namely, an insurer owes a fiduciary duty to its insured where it undertakes the defense of its insured and assumes control of settlement negotiations.

In *Miller v. ACE U.S.A.*, the United States District Court for the District of Minnesota rejected the precise argument advanced by API. The court held 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." *Miller*, 261 F. Supp. 2d at 1141, n.4.

While not binding on this Court, the *Miller* decision is persuasive. The decision analyzed numerous Minnesota decisions that limit an insurer's fiduciary duty to the circumstances in *Short*, and expressly concluded that *Kissoondath* did not expand the scope of an insurer's fiduciary obligations to include instances where the insurer does not control the defense of the insured. *Id.* at 1140-41.

> [T]he rule enunciated in *Short* and referenced in *Kissoondath*, specifies the fiduciary obligations as arising once the insurer assumes the defense of the insured. 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. [The insured]

> cites no authority expressly providing for a fiduciary duty before this time, and Minnesota law is established that an alleged bad-faith breach of contract does not support extra-contractual liability absent an independent tort.

Id. at 1141.

It is undisputed that General Accident never controlled the defense of API and never entered into settlement negotiations on behalf of API. The fiduciary duty articulated in *Short* never came into being. Likewise, General Accident's denial of coverage was not accompanied by an independent tort. The jury specifically rejected API's misrepresentation claim, finding that API did not rely on General Accident's statements. (A.192.)

Under Minnesota law, no claim exists for bad faith refusal to admit coverage under circumstances such as were presented here. *Cf. Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.,* 588 N.W.2d 756, 771 (Minn. Ct. App. 1999) (no bad faith when liability insurer denied coverage despite having file copies of insured's claim experience cards, where neither party retained copies of policies). Under Minnesota law, bad faith can arise only when the insurer controls the defense and settlement of a claim. Until that happens, no special duties are imposed on the insurer.

The district court committed reversible error in denying OneBeacon's motions in limine to exclude evidence on API's bad faith and breach of fiduciary claims, and further erred in permitting those claims to go to the jury. The judgment in API's favor as to those claims must be vacated. In addition, the presentation of those claims at trial was so

prejudicial that even if the Court does not grant judgment as a matter of law on API's contract claims, OneBeacon is entitled to a new trial.

II. THE DISTRICT COURT ERRED IN DENYING ONEBEACON'S MOTION FOR NEW TRIAL BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED ON BREACH OF FIDUCIARY DUTY AND BAD FAITH

As a matter of law, API should not have been allowed to present to the jury its claims for bad faith and breach of fiduciary duty, which are contrary to Minnesota law. But even if those claims could proceed, they were improperly presented to the jury because the instructions which API requested, and which the district court gave, were erroneous and prejudicial.

A. Standard Of Review

A district court is bound to follow established case law in rendering decisions with regard to the selection of jury instructions. *Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n. 1 (Minn. Ct. App. 1990). While jury instructions are "viewed as a whole to determine whether they fairly and adequately explain the law," an appellate court will hold that "an instruction is error if it materially misstates the law." *Peterson v. BASF Corp.*, 711 N.W.2d 470, 484 (Minn. 2006). If the error is prejudicial, or an appellate court is unable to determine whether the error affected the jury, a new trial should be granted. *Lieberman v. Korsh*, 264 Minn. 234, 242, 119 N.W.2d 180, 186 (1962) (granting new trial based on error in jury instructions); *Zitzow v. Wal-Mart Stores, Inc.*, 568 N.W.2d 549, 552 (Minn. Ct. App. 1997) (same).

B. The Jury Instructions On Breach Of Fiduciary Duty And Bad Faith Were Contrary To Existing Law

The district court instructed the jury that an insurer owes a fiduciary duty to its insured, regardless of the circumstances. That error alone makes the instructions fatally flawed. Fiduciary duties only arise in specific circumstances and are not inherent in the insurer/insured relationship. The instructions also list specific obligations taken from inapposite cases—cases where the insurer controlled the defense—and from a statutory provision that does not allow a private cause of action. The instructions were unsupported by the law.

1. Fiduciary Duty

First, with respect to API's breach of fiduciary duty claim, API requested that the jury be instructed as follows:

> A "fiduciary relationship" exists when one person places confidence in another person who, as a result of having this confidence place in him or her, assumes a position of superiority and influence.
>
> An insurer and its policyholder hold a fiduciary relationship and the insurer owes its policyholder a fiduciary duty.
>
> The fiduciary duty owed to a policyholder includes:
>
> 1. Full consideration of the policyholder's interests
> 2. Prompt and open communication with the policyholder
> 3. Fair and complete investigation of the claim
> 4. Correct interpretation, application and representation of policy provisions and coverage
> 5. Providing timely decisions on the payment or denial of a loss with a proper explanation to the policyholder of the basis of the coverage decision

6. Viewing claims against the policyholder as if there were no policy limits applicable to the claim

7. Giving equal consideration to the financial exposure of the policyholder

8. Full disclosure of material facts

(A.150.) Over OneBeacon's objection (T.154-55, 11/22/05), the district court adopted verbatim API's proposed jury instruction. No existing Minnesota case law supports this instruction.

As is more fully discussed above, the normal relationship between an insurer and an insured is not fiduciary in nature. *Cherne*, 572 N.W.2d at 343. Thus, it was error to tell the jury that an insurer owes an insured a fiduciary duty in all circumstances. That, however, is just what the instruction did.

A fiduciary duty of an insurer only arises once the insurer controls the defense of a claim. The insurer has assumed responsibility for the entire litigation despite the fact that the insured has an ongoing interest in the suit. For that reason, the insurer owes special duties to keep the insured informed of the course of the litigation, to consider the insured's interests during settlement negotiations, and to give equal consideration to the financial interests of the insured. In settlement negotiations, the insurer must view the claims against the policyholder as if there were no policy limits. *See Short*, 334 N.W.2d at 387-88.

These duties, included in the district court's instruction and derived from excess verdict cases where the insurer controlled the defense of the case, do not arise when the insurer has not assumed control of the defense of a claim against the insured. Thus, it

was improper to instruct the jury that any fiduciary duty that might be owed included these specific obligations, when the context in which those obligations are imposed was not present.

The district court also improperly based portions of the instruction on provisions of the Unfair Claims Practices Act, Minn. Stat. § 72A.17 *et seq*. That Act provides for administrative oversight of certain insurer activities, and provides, for example, that an insurer must advise the insured in writing of the basis for a claim denial. Minn. Stat. § 72A.201, subd. 8(1). The district court utilized these statutory provisions to conclude that OneBeacon had a fiduciary obligation to API to, among other things, provide "timely decisions on the payment or denial of a loss with a proper explanation to the policyholder of the basis for the coverage decision." (A.150.)

An unbroken string of appellate decisions, however, clearly holds that the Unfair Claims Practices Act provides for administrative enforcement only, and does not provide the insured with a private cause of action. *See Glass Serv. Co. v. Progressive Specialty Ins. Co.*, 603 N.W.2d 849, 852 n.2 (Minn. 2000) (citing *Glass Serv. Co. v. State Farm Mut. Auto Ins. Co.*, 530 N.W.2d 867, 872 (Minn. Ct. App. 1995)); *Morris*, 386 N.W.2d at 237. Utilizing the provisions of this statute to define the scope of OneBeacon's fiduciary obligations to API is directly contrary to these decisions and constitutes reversible error.

2. Bad Faith

With respect to API's bad faith claim—and over OneBeacon's objection (T.145, 11/22/05)—the district court gave API's requested instruction verbatim.

> An insurer acts in "bad faith" when it breaches its fiduciary duty. Bad faith includes dishonest or deceitful conduct and 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 towards its policyholder if it fails to perform any of its fiduciary duties.

(A.153, T.825.)

No existing Minnesota case law supports this largely circular and duplicative instruction. *See* discussion, *supra* at § I.B. Bad faith can only arise under Minnesota law when the insurer controls the defense and settlement of a case. Moreover, by this instruction, the jury was told that bad faith *is* the breach of a fiduciary duty. This instruction misstates the law and constitutes reversible error. *See Peterson*, 711 N.W.2d at 484 (noting that a jury instruction is reversible error if it materially misstates the law).

III. 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. Standard Of Review

When a district court's decision on a new trial is based on legal error this Court will exercise *de novo* review. *Reider v. City of Spring Lake Park*, 480 N.W.2d 662, 666 (Minn. Ct. App. 1992). Where a plaintiff has failed to establish an essential element of the claim, this Court will reverse judgment for the plaintiff and order judgment for the defendant as a matter of law. *See, e.g., Obst v. Microtron, Inc.*, 588 N.W.2d 550, 555 (Minn. Ct. App. 1999), *affirmed*, 614 N.W.2d 196 (Minn. 2000) (holding defendant entitled to JNOV where record did not establish requirements of claim); *Cokley v. City of Otsego*, 623 N.W.2d 625, 634 (Minn. Ct. App. 2001) (holding district court erred in failing to direct verdict for defendant where plaintiff failed to make *prima facie* case).

B. API Failed To Prove Its Breach Of Contract Claim Because No Record Evidence Establishes That OneBeacon Breached The Insurance Policies With Respect To Any Particular Bodily Injury Claim

Under Minnesota law, an insurer's duty to defend is generally determined by comparing the allegations contained in the complaint with the terms of the insurance contract. *St. Paul Mercury Ins. Co. v. Dahlberg, Inc.*, 596 N.W.2d 674, 677 (Minn. Ct. App. 1999) (citing *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 256 (Minn. 1993)). Thus, to determine whether an insurer has a duty to defend a particular claim, one must identify both parts of the equation—the material terms of the insurance contract *and* the facts and circumstances of the underlying claim. It is insufficient to know only that a particular insurance policy includes a duty to defend in the abstract. Rather, the question remains: the duty to defend what?

Here, as the party seeking coverage, API had the burden of proving that each complaint for which it sought a defense presented claims potentially covered under one of the alleged General Accident policies. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995); *see also Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982). Indeed, the district court specifically held prior to trial that API must prove its breach of contract claim on a case-by-case basis. (A.117-20.) The district court went on to hold that, "if the injury [from] the asbestos arose from API's operations *while the policy was in effect*, then any underlying claim arising from such exposure triggers the policy." (A.121.) (Emphasis added.)

The trial record is devoid of any evidence that General Accident or OneBeacon had a duty to defend any particular claim brought against API, let alone that General Accident or OneBeacon breached that duty with respect to any particular lawsuits. API presented no evidence pertaining to the timing of any specific claimant's alleged exposure to API's asbestos-containing products. Rather, API simply presented evidence that thousands of claims had been made against it over the course of several decades, and that each of those claims had been tendered to all insurers regardless of the time of each claimant's alleged exposure to API's products, the timing of each claimant's injuries, or the policy dates. *See* discussion, *supra* at Statement of Facts, § B.

API also presented no evidence that General Accident/OneBeacon breached its duty to indemnify API against any of the lawsuits brought against it. Under Minnesota law, an insurer's duty to indemnify is narrower than its duty to defend, and is only triggered when the facts establish that the insured is legally liable for a covered loss. *See, e.g., Milbank Ins. Co. v. B.L.G.*, 484 N.W.2d 52, 56 (Minn. Ct. App. 1992) (noting that findings of fact and conclusions of law must be sufficient to determine insurer's duty to indemnify against insured's liability).

Other than the *Gartner* case (which was never tendered to OneBeacon), API presented absolutely no evidence that any claimant *actually* suffered damage during the General Accident policy periods. In fact, it is undisputed that the claim referenced primarily during trial—the *Akin* lawsuit—involved exposure to API's products years *after* the claimed General Accident policy periods. Attorney Thibodeau testified at trial without contradiction that many claims asserted against API were ultimately dismissed

due to the claimant's inability to prove exposure to API's products. (T.705-06.) Thus, for many claims, there was simply no indemnity obligation to breach. Moreover, since all of API's defense costs were paid by one or more of its insurers, API could not—and did not—show that it was damaged by General Accident/OneBeacon's failure to participate in API's defense.

The purpose of insurance is to reimburse the insured for its expenses related to an insured claim; where an insured has already been compensated by one insurer for amounts it claims are owed by a second insurer, the insured is not entitled to anything more. *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 186 (Minn. Ct. App. 2001). In *Youngquist*, the Court rejected an attempt by the insured to recover from one insurer amounts paid by another insurer that defended the insured in litigation. The Court reasoned that the plaintiff has the burden to prove damages, and judgments, attorney fees, and costs paid by another insurer do not constitute proven damages. *Id.* at 187, 188.

The insured also argued that public policy dictates that insurance companies should not be allowed to breach their contracts. The Court rejected that argument, citing Minnesota's expressed preference that each insurer perform its independent duty to cover a mutual insured. *Id.*

Given the complete lack of evidence with respect to the nature, timing, and other characteristics of any bodily injury claim asserted against API, there was no basis upon which the jury could conclude that General Accident/OneBeacon had a duty to defend API against any particular claim, much less that it breached that duty with respect to a

particular claim. Moreover, in the absence of evidence of the amounts of particular settlements or verdicts, and in light of the undisputed fact that all claims against API were defended and paid by other insurers, there was likewise no basis upon which the jury could conclude that General Accident/OneBeacon breached its duty (if any) to indemnify API. Accordingly, the judgment against OneBeacon cannot stand.

IV. THE DISTRICT COURT ERRED IN DENYING ONEBEACON'S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE NO RECORD EVIDENCE ESTABLISHES API'S CLAIMED DAMAGES WERE CAUSED BY GENERAL ACCIDENT OR ONEBEACON'S ACTIONS

Even assuming this Court sustains the liability determinations, it must reverse the judgment because there is no record evidence establishing that the damages awarded were foreseeable or that any breach by General Accident or OneBeacon caused API's damages. When a contract is breached, the non-breaching party is entitled to direct damages—*i.e.,* damages that will place it in the same situation that it would have been had the contract been fully performed. In the insurance context, an insured may recover as direct damages defense costs and indemnity payments owed under the insurance contract. In some cases, the non-breaching party may also recover additional, consequential damages that flow from the direct damages. In those cases, however, the insured must establish that the consequential damages were foreseeable, were within the contemplation of the parties when they entered into the insurance contract, and flowed from the direct damages caused by the insurer's breach of contract. An insured is not entitled to remote or speculative damages. These standards apply equally to all of API's claims and, applying those standards, the jury's award cannot stand.

A. Standard Of Review

Judgment as a matter of law is proper where the record does not establish that the alleged breach of contract caused the claimed damages. *See, e.g., Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 105-06 (Minn. Ct. App. 1987) (affirming directed verdict in a contract claim where plaintiffs failed to offer proof that the damages resulted from the alleged breach).

B. API's Claims Against OneBeacon Were All Governed By The Same Rules Of Causation

API pursued four different legal theories at trial: breach of contract; bad faith; breach of fiduciary duty; and misrepresentation. The jury found in favor of API on the first three claims, but rejected API's misrepresentation claim. The jury was instructed that the same measure of damages—*i.e.,* breach of contract damages—applied to the legal theories upon which API prevailed. (T.819.) ("In deciding damages for breach of contract, you will be answering Questions 13, 15, 17 and 27.")[13] Thus, the adequacy of API's proof of damages under all three theories is subject to the legal test applicable to breach of contract actions.

C. API Did Not Seek Or Prove Direct Damages

Under Minnesota law, the general measure of damages in a breach of contract action is the amount that will place the non-breaching party "in the position in which he

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[13] Claims for bad faith are contract claims and do not sound in tort. *Cherne*, 572 N.W.2d at 343-44 ("[T]here is no duty independent of the contract."). The measure of damages for breach of contract remains the same "however malicious or wrongful" the breach. *Wild v. Rarig*, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975). A party may not recover tort damages or other extra-contractual damages for breach of contract. *Morris,* 386 N.W.2d 233, 237 (Minn. 1986).

would be if the contract were performed." *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983). In this case, API claimed that General Accident/OneBeacon breached third-party liability policies. Where an insurer fails to defend its insured, the insured may recover as direct contract damages the legal costs incurred by the insured in defense of a lawsuit by a third party, *SCSC,* 536 N.W.2d at 316, as well as those amounts the insured paid as a result of its legal liability to a third party, *RLI Insurance Co. v. Pike*, 556 N.W.2d 1, 3 (Minn. Ct. App. 1996). In bad faith cases, direct damages may also include the amount of any legal liability the insured is obligated to pay to a third party in excess of the policy limits. *Short*, 334 N.W.2d at 389 (citing *Strand v. Travelers Ins. Co.*, 300 Minn. 311, 219 N.W.2d 622 (1974)).

API conceded throughout this litigation that other insurers defended and indemnified API in each and every bodily injury lawsuit. The jury was never asked to determine what direct damages, if any, API might have sustained. In fact, there were no such damages.

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

In limited cases, contract damages may include more than direct damages. In *Lesmeister*, for example, the supreme court explained that a party may recover "damages sustained by the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as a probable result of the breach." 330 N.W.2d at 103. The damages must "either have been within the contemplation of the [defendant] at the time it entered into the contract or be

so likely to result from the breach that they can reasonably be said to have been foreseen." *Franklin Mfg. Co. v. Union Pacific R.R. Co.*, 311 Minn. 296, 298, 248 N.W.2d 324, 325 (1976) (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)). Damages that are "remote, conjectural, or speculative" are not recoverable in a breach of contract action. *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 579 (Minn. Ct. App. 2004).

Here, API never claimed that there was any judgment against it that went unpaid, let alone an excess judgment. Nonetheless, API claimed that there *might* be future claims against it, that it *might* not have enough insurance coverage to pay for those claims, and that, as a result, it voluntarily filed for bankruptcy. As a matter of law, any consequences that API experienced as a result of its voluntary decision to seek bankruptcy protection are too remote to support a damages claim.

In *Independent Grocery Co. v. Sun Insurance Co.*, 146 Minn. 214, 178 N.W. 582 (1920), the Minnesota Supreme Court held that damages consisting of an insured's financial insecurity as a result of an insurer's breach of contract are too remote to be recoverable in a breach of contract action. In that case, the insured sustained fire damage to its inventory. It tendered the covered loss to its insurance carriers, who eventually paid the claim after some delay. The insured sued the insurers, alleging that the delay in payment was "ruinous to plaintiffs' business and the good will thereof." *Id.* at 216, 178 N.W. at 583. Each insurer moved to dismiss the complaint based on the remoteness of the damages alleged.

The supreme court held that the damages asserted in the complaint were too remote and had to be dismissed as a matter of law. The court first stated the general rule for consequential damages in contract cases:

> The general rule of damage for the breach of contract obligations is well-settled law in this state. It limits the rights of the complaining party to compensation for such loss as results naturally and proximately from the breach, or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into.

Id. at 217, 178 N.W. at 583 (internal citation omitted). The court continued:

> The facts presented do not bring the case within this rule. Neither the loss of trade nor the inability to pay their creditors, or even that they were likely to have creditors in the event of a destruction of the insured property by fire, or the loss of the good will of the business, flowed naturally or proximately from the delay of defendants in adjusting and paying the loss; nor can it be said that the financial condition and business situation of plaintiffs as pictured by the complaint was within the contemplation of the parties when the contract was entered into. Those facts therefore furnish no basis for the recovery of damages, for as to the breach of the contract, whether malicious or not, plaintiffs' recovery, within the rule stated, must be limited to the amount of the legal liability under the policy with interest. The items claimed are entirely too remote.

Id. (internal citations omitted).

The supreme court subsequently qualified *Independent Grocery Co.* to make clear that an insured is not always limited to recovering only the amount due under the policy.

> When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach. . . . Lost profits may be recovered if they are a natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty. . . . To the extent that our opinion in *Independent Grocery Co. v. Sun Insurance Co.* . . holds that an insured is limited to recovering only the amount of the policy plus interest, it is hereby overruled.

Olson v. Rugloski, 277 N.W.2d 385, 388 (Minn. 1979) (citations omitted). Even after *Olson*, however, the supreme court has continued to adhere to the same foreseeability test for consequential damages in contract cases as it stated in *Independent Grocery Co.* "A nonbreaching party should recover damages sustained by the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as a probable result of the breach." *Lesmeister*, 330 N.W.2d at 103.

In *Olson* and *Independent Grocery Co.*, the insured could point to a concrete, tangible current payment obligation owed by the insurer, and consequences that flowed directly and immediately from the failure of the insurer to honor that payment obligation. Here, API did not—and could not—point to any such current obligation or direct consequences flowing from General Accident's alleged failure to meet that obligation. Instead, API sought to recover for consequences that were far more remote and speculative. It claimed that because of the conduct of its insurers, "including General Accident," it *might* not have enough coverage in the future to pay claims (although it presented *no* evidence as to how much the defense and indemnity obligations might be for those future claims). Regardless of where the line might be drawn on foreseeability of contract damages, it is clear that API's claim was miles beyond the outer limit.

Courts that have concluded that an insured's bankruptcy was a consequential damage of the insurer's breach of contract have done so only where the bankruptcy is directly caused by the insurer's refusal to pay a liquidated sum to the insured. *See, e.g., Reichert v. Gen. Ins. Co. of Am.*, 442 P.2d 377, 381-82 (Cal. 1968) (holding that, where

the insurer failed to pay a fire loss of $424,000, and the insured subsequently entered bankruptcy as a result of that breach, the insurer was liable for damages caused by the bankruptcy); *Wooten v. Cent. Mut. Ins. Co.*, 182 So. 2d. 146, 150 (La. Ct. App. 1966) (insured filed bankruptcy as a result of excess judgment entered against him and insurer's unreasonable refusal to settle within policy limits); *Venturi v. Zurich Gen. Accident & Liab. Co., Ltd.*, 57 P.2d 1002, 1003 (Cal. Ct. App. 1936) (insured filed bankruptcy as a result of insurer's failure to pay four judgments against insured arising out of automobile accident).

In the present case, API did not prove that it was forced into bankruptcy by General Accident/OneBeacon's failure to pay any judgment, obligation, or other liquidated sum. Rather, API simply claimed that General Accident's conduct concerning unspecified claims, *together with the conduct of its other insurers*, caused API and its financial institutions to become nervous about API's future financial condition. This is plainly insufficient to establish that API's voluntary bankruptcy was a consequence of General Accident's claimed breach of contract. *See Point Prods. A.G. v. Sony Music Entm't, Inc.*, 215 F. Supp. 2d 336, 344-46 (S.D.N.Y. 2002) (concluding that plaintiff failed to prove that defendant was the cause in fact of plaintiff's bankruptcy, and observing that plaintiff failed to proffer any expert testimony that, had defendant complied with the terms of the contract, plaintiff would have had sufficient assets to remain solvent).

Finally, consistent with the general Minnesota rule for contract damages, bankruptcy damages other consequential financial damages are not recoverable unless

contemplated by the parties at the time they entered into the contract. *See, e.g., Burton v. William Beaumont Hosp.*, 373 F. Supp. 2d 707, 719 (E.D. Mich. 2005) (plaintiff not entitled to bankruptcy damages where "damages did not arise naturally from [the] alleged breach, nor could they have been in contemplation of the parties" when they entered into a contract). *Cf. Held Constr. Co. v. Michigan Nat'l Bank of Detroit*, 335 N.W.2d 8, 10 (Mich. Ct. App. 1983) ("[A]bsent evidence that a risk of insolvency was within the actual contemplation of the parties at the time the contract was made, damages are not recoverable for such a consequence."); *Williams v. Associated Mut. Ins. Co.*, 621 N.Y.S.2d 206 (N.Y. App. Div. 1995) (concluding that insured's inability to sell certain property and reduced credit rating as a result of insurer's breach of the duty to defend were not consequences that were within the contemplation of the parties at time of contract formation and therefore not recoverable as contract damages).

No record evidence establishes that bankruptcy was in the contemplation of the parties at the time they entered into an insurance contract or when API began tendering claims in 1987. Indeed, it is undisputed that no one—including API—contemplated bankruptcy until after the *Akin* verdict, which was decades after the General Accident policies were issued, nearly twenty years after API first tendered claims to General Accident, and years after API stopped tendering claims to General Accident.

API's decision to voluntarily reorganize in 2005 is simply too remote to give rise to a claim for damages against OneBeacon for another reason as well. API filed for bankruptcy to take advantage of 11 U.S.C. § 524(g), a provision in the Bankruptcy Code that was enacted in 1994. Section 524(g) provides unique relief to a debtor with

asbestos-related liabilities because it not only allows for the discharge of current claims, but also an injunction that channels future asbestos demands to the asbestos trust for resolution. In that way, the debtor sheds all of its asbestos liability at one time. It could not have been foreseeable in the late 1950s and early 1960s, when the General Accident policies were issued, that API would resolve its asbestos liabilities (both current and future) through contributions to a trust formed pursuant to a Bankruptcy Code provision enacted in 1994. It was also hardly foreseeable at that time that API would some day pay to rid itself of asbestos claims that have yet to be asserted (*i.e.,* future demands by as-yet unknown claimants), and claim that its insurers, "including General Accident," were required to pay for that choice.

General Accident (and later OneBeacon) was one of many insurers who had a coverage dispute with API. API failed to establish, however, that the actions or inactions of General Accident or OneBeacon directly caused API to file bankruptcy—as opposed to the actions or inactions of the many other insurers with whom API had coverage disputes.[14] Even if it had, API proffered no evidence that its insecure financial position

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[14] OneBeacon was not obligated alone to pay the defense and indemnity obligations that might arise in the future. During the course of this litigation, the district court ruled that those insurers whose coverages were triggered by a particular claim would be required to provide API a defense and indemnity pro rata based on that insurer's time on the risk. (A.106.) A.P.I eventually settled with all insurers, except OneBeacon, and in the process collected millions of dollars in settlement proceeds. Even assuming API proved its case against OneBeacon, OneBeacon would only be responsible at most to pay its pro-rata share of any unpaid past and future defense and indemnity costs. *See Domtar v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732-33 (Minn. 1997) (concluding that, where injuries are continuous and indivisible, insurers are responsible for indemnity obligations pro-rata by time on the risk, and insured is liable for uninsured periods).

after the *Akin* verdict was within the contemplation of the parties at the time of contracting. API's claimed damages were, as a matter of law, remote, speculative and not foreseeable at the time the contracts were made. The judgment based on those damages cannot stand.

V. THE DISTRICT COURT ERRED IN DENYING ONEBEACON'S MOTIONS FOR SUMMARY JUDGMENT AND JUDGMENT AS A MATTER OF LAW ON THE STATUTE OF LIMITATIONS

OneBeacon denies that it breached its insurance contracts with API or otherwise acted improperly. Regardless of how that claim is resolved, however, any cause of action API might have had was time-barred because API commenced this action well beyond the expiration of the applicable statute of limitations. General Accident first declined API's tender of defense in 1987. API considered General Accident to have breached its insurance contract at that time. (T.226-27.) By 1991, API believed that General Accident had all the information it needed to acknowledge coverage, and was aware that General Accident still declined to do so. (T.347-48.) Yet API did nothing to pursue its claim against General Accident or OneBeacon until 2003, well outside the statute of limitations.

A. Standard Of Review

The construction and applicability of statutes of limitations are questions of law reviewed *de novo*. *See Noske v. Friedberg,* 670 N.W.2d 740, 742 (Minn. 2003); *Benigni v. County of St. Louis,* 585 N.W.2d 51, 54 (Minn. 1998).

B. The Statute Of Limitations On API's Claims Expired Long Before API Sued OneBeacon

The statute of limitations applicable to contract actions is six years. Minn. Stat. § 541.05, subd. 1; *Miklas v. Parrott*, 684 N.W.2d 458, 460-61 (Minn. 2004). Bad faith claims are contract based, and governed by contract law. *Cherne Contracting Corp.*, 572 N.W.2d 339 at 343-44. Claims for breach of fiduciary duty are also governed by the six-year statute of limitations. *See Davies v. West Publ'g Co.*, 622 N.W.2d 836, 840 (Minn. Ct. App. 2001).

A cause of action for breach of contract accrues when the terms of the contract are breached. *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). Stated more generally, the statute of limitations begins to run when a complete cause of action accrues, *i.e.,* when there is a demand capable of present enforcement. *Noske*, 670 N.W.2d at 742. *See also Antone v. Mirviss,* 720 N.W.2d 331, 336 (Minn. 2006) ("We continue to agree with the rationale supporting and the policies reflected by the 'some damage' rule of accrual, and thus we reaffirm our prior case law adopting this rule.").

No Minnesota appellate court has addressed specifically when the limitations period begins to run on a breach of contract claim for the failure of an insurer to undertake its duty to defend.[15] In *Northwestern Nat'l Ins. Co. v. Carlson*, 711 N.W.2d

[15] This Court has held that in an action against a liability insurer for bad-faith failure to settle a claim, the statute of limitations does not begin to run until the appellate process is complete and final judgment has been entered in the underlying case. *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 812 (Minn. Ct. App. 1992).

821 (Minn. Ct. App. 2006), this Court held that the statute of limitations for an indemnity claim begins to run when the insured is legally obligated to pay damages for which indemnity is claimed to be owed. That case did not, however, involve a claim for defense. The sole breach claimed was of the indemnity obligation. Here, API asserted both defense and indemnity claims. Under the rule of *Bachertz,* and for the policy reasons articulated by the supreme court in *Antone*, the statute of limitations on API's claims clearly began when General Accident declined to accept the first tender of defense in 1987.[16]

API representative Loren Rachey testified that General Accident first breached its contract with API in 1987. (T.226-27.) But API did not immediately pursue a claim against General Accident. Other insurers were providing defense and indemnity. Only *after* the *Akin* verdict did API decide it needed more coverage. (T.152.) But that kind of choice is exactly what statutes of limitations are designed to forestall.

API cannot escape the statute of limitations by claiming that limitations were tolled or inapplicable. Delayed manifestation of damages—*i.e.*, API's bankruptcy—does not delay the accrual of an action for breach of contract. *Guercio v. Prod. Automation*

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[16] Other jurisdictions have held that the limitations period commences when insurer has denied coverage for the loss and the injured claimant sues the policyholder. *See, e.g., Daugherty v. Allstate Ins. Co.*, 55 P.3d 224, 227 (Colo. Ct. App. 2002) (breach of contract claim for failure to defend accrued, at the latest, when injured claimants filed their complaint against policyholder and policyholder was on notice that insurer was denying all coverage under the policy); *Beaudette, Inc. v. Sentry Ins.*, 94 F. Supp. 2d 77, 102 (D. Mass. 1999) (cause of action against insurer for breach of contact failure to defend accrued when lawsuit was filed against policyholder and insurer refused to defend).

Corp., 664 N.W.2d 379, 387 (Minn. Ct. App. 2003) (holding that "[a] breach-of-contract cause of action accrues, for limitations purposes, generally at the time of the breach, even if the damages do not manifest themselves until a later time"). A cause of action for breach of contract accrues at the time of the alleged breach even when actual damages resulting from the breach do not occur until some time afterwards or the aggrieved party was ignorant of the facts constituting the breach. *Bachertz*, 201 Minn. at 176, 275 N.W. at 697; *Weston v. Jones*, 160 Minn. 32, 36, 199 N.W. 431, 433 (1924).

As the supreme court recently confirmed in *Antone*, even where a greater injury may occur in the future, tolling is not appropriate. *Antone*, 720 N.W.2d at 336. Here, API was damaged, if at all, when General Accident initially denied its tenders of asbestos-related bodily injury claims in 1987 and API was allegedly deprived of insurance benefits. The fact that additional damage might later accrue because of that breach did not prevent the statute of limitations from beginning to run.

Nor can API avoid the statute of limitations, as the district court ruled, because its action against OneBeacon was commenced as a declaratory judgment action. While a declaratory judgment action is not subject to a statute of limitations, the statute of limitations will bar a money judgment. A declaratory judgment becomes moot "if the claimant has failed to commence its breach of contract action within the statute of limitations." *State v. Joseph*, 622 N.W.2d 358, 362 (Minn. Ct. App. 2001).

Here, API may have initiated its claims against its insurers as a declaratory judgment action, but at trial API litigated a damages claim. API received much more

than a mere declaration of coverage—it received contract damages that were precluded by the statute of limitations long ago. The judgment cannot stand.[17]

[17] The district court not only refused to dismiss API's suit as untimely under the statute of limitations, but it also failed to properly submit a related issue to the jury. OneBeacon requested an interrogatory on the verdict form asking for each policy on what date OneBeacon breached the contract. (A.172-74.) The district court also declined to submit any question to the jury regarding the time of the breach. (A.188-94.)

CONCLUSION

In 1958, when API first purchased insurance from General Accident, no one appreciated the scope of asbestos claims that would arise decades later. When asbestos claimants first sued API beginning in 1982, it was fully defended and indemnified by one or more of its liability insurers. That situation apparently satisfied API until the *Akin* verdict in 2001. Despite the fact that API considered General Accident to have breached its insurance contract as early as 1987, API did nothing to pursue its claims against General Accident or OneBeacon while other insurers were defending and settling the asbestos litigation against API.

API claimed that the playing field shifted dramatically with the *Akin* verdict. API suddenly had a different view of its insurance coverage than it had enjoyed up to that point in time. API for the first time asserted claims against its insurers in an effort to expand the coverage available to it.

API took advantage of a provision in the bankruptcy law that did not exist until 1994, filing for a voluntary reorganization that allowed API to get out from underneath all past and future liability for asbestos claims. API ultimately sought to make OneBeacon pay for that bankruptcy, by asserting that its insurers, "including General Accident," should have acknowledged unlimited coverage for asbestos-related bodily injury lawsuits. If they had, API maintained, the company would not have had to file voluntary bankruptcy.

If not barred by the statute of limitations, API's claims against OneBeacon fail as a matter of law. Minnesota law does not recognize bad faith or breach of fiduciary

claims in the circumstances of this case. API failed to prove a specific breach of the insurance policies allegedly issued by General Accident. It also failed to show how any specific action of General Accident/OneBeacon directly caused any damage to API, or that the damages it sought from OneBeacon—full responsibility for the consequences of the voluntary bankruptcy—were within the contemplation of the parties when the insurance policies under which it sought coverage were issued more than four decades earlier.

There is no basis in law or in fact to hold OneBeacon liable for API's claimed damages. The judgment against OneBeacon is unsupported in law, and on the record in this case. It must be set aside in its entirety.

Respectfully submitted,

HINSHAW & CULBERTSON
Eric J. Strobel (222434)
Thomas P. Kane (53491)
Campbell Mithun Tower
Suite 3100
222 S. 9th St.
Minneapolis, MN 55402
(612) 333-3434

RIDER BENNETT, LLP

By_____
Eric J. Magnuson (66412)
Diane B. Bratvold (18696X)
Mark R. Bradford (335940)
Attorneys for OneBeacon Insurance Company
33 South Sixth Street
Minneapolis, MN 55402
(612) 340-8900

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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:

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Eric J. Magnuson (66412)
33 South Sixth Street
Suite 4900
Minneapolis, Minnesota 55402
(612) 340-8900

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