

NO. A06-1229

State of Minnesota
In Court of Appeals

St. Paul Fire and Marine Insurance Company,
Plaintiff,

v.

A.P.I., Inc.,
Respondent,

v.

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.

**RESPONDENT A.P.I., INC.'S PRINCIPAL RESPONSE BRIEF AND
OPENING BRIEF ON CROSS-APPEAL ISSUES**

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Statement of Legal Issues

ISSUES RAISED ON APPELLANT ONEBEACON'S APPEAL¹

- I. Faced with thousands of wrongful death and bodily injury lawsuits relating to asbestos claims allegedly caused by insulation materials it sold or installed, API tendered those claims to OneBeacon's predecessor General Accident, which withheld critical information regarding coverage and refused to defend and indemnify API, resulting in API's bankruptcy. Did the trial court properly submit API's claims of breach of fiduciary duty and bad faith against OneBeacon to the jury?

The trial court correctly submitted API's claims to the jury, entered judgment in favor of API on the jury's findings and denied OneBeacon's motion for a new trial.

Authorities:

Kissoondath v. U. S. Fire Ins. Co., 620 N.W.2d 909 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001).

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

Lange v. Fid. & Cas. Co. of N.Y., 185 N.W.2d 881 (Minn. 1979)

- II. API's trial evidence proved that as early as 1987 OneBeacon knew that it had insured API and concealed the existence and terms of coverage until the eve of trial in order to avoid defending and paying claims. As a direct result of OneBeacon's abandonment of its policyholder, API was forced into bankruptcy and the jury found that OneBeacon breached its fiduciary duty and acted in bad faith. Was the jury's verdict supported by the evidence?

The trial court correctly ruled that the evidence supported the jury's breach of fiduciary duty and bad faith verdict and denied OneBeacon's motion for judgment as a matter of law.

Authorities:

Langeslag v. KYMN Inc., 664 N.W.2d 860 (Minn. 2003)

¹ API is not responding to the arguments raised by OneBeacon's *amicus* but which were not raised by Appellant and therefore waived, for the reasons set forth in its pending Motion to Strike the Brief of *Amicus Curiae*, served and filed on November 20, 2006.

Navarre v. South Washington Cty. Sch., 652 N.W.2d 9 (Minn. 2002)

Harman v. Heartland Food Co., 614 N.W.2d 236 (Minn. App. 2000)

- III. **The jury found that OneBeacon insured API from 1958 to 1966 pursuant to liability policies that contained standard policy form language. OneBeacon refused to defend and pay hundreds of covered asbestos claims, and the jury found that OneBeacon thereby breached its contracts. Was the jury's verdict supported by the evidence?**

The trial court correctly ruled that the evidence supported the jury's breach of contract verdict and denied OneBeacon's motions for judgment as a matter of law and new trial.

Authorities:

Hauenstein v. Locite Corp., 347 N.W.2d 272 (Minn. 1984)

ZumBerge v. N. States Power Co., 481 N.W.2d 103 (Minn. App. 1992)

Westfield Ins. Co. v. Kroiss, 694 N.W.2d 102, 107 (Minn. App. 2005)

- IV. **Under Minnesota law, an insurer who wrongfully refuses to pay an insured is liable for the loss that naturally and proximately flows from its wrongful conduct. At trial, the trial court instructed the jury as to this measure of damages for all of API's claims with no objection from OneBeacon. The jury found that API suffered over \$50 million in damages that naturally and proximately flowed from OneBeacon's misconduct. Under the instruction given to them and not objected to by OneBeacon, was the jury's damage verdict manifestly and palpably contrary to the evidence?**

The trial court correctly ruled that API's damages were not manifestly and palpably contrary to the evidence, and denied OneBeacon's motion for judgment as a matter of law.

Authorities:

Levienn v. Metro. Transit Comm'n, 297 N.W.2d 272 (Minn. 1980)

Wolner v. Mabaska Indus., Inc., 325 N.W.2d 39 (Minn. 1982)

Olson v. Rugloski, 277 N.W.2d 385 (Minn. 1979)

- V. **Based on evidence of fraudulent conduct and the declaratory relief sought in this action, did the trial court properly rule that OneBeacon's misconduct vitiated its asserted statute of limitations defense to API's claims?**

The trial court correctly ruled that OneBeacon was precluded from relying on a statute of limitations defense because of its misconduct and because API sought declaratory relief in this matter, and denied OneBeacon's motions for summary judgment and judgment as a matter of law.

Authorities:

DeCosse v. Armstrong Cork Co., 319 N.W.2d 45 (Minn. 1982)

State v. Joseph, 622 N.W.2d 358 (Minn. App. 2001)

N. States Power Co. v. Fidelity & Cas. Co. of N.Y., 523 N.W.2d 657 (Minn. 1994)

ISSUES RAISED BY RESPONDENT API'S NOTICE OF REVIEW

1. **Under Minnesota law, should insurers' liability for asbestos-related bodily injury claims be allocated against the insured in a case where the uncontroverted medical evidence compelled the conclusion that the injuries occurred at discrete, ascertainable times?**

The trial court incorrectly ruled that liability for asbestos-related bodily injury claims should be allocated based on time on the risk and apparently allocating liability to the insured.

Authorities:

Wooddale Builders, Inc. v. Md. Cas. Co., 722 N.W.2d 283 (Minn. 2006)

In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405 (Minn. 2003)

N. States Power Co. v. Fid. & Cas. Co. of N.Y., 523 N.W.2d 657 (Minn. 1994)

2. **Did the trial court err when it denied API's motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment on issues squarely before the court in this declaratory judgment action?**

The trial court improperly denied API's motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment, which sought rulings on legal issues for the Court which could not be determined by the jury.

Authorities:

Woodrich Constr. Co. v. State, 287 Minn. 260, 177 N.W.2d 563 (1970)

Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 290 N.W. 802 (1940)

Statement of the Case

This appeal arises in an insurance coverage action tried to verdict in Ramsey County District Court, Judge John T. Finley, presiding. Appellant OneBeacon Insurance Co. ["OneBeacon"], as successor to General Accident Insurance,² refused to defend and indemnify its insured Respondent A.P.I., Inc. ["API"] in thousands of wrongful death and bodily injury cases. As a result of OneBeacon's breach of contract, breach of its fiduciary duty, and bad faith conduct, as found by the jury, API was awarded substantial damages.

General Accident sold Comprehensive General Liability ["CGL policies"] to API for the period 1958 through 1966. Beginning in 1987, General Accident and subsequently OneBeacon denied insuring API and refused to defend or pay any claims. General Accident's and OneBeacon's abandonment of its policyholder caused API to file for bankruptcy in 2005. This case is also about General Accident's, and subsequently OneBeacon's, efforts to withhold critical information from API that would have allowed it to establish the terms of the policies General Accident issued to API.

In 2002, St. Paul Fire and Marine Insurance Co. commenced this declaratory judgment action to determine its rights and obligations under CGL policies it issued to API. API counterclaimed and brought third-party claims against several of its insurers,³ including OneBeacon. By the time of trial, all of API's liability insurers involved in this case, other

² There is no issue that OneBeacon stands in the shoes of General Accident and is liable as its successor for all claims in this action. This brief will refer to the two interchangeably.

³ Those other insurers were Great American Ins. Co., The Home Ins. Co., Fireman's Fund Ins. Co., Continental Cas. Co., Transportation Ins. Co. and United States Fire Ins. Co.

than OneBeacon, had entered into settlements.⁴ Those settlements require the settling insurers to contribute to a trust established under API's bankruptcy plan to pay injured asbestos claimants. None of the insurance proceeds go to API. *Tr.177-78.*

In addition to seeking a judicial declaration of OneBeacon's insuring obligations, API also sought damages for OneBeacon's breach of contract, bad faith, breach of fiduciary duty, and misrepresentations. *A.71.*⁵ OneBeacon denied that General Accident issued CGL policies and denied that it had any duty to defend or indemnify API. *RA.1.* It persisted in these positions until the eve of trial, at which time it finally admitted that it sold API two of the policies at issue. *Tr.283,515-16,601.*

The case was tried to a Ramsey County jury commencing on November 28 and concluding with a unanimous verdict on December 7, 2005. Based on OneBeacon's eve-of-trial acknowledgement that the certificates of insurance proved that General Accident insured API for the period of 1958 through 1964, the trial court directed a verdict that General Accident issued liability policies to API for the period from 1958 through 1964 under policy numbers 1CG304795 and CG366219, with policy limits of \$300,000 per person, \$1,000,000 per occurrence, and \$1,000,000 aggregate. *A.189.* The remaining questions on the special verdict form were submitted to the jury after six days of trial. By its verdict, the jury found that:

1. OneBeacon insured API under CGL insurance policies for the period 1964 through 1966;

⁴ The matter was previously stayed as to The Home, now in liquidation.

⁵ In this brief, Appellant's Appendix is cited "*A.xx*," Respondent's Appendix is cited "*RA.xx*," the trial transcript is cited "*Tr.xx*" and Appellant's Brief is cited as "*Applt.Br.xx*."

2. OneBeacon breached its contracts of insurance by failing to defend and/or indemnify API;
3. OneBeacon acted in bad faith and that OneBeacon breached its fiduciary duty to API;
4. The language in all of the policies General Accident sold to API for the period between 1958 and 1966 contained the same wording as that contained in the “1CG” and “CG” policy forms used by General Accident;
5. The policies General Accident issued to API did not contain an overall aggregate limit applicable to all coverages, but only to the “products-completed operations” hazards as defined in the General Accident policy forms; and
6. OneBeacon had misrepresented facts to API.

A.188-94. The jury also found that OneBeacon’s breach of contract, breach of fiduciary duty, and bad faith caused damages to API, and awarded API total compensatory damages of \$52,573,824.

On January 19, 2006, the trial court entered judgment for API in the damage amount awarded and entered its pre-trial orders as Judgments. *RA.43.* The judgment included the trial court’s previous summary judgment order that determined that the insurers’ liability for the asbestos-related bodily injury claims against API were to be allocated based on time on the risk.⁶ *A.128.* The trial court ruled that the asbestos-related bodily injury claims against API were analogous to the damages in *NSP* and *Domtar* and that “[t]his is the ‘difficult case’

⁶ Although OneBeacon did not join Fireman’s Fund and CNA’s summary judgment motion on this issue of allocation, OneBeacon appears to assert rights affirmative under the trial court’s Order despite not bringing or joining the motion. *See Aplt.Br.46n.14.*

as described by Justice Paul Anderson and, therefore, allocation is by time on the risk and not by the 'actual injury' rule." *Id.*

Both API and OneBeacon sought post-trial relief. API moved for Amended Findings of Fact, Conclusions of Law and Order for Judgment. The motion requested the trial court make certain findings and conclusions as sought by API's declaratory judgment action against its insurers, including a finding as to the minimum limits of the policy General Accident issued to API for the period 1964 through 1966 and OneBeacon's ongoing duty to defend and pay claims pursuant to available operations coverage. OneBeacon moved for judgment notwithstanding the verdict and/or a new trial. By Orders filed April 7, 2006, April 27, 2006, and May 9, 2006, the trial court granted, in part, API's motion for attorneys' fees in the amount of \$1,091,607.50 and denied the remaining post-trial motions.

OneBeacon appeals from Orders filed April 7, 2006, (*A.223*) (denying post-trial motions brought by both OneBeacon and API); April 27, 2006, (*A.242*) (granting, in part, API's motion for attorneys' fees and denying API's motion for amended Findings of Fact, Conclusions of Law and Order for Judgment); May 9, 2006, (*A.246*) (amending Order of April 27, 2006); and from judgment entered on January 19, 2006, (*A.213*) Corrected Judgment entered on April 13, 2006, (*A.241*) and Judgment entered on May 10, 2006, (*A.248*).

By Notice of Review, API appeals from Judgment entered on January 19, 2006 (concerning the trial court's Order filed September 27, 2005 regarding allocation), Order filed April 27, 2006, and Amended Order filed May 9, 2006, and the Judgment entered

pursuant to those Orders on May 10, 2006 (denying API's motion for Amended Findings of Fact, Conclusions of Law and Order for Judgment). *A.259.*

Statement of Facts

A. Respondent API, Inc.

API is a Roseville, Minnesota, company that from the 1940's until 1972, sold, distributed, and installed insulation materials, some of which contained asbestos, and worked as a contractor on large, commercial projects, such as power plants and refineries, for customers such as Northern States Power. *Tr.94-98.* At all relevant times, API purchased CGL insurance in accordance with the requirements of its contract customers. *Tr.107-16.* For example, in 1964, Northern States Power required that its contractors maintain GCL insurance with minimum limits of at least \$100,000 per person, \$300,000 per occurrence and \$300,000 aggregate (the aggregate being applicable only to the policies' "products/completed operations" hazard coverage). *RA.350-82;Tr.109-11.* API's other contract customers required that API maintain similar limits. *E.g., RA.162-349;Tr.112-16.* API complied with its contract customers' requirements and maintained, at the very least, the minimum limits required by its customers. *Tr.107-11.*

B. API's Futile Attempts to Have OneBeacon Defend and Indemnify API.

In approximately 1982, API began to be sued in asbestos-related personal injury lawsuits. *Tr.101,192.*⁷ Many, if not all, of the claims allege injury arising from exposure to asbestos emanating from API's contracting operations. *Tr.103-07,692-93;A.315,351.* The

⁷ API has been sued in approximately 3,000 asbestos-related wrongful death and bodily injury claims throughout Minnesota and surrounding states between 1982 and 2005. *Tr.101-03.*

suits related to API's work decades earlier, so API sought to identify the insurers from which it had purchased insurance. It searched for copies of its insurance policies dating back to the 1950's, 1960's and 1970's—the years during which many of the claims allege exposure. API was able to locate some policies and evidence of older policies. Based on the information it had, API tendered the asbestos-related bodily injury cases to several of its insurers.

Tr.116,117. Four of API's primary insurers afforded some coverage, provided a defense and paid some claims as the asbestos litigation proceeded.⁸ *Tr.119-20.*

Despite an extensive search, API was unable to locate copies of the policies General Accident sold to API. *Tr.120.* API turned to its certified accounting firm, Wilkerson and Guthmann. The firm had conducted annual audit and tax work for API for decades, beginning in the 1950's. The audit records specifically identify General Accident as API's general liability insurer for the period from 1958 to 1966 under policy numbers 1CG304795, CG366219 and 436512. The records enumerate specific policy periods, policy limits for each policy and list the premiums paid by API for those policies. *See R.A.383-89.*⁹ These records were prepared by an independent, certified public accounting firm. *Tr.352-59.*¹⁰

A CPA/Principal of that accounting firm, Howard Guthmann, testified at trial that the accounting records were prepared after reviewing invoices and, in some cases, the actual policies. *Tr.361-64.* Guthmann was in charge of the API account when the records were

⁸ Those insurers were St. Paul, Great American, The Home and Fireman's Fund.

⁹ Only selected portions of Exhibit 74 were actually used at trial. These portions are found at *R.A.383-89.* These copies are considerably more legible than those found at *A.346-50.*

¹⁰ OneBeacon incorrectly claims that API destroyed the original accounting records and that the copies should not have been allowed into evidence. *Apmt.Br.10n.5.* OneBeacon's unfounded allegation was squarely rejected by the trial court. *A.163.* OneBeacon has not appealed this ruling.

created. He testified that there was no question in his mind that the accounting records clearly showed that General Accident sold API CGL policies with policy numbers 1CG304795, CG366219 and 436512 for the period of time between 1958 and 1966. *Tr.382-83, 410.*

Based upon this information, API began tendering asbestos-related bodily injury claims to General Accident in 1987. *See, e.g., Tr.161,272-75,526;RA.115-16.* General Accident was provided with the audit records which identified it as API's primary insurer for the period from 1958 to 1966. *Tr.161-62,272-75;RA.393.* Nonetheless, in response to the hundreds of cases tendered by API between 1987 and 1999, General Accident repeatedly represented that it was not in possession of sufficient information to confirm or deny coverage and refused to defend or pay claims on behalf of API. *Tr.526-27;RA.143-61.* Neither General Accident nor OneBeacon ever defended or indemnified API for any asbestos-related claim.¹¹ *Tr.287-88,526-27.* After years of denials of hundreds of API's futile tenders to General Accident, API ceased tendering ongoing claims in March 1999. *Tr.215-17,225.*

Shortly after API first tendered claims to General Accident, General Accident's claims handler, Frank Thorne, wrote an inter-office memo stating: "What I do not want is to telegraph to their defense attorneys or insured we are eager and in short order they would all be on our back to tender their defense." *A.327;Tr.536-37.*

¹¹ OneBeacon repeatedly claims that certain of API's insurers fully defended and paid all asbestos claims against API. *See, e.g., Apmt.Br.4,6,8.* The record is clear, however, after the 2001 verdict in a matter entitled *Joseph Akin v. Am. Standard, Inc.*, API was defended on a case-by-case basis (with a full reservation of rights) by St. Paul Fire and that at no time did OneBeacon defend or pay any portion of any asbestos claim asserted against its insured, API. *Tr.169,526-27.*

C. OneBeacon's Misrepresentations to API Concerning the Existence, Terms and Conditions of the Policies.

As early as 1987 General Accident had the audit records that identified it as API's general liability insurer for the period 1958 to 1966 with policy numbers bearing "1CG" and "CG" prefixes and the policy limits for the policies sold from 1958 to 1964. *Tr.528-31;RA.393*. The audit records also showed that API paid premiums to General Accident for the insurance policies. *RA.383-89;Tr.364-73*.

General Accident also knew that it used "1CG" and "CG" policy prefixes to designate CGL policy forms during the 1950's and 1960's. *Tr.531,533-36*. Those policy forms contain standard language used by General Accident for the coverages for all policies containing the "1CG" and "CG" policy prefix. *Tr.445-47*. This information, however, was withheld by General Accident from API. These policy forms are the most critical evidence in the record concerning the terms and conditions of the General Accident policies.

OneBeacon acknowledged at trial that it had no knowledge of any General Accident policy forms that bear a "1CG" or "CG" prefix other than the forms introduced at trial. *A.328, 332,336,340;Tr.602-605*.

General Accident withheld this information from API for eighteen years. *Tr.531, 533-36*. The audit records and corresponding policy forms, taken together, provided the necessary information by which General Accident, and subsequently OneBeacon, could reconstruct the policies General Accident sold to API. *Tr.441*. Instead, General Accident, and subsequently OneBeacon, refused to acknowledge coverage and withheld from API the fact that General Accident used "1CG" and "CG" policy forms during the 1950's and

1960's.¹² *Tr.292-93,531,533-36*. This precluded the reconstruction of the General Accident coverage.

While General Accident continued to deny any knowledge of its policy forms or the significance of the “1CG” and “CG” policy prefixes, the evidence at trial was clear and unequivocal that it was in possession of the policy forms all along. In the mid-1990's, at the same time that API was tendering asbestos personal injury and wrongful death complaints to General Accident, General Accident produced “1CG” and “CG” policy forms and other policy-related information in another case entitled *Western MacArthur v. General Acc. Ins. Co. of Am., et. al.*, No. 721595-7 (Super. Ct., Alameda Cty., Calif.), also involving missing policies from the 1950's and 1960's. *Tr.546-49*. In that case, General Accident responded under oath in discovery responses that the policy prefixes “1CG” and “CG” signified CGL policies. *Id.*

In the instant case, however, OneBeacon failed to disclose this information to API. *Tr.292-93,531,533-36*. It was not until six months prior to trial, in May of 2005, and only upon Order of the trial court, that OneBeacon finally admitted that it was in possession of such documents and information that it failed to produce—both before and after the commencement of this lawsuit. *Tr.526-36,538-55;RA.37*. Still, up until the eve of trial, OneBeacon refused to acknowledge that General Accident ever issued CGL policies to API.

¹² OneBeacon refers to the fact that API's tender letters referenced policies refer to an “ICG” prefix (as opposed to “1CG”) as a basis for its protracted denial of its contractual obligations. *See, e.g., Aplt.Br.17*. However, OneBeacon and General Accident never advised API that it did not issue “ICG” policies, but rather “1CG” policies, nor did OneBeacon or General Accident advise API that it was in possession of “1CG” and “CG” policy forms. *Tr.149-50,292-93*.

D. The Terms and Conditions of the Policies Sold to API.

The policies issued by General Accident are “standard form” policies, meaning they contain standard wordings for the coverages afforded by the policies. *Tr.447-50*. Each policy has a basic coverage grant that affords coverage to pay “all sums” which the insured shall become legally obligated to pay. This broad coverage is subject to a “products hazard” definition, which provides for the application of an aggregate limit *only* for injuries arising from the sale of products after the policyholder releases possession of the product or for completed operations. *A.330,335,338,342*. In fact, General Accident stated in sworn interrogatory responses given in the *Western MacArthur* case that the policies it issued during the 1950’s and 1960’s did not contain an overall aggregate limit applicable to all coverages. *A.296*.

What is important is that with the “1CG” and “CG” policy forms in hand, along with the accounting audit records, General Accident and OneBeacon had all the information they needed to determine the terms of coverage and how the various policy limits applied to covered hazards.

In April of 2005, API located further evidence that General Accident had sold CGL policies to API: certificates of insurance at Madison Gas & Electric Co. Those certificates identified General Accident as API’s CGL insurer for the periods of April 30, 1958, through April 30, 1961, and April 30, 1961, through April 30, 1964, under policy numbers 1CG304795 and CG366219, the same information contained in the accounting records. *A.313-14*. The certificates also reflected identical information concerning the policy limits. Even when confronted with this indisputable evidence, OneBeacon denied that the

certificates were evidence of policies and continued to deny that General Accident ever issued CGL policies to API. *Tr.514-23;RA.390.*

Nevertheless, OneBeacon continued to deny that there was evidence of the terms and conditions of those policies, notwithstanding the fact that it was in possession of the policy forms containing those terms and conditions, and continued to deny any responsibility for the policies General Accident sold to API for the period from 1964 through 1966. *Tr.682.* The vice-president in charge of the API claims typified OneBeacon's attitude and behavior toward its policyholder by admitting to the jury, without objection:

Q And as the decision-maker in this case, Mr. Ryan, on behalf of One Beacon, are you going to take full responsibility for the full extent of the coverage provided by One Beacon to my client API pursuant to your policy forms?

A No.

Tr.607.

E. OneBeacon's Misconduct Causes Damages to API.

Between fifty and seventy percent of the claims against API involved allegations of asbestos exposure and resulting injury during the period of time during which API was insured by OneBeacon, the 1950's and 1960's. *Tr.695-96.* API believed, until May 2001, that it had enough insurance coverage afforded from those insurers who had agreed to defend and indemnify its asbestos-related bodily injury claims. *Tr.151-54.* Until then, the asbestos claims against API had been settled for "relatively small amounts" of money, with the largest settlement approximately \$25,000. *Id.* In May 2001, however, a Ramsey County jury returned a verdict in excess of \$8,000,000 against API in a matter entitled *Joseph Akin v. Am. Standard, Inc.* *Tr.151-52.* Following the *Akin* verdict, the insurers that had been

defending and paying claims on behalf of API informed it that their insurance policies' limits would soon be "exhausted" and that they would provide no further coverage for API.¹³ They also advised API that there were insufficient resources available to pay the *Akin* verdict. *Tr.153-54.*

The *Akin* verdict also had the effect of dramatically increasing settlement values in pending and future cases against API. *Tr.168-69,691-92.* Without adequate liability insurance to cover these cases, API's assets were exposed and its relationship with its banks, bonding companies and note-holders deteriorated. *Tr.170-71,176-77.* In order to maintain its relationship with its lenders, API could not pay the settlements and judgments for asbestos claims itself. *Tr.171-72.* Lenders would not extend credit to settle the claims. *Tr.172,176.* In turn, API could not function as an ongoing business without credit. *Id.*

Because OneBeacon abandoned API, it was left to negotiate with an excess insurer, The Hartford Accident & Indemnity Co., for settlement of the *Akin* verdict and a number of other asbestos claims that were pending against API. *Tr. 154-57.* The total settlement amount paid by Hartford was \$9,500,000 despite the fact API had \$15,000,000 in coverage. *Tr.155-57,224.*

¹³ Following the *Akin* verdict, API learned that those primary insurers that had been defending and paying claims on its behalf had treated *all* asbestos claims as if they were subject to the limiting language contained in the "products-completed operations" hazard definitions. Under the policies, however, only those claims *caused by* a hazard arising from "products" or "completed operations," are subject to an "aggregate" policy limit; those that do not are not subject to any aggregate limit. 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 limit. The insurers' improper allocation of the claims against API had the effect of prematurely "exhausting" available coverage. *See Tr.250.*

Pursuant to a 2002 agreement between API and Hartford, this payment resulted in a discounted “buy-out” of the excess policies issued by The Hartford to API which had limits of \$15,000,000. *Id.* API would not have had to agree to this settlement, resulting in \$5,500,000 in lost insurance benefits, if General Accident and OneBeacon had been defending and paying claims pursuant to the policies API purchased from them. *Tr.* 226.

As a result of the mounting asbestos claims asserted against API after the *Akin* verdict coupled with General Accident’s and OneBeacon’s refusal to defend and pay any claims, API had no choice but to seek bankruptcy protection on January 6, 2005. *Tr.* 169-71. API’s representative, Loren Rachey, testified at trial that had General Accident (OneBeacon’s predecessor) defended and paid claims as it was obligated to do, “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.” *Tr.* 249-50.

API’s reorganization plan requires API to contribute \$40,500,000 of its own money to a trust established to pay asbestos claimants. *Tr.* 173-74. API is also required to direct all recoveries from its insurance companies to the trust. *Tr.* 177-78. In addition, API paid \$5,875,765 in attorneys’ fees and costs related to the bankruptcy as of the time of trial. *Tr.* 175. The jury found that the lost Hartford insurance benefits and API’s bankruptcy was a direct result of the mounting asbestos claims asserted against it combined with the refusal of OneBeacon to honor their obligations, and compensated API for those damages. *Tr.* 176, 249-250; A.188.

Argument

ISSUES RAISED ON APPELLANT ONEBEACON'S APPEAL

I. API's Breach of Fiduciary Duty and Bad Faith Claims Were Properly Submitted to the Jury.

API is entitled to its remedy for the breach of fiduciary duty and bad faith claims against OneBeacon. Both claims are consistent with Minnesota law and were properly submitted to the jury. The evidence at trial provides more than a sufficient basis for the jury's verdict that OneBeacon breached its fiduciary duty and acted in bad faith when it concealed evidence of coverage from API for *18 years* while API and its other insurers struggled with thousands of asbestos claims, which ultimately drove it into bankruptcy.

A. Standard of Review.

OneBeacon makes two interrelated arguments in an effort to persuade this Court to set aside the jury's verdict. First it argues that the trial court erred in denying OneBeacon's motion for judgment as a matter of law.¹⁴ Second, it argues that the jury instructions were erroneous.

The standard for review of denial of judgment as a matter of law asks whether the evidence presented at trial is sufficient to support the jury's verdict. *See, e.g., Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). Before answering this question, the Court

¹⁴ OneBeacon's heading for Section I states that it is seeking review of the trial court's denial of its motion *in limine* on API's claims of bad faith and breach of fiduciary duty. However, it never actually addresses the denial of that motion in its briefing. In any event, it should be noted that the trial court denied OneBeacon's motion because it was, in fact, an untimely motion for summary judgment. *A.169*. Absent a clear waiver by API, the time-period requirements of Minn. R. Civ. P. 56.03 were mandatory. *See, e.g., Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003) (motion *in limine* functioning as a summary judgment must comply with procedural requirements or it is improper).

must review the threshold issue of whether the claims were in fact properly submitted to the jury.

The Court should review the trial court's decision on jury instructions for abuse of discretion.¹⁵ *Rowe v. Munye*, 702 N.W.2d 729 (Minn. 2005); *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Trial courts have "considerable latitude" in choosing jury instructions. *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). A party will not receive a new trial for errors in jury instructions unless the error was prejudicial. *Lewis v. Equitable Life Assur. Soc'y of the U.S.*, 389 N.W.2d 876, 885 (Minn. 1986). In determining whether erroneous instructions resulted in prejudice, the court must construe the instructions as a whole from the standpoint of the total impact on the jury. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 48 (Minn. 1997). All that is required to uphold the verdict as submitted is that the charge as a whole conveyed to the jury a clear and correct understanding of the law. *Smith v. Kahler Corp.*, 297 Minn. 272, 282, 211 N.W.2d 146, 153 (1973).

¹⁵ This standard of review applies only if OneBeacon had properly preserved its objection to the Court's jury instructions. In its brief, it refers the Court to the objections it made during the pre-trial hearing on November 22, 2005. *See Aplt.Br.32* (citing objection to breach of fiduciary duty instruction) and *33* (citing objection to bad faith instruction). However, objections at this preliminary stage are not sufficient to preserve the issues for appeal. *See The H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271 (Minn. App. 1999) (party that fails to make specific objection at time jury was charged waived objection). More importantly, however, OneBeacon completely failed to object to the trial court's special verdict form and does not seek appellate review of the special verdict form. A party who fails to object to a special verdict form before its submission to the jury waives any later objection. *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. App. 1989).

B. API'S Fiduciary Duty Claim Is Recognized under Minnesota Law.

OneBeacon argues that an insurer can *only* be liable for breach of fiduciary duty if it assumes its duty to defend and *then* fails to exercise good faith in settlement of claims against its insured. *Aplnt.Br.24,27*. The trial court summed up its view of this position when it stated, "One Beacon's position is that providing no defense is good faith, but providing deficient defense is bad faith, and their failure to negotiate any claims is good faith, but not negotiating in good faith is the only way it can liable for bad faith. . . . One Beacon's position . . . brings about [an] absurd result which this court will not permit." *A.230-32*. The trial court is correct that Minnesota courts have never countenanced such a rule of law, and they never would.

1. OneBeacon Owes API a Fiduciary Duty Measured by Good Faith.

Minnesota law is definitive: as API's insurer, OneBeacon owes API a fiduciary duty. *Kissoondath v. U.S. Fire Ins. Co.*, 620 N.W.2d 909, 915 (Minn. App. 2001), *review denied*, (Minn. Apr. 17, 2001) (an "insurer owes its insured a fiduciary duty to represent the insured's best interests"); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983) (an "insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify"); *Am. Standard Ins. Co. v. Le*, 539 N.W.2d 810, 815, *reversed on other grounds*, 551 N.W.2d 923, 925 (Minn. 1996) (an insurance policy "creates a fiduciary duty in the insurer toward its insured"). That fiduciary duty is measured by the standard of good faith. *Kissoondath*, 620 N.W.2d at 916 (citing *Short*).

While it is true that *Short* and *Kissoondath* applied the breach of fiduciary duty claim when the insurer had assumed the duty to defend and failed to negotiate a good faith

settlement within policy limits, nowhere did those cases *limit* the claim to that context. In *Short*, for example, the Minnesota Supreme Court was persuaded by the egregious conduct on the part of the insurer in the face of its insured's clear liability. The court does not state that the insurer's duty of good faith is *only* breached in such situations, as OneBeacon would have this Court believe.

OneBeacon relies on *Cherne Contracting Corp. v. Wausau Ins. Co.*, 572 N.W.2d 339, 342 (Minn. App. 1997), for its proposition that the Court has rejected "the general notion that an insurer stands in a fiduciary relationship with its insureds." *Aplmt.Br.27*. No other published Minnesota case, including *Kissoondath*, has followed *Cherne* for this principle.

OneBeacon's reliance on the Minnesota federal court opinion in *Miller v. Ace* is also misplaced. In *Miller*, the federal court mistakenly predicts Minnesota law, stating that "[w]here 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 a fiduciary duty is not at issue." 261 F. Supp. 2d 1130, 1141 (D. Minn. 2003). *Miller* ignores the fiduciary duty discussion in *Kissoondath*, and the cases it relied on. Instead, *Miller* cites Minnesota cases that again recite that the fiduciary duty of an insurer is to "settle within limits." *Id.* Certainly *none* of those cases considered evidence of the kind of egregious insurer misconduct that occurred in *Short* or in this case. *Miller* hypothesizes a bright-line rule, but it is a rule that the Minnesota courts have never adopted in any published opinion.

2. The Jury Was Properly Instructed on OneBeacon's Fiduciary Duty.

Consistent with the law as set forth in *Kissoondath, Short* and numerous other Minnesota cases, the trial court properly instructed the jury on an insurer's fiduciary duty to its insured as follows:

A fiduciary relationship exists when one person places trust and confidence in another person who, as a result of having this trust and confidence placed in him or her, assumes a position of superiority 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 the 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 claims
4. Correct interpretation, application and representation of the policy provisions and the 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 for the financial exposure to the policyholder
8. Full disclosure of material facts

A.150; Tr.824.

The definition of a "fiduciary duty" comes nearly verbatim from authoritative Minnesota law. *See, e.g., Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (stating that a fiduciary relationship exists "when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic or merely personal."); *Murphy v. Country House, Inc.*,

307 Minn. 344, 350, 240 N.W.2d 507, 512 (1976) (a fiduciary relationship exists where there is “[d]isparity of business experience and invited confidence”); *Stark v. Equitable Life Assur. Soc’y*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939) (“A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other.”).

Likewise, the instruction’s enumerated elements come directly from the case law. In *Short* the Minnesota Supreme Court stated that “the insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify.” *Short*, 334 N.W.2d at 387. In *Boerger v. Am. Gen. Ins. Co. of Minn.*, 257 Minn. 72, 100 N.W.2d 133 (1959), the court stated that an insurer must “give at least equal consideration of the interests of the insured.” *Id.* at 77, 100 N.W.2d at 136; *Kissoondath*, 620 N.W.2d at 916. The insurer must view claims against the insured as “if there were no policy limit applicable to the claim” and it owes its insured a fiduciary duty even if the insured is insolvent and judgment-proof. *Lange v. Fidelity & Cas. Co. of N.Y.*, 185 N.W.2d 881, 884 (Minn. 1979); *see also Kissoondath*, 620 N.W.2d at 916. An insurer is “better able to ‘facilitate clear communication’” with its policyholder. *Home Ins. Co. v. Nat’l Union Fire Ins. Of Pittsburgh*, 658 N.W.2d 522, 533 (Minn. 2003). An insurer’s failure to “materially inform and continually communicate with insured” may be evidence of the insurer’s breach of fiduciary duty and bad faith. *Kissoondath*, 620 N.W.2d at 919. An insurer’s failure to perform even any “one factor *alone* may constitute a breach of the duty of good faith.” *Id.* at 916.

Significantly, the trial court’s fiduciary duty instruction includes “full disclosure of material facts,” which is supported by black letter law that one party to a transaction has a

duty to disclose information to the other party in three instances: (a) a party who speaks must say enough to prevent his words from misleading the other party; (b) a party who has special knowledge of material facts to which the other party does not have access may have a duty to disclose those facts to the other party; (c) a party who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts. *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972); *A.150; Tr.824*.

OneBeacon argues that the jury instructions are erroneous merely because they include language from the Unfair Claims Practices Act, MINN. STAT. §§ 72A.17, *et seq.* However, the trial court did not use these elements to create some “back-door” private cause of action under chapter 72A or even to “define the scope of the claim,” as OneBeacon alleges. *Applt.Br.33*. API never alleged a violation of the UCPA. Accordingly, the case cited by OneBeacon to defeat this instruction, *Glass Serv. Co., Inc. v. State Farm Mut. Auto Ins. Co.*, 530 N.W.2d 867, 872 (Minn. App. 1995), is inapposite. In that case, the insured alleged that the insurer’s actions constituted coercion and/or inducement in violation of chapter 72A. *Id.* The court rejected the insured’s claim, holding that it was “attempting to use an alleged violation of the act to establish an element of its common law claim.” *Id.* That clearly is not the case here. Here, the trial court simply set forth the broad parameters of an insurer’s duties, and did so fairly and in a way the jury could understand; the judge cannot be faulted for incorporating concepts the legislature also recognizes as constituting duties of insurers.

All that is required to uphold the verdict as submitted is that the charge as a whole conveyed to the jury a clear and correct understanding of the law. *Smith, Inc.*, 297 Minn. at 282, 211 N.W.2d at 153. The fiduciary duty instruction did just that.

C. Minnesota Law Supports a Claim of Bad Faith in this Context.

1. OneBeacon's Conduct Constitutes Bad Faith under Minnesota Law.

In an unavailing effort to avoid the duty arising from *Short* and *Kissoondath*, OneBeacon urges this Court to view this case as another coverage dispute in which “the claims are based on the insurer’s conduct in denying coverage.” *Aplnt.Br.25*. It claims that OneBeacon owed API a duty to act in good faith “only in specific circumstances.” *Aplnt.Br.24*. Accordingly, it cites several well-known coverage cases in which the Minnesota court has rejected an insured’s attempt to assert bad faith denial of an insurance claim against its insurer. *Aplnt.Br.25*.

These cases are inapposite for several reasons. First, several of these cases arise in the first-party property insurance context. See, e.g., *Pillsbury Co. v. Nat’l Union Fire Ins. Co.*, 425 N.W.2d 244 (Minn. App. 1988); *R.L.B. Enters., Inc. v. Liberty Nat’l Fire Ins. Co.*, 413 N.W.2d 551 (Minn. App. 1987). They therefore do not implicate the heightened standard Minnesota law imposes on a liability insurer, such as Appellant, which has separate duties to defend and indemnify its insured for third-party claims. *Morrison v. Swenson*, 274 Minn. 127, 142 N.W.2d 640 (1966).

More significantly, *none* of the cases cited by OneBeacon presents evidence of egregious insurer conduct such as has been presented in this case, concerning not only the bad faith denial of *thousands* of claims, but also the persistent denial of *the very existence* of the insurance relationship while actively withholding critical information showing insurance coverage. In *none* of those cases did the insurer’s wrongful failure to defend or indemnify drive its insured into bankruptcy. OneBeacon ignores Minnesota law that contemplates the

“exceptional cases” where a breach of contract can be accompanied by an independent tort. *Wild v. Rarig*, 302 Minn. 419, 439, 234 N.W.2d 775, 789 (1975). This is one of those “exceptional cases.”

Additionally, the very case OneBeacon cites for the proposition that “no claim exists for bad faith refusal to admit coverage” holds just the opposite. *Aplnt.Br.29*. In *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 771 (Minn. App. 1999), this Court recognized that when the evidence is sufficient to demonstrate an insurer’s bad faith denial of the insurance relationship, such a claim can be maintained.

The Minnesota law applied by the trial court here accords with that of numerous other jurisdictions that have recognized a claim for bad faith concealment or denial of the insurance relationship. Such a claim arises from the insurer’s duty of good faith and fair dealing¹⁶ and its “duty to disclose the existence of coverage.” *See, e.g., Weber v. State Farm Mut. Auto. Ins. Co.*, 873 F. Supp. 201, 209 (S.D. Iowa 1994); *Henderson v. United States Fid. & Guar. Co.*, 620 F.2d 530, 537 (5th Cir. 1980).¹⁷

The California Court of Appeals has held that this duty is analogous to the duty of the insurer to act in good faith once it has assumed the defense of the insured:

An insurer is not entitled to delay disclosure of policy existence and terms of underinsurance . . . In reality the need for disclosure at an early date is more urgent in this situation so as to enable an injured insured to make meaningful decisions on how to conduct litigation and to refrain from useless lawsuits against persons with no liability with the delay and expense

¹⁶ Minnesota recognizes that “every contract includes an implied covenant of good faith and fair dealing.” *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995).

¹⁷ In these jurisdictions, as in Minnesota, the existence of bad faith is a fact question. *See, e.g., Gendreau v. Foremost Ins. Co.*, 423 N.W.2d 712, 714 (Minn. App. 1988).

attendant upon such suits. This rule is analogous to the rule that, when the insurer accepts a tendered defense, the insurer must act in good faith, even if coverage is disputed.

Ramirez v. USAA Cas. Ins. Co., 285 Cal. Rptr. 757 (Cal. Ct. App. 1991).¹⁸ Moreover, other than the ruling in *Gopher Oil*, no Minnesota court has explicitly addressed the insurer's good faith duty to disclose coverage in the missing policy context.

API acknowledges the rule in Minnesota that the "mere" failure to pay an insurance claim "no matter how malicious," does not constitute a tort but rather is a breach of contract. *See, e.g., Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986); *Saltou v. Dependable Ins. Co.*, 394 N.W.2d 629 (Minn. App. 1986). However, here the Court is presented with an insurer the jury found to have misled its insured and concealed the very *existence* of the insurance relationship—*i.e.*, the very *existence* of the contract. The rule regarding malicious breach of contract is inapplicable here. As the trial court stated, "[i]f the insurer can only be accused of bad faith for its failure to settle within its policy limits *only after* acknowledging it is the insurer, but cannot be accused of bad faith if it never acknowledges existence of the insurance is totally contrary to good public policy." *A.232 (emphasis added)*.

¹⁸ Some courts have based this duty on RESTATEMENT (SECOND) OF TORTS § 551(2)(a)(1977), which recognizes that a party to a business transaction has a duty to disclose "matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *See, e.g., Weber*, 873 F. Supp. at 209 (relying on the Restatement and concluding that State Farm owed its insured a duty to disclose the existence of underinsured motorist coverage when its insured was unaware he had such coverage). Minnesota courts have adopted this section of the Restatement outside the insurance context. *See, e.g., Gerdin v. Princeton State Bank*, 371 N.W.2d 5 (Minn. App. 1985) (holding under Restatement that bank had duty to disclose the existence of tax liens on a property to a buyer bidding on the property at a foreclosure sale because the bank knew of the existence of tax liens and the buyer did not).

The Minnesota Supreme Court has recognized that the public interest is served by compelling insurers to act in good faith. *See Lange*, 185 N.W.2d at 881. A rule that requires insurers to act in good faith serves both the insured and the public.

2. The Trial Court Properly Instructed the Jury on Bad Faith.

The trial court properly instructed the jury on bad faith. The instruction stated:

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;Tr.825.

This instruction derives from the relevant case law. For example, under *Kissoondath*, “[t]he fiduciary duty owed by an insurer to its insured is measured by the standard of good faith.” *Kissoondath*, 620 N.W.2d at 916. Bad faith is defined as a party’s “refusal to fulfill some duty or contractual obligation” based on an ulterior motive, not an honest mistake regarding one’s rights or duties. *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 837 (Minn. App. 1994). Bad faith is not easily defined but includes “the commission of a malicious, willful wrong” and requires “fraudulent intent.” *Mjolsness v. Riley*, 524 N.W.2d 528, 530 (Minn. App. 1994). Good faith, at a minimum, excludes actions that violate community standards of decency, fairness or reasonableness. RESTATEMENT (SECOND) OF CONTRACTS § 205, cmt. *a* (1981). Subterfuge, evasion, and “abuse of a power to specify terms” are some examples of bad faith. *Id.* cmt. *d*. There simply is no merit to OneBeacon’s claim that the law does not support the trial court’s jury instructions.

II. The Jury's Verdict that OneBeacon Breached its Fiduciary Duty to API and Acted in Bad Faith is Supported by the Evidence.

A. Standard of Review.

The decision to grant judgment as a matter of law is a question of law to be decided by the trial court and is reviewed *de novo*. *Langeslag*, 664 N.W.2d at 864. On appeal, the trial court must be affirmed if, “in considering the evidence in the record in the light most favorable to the prevailing party, ‘there is any competent evidence reasonably tending to sustain the verdict.’” *Id.* In deciding whether to grant a motion for judgment as a matter of law, the trial court must view the evidence in the light most favorable to the non-moving party. *Navarre v. South Washington Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002). Judgment as a matter of law should only be granted when the verdict is manifestly against the entire evidence. *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 240 (Minn. App. 2000).

B. There was Ample Evidence that OneBeacon Breached its Fiduciary Duty To API and Acted in Bad Faith.

API presented compelling and uncontradicted evidence that General Accident and OneBeacon failed to communicate openly with API and failed to disclose material facts when they repeatedly misrepresented that they possessed “insufficient” information to establish the existence or terms of coverage. The trial judge, who heard all the testimony, had no question that the evidence was more than sufficient to support the jury’s verdict. In denying OneBeacon’s post-trial JAML motion, he ruled:

During trial, One Beacon refused to acknowledge that, as the insurer, it had a duty to help determine coverage. Instead they insisted that only their insured had a duty to prove that One Beacon insured API and One Beacon had no responsibility to help determine the existence of the policies or its terms and conditions. The Jury determined that One Beacon was acting in

bad faith and breached its contract and fiduciary duty in its dealing with its insured. That jury determination was based on the evidence at trial and was not manifestly or palpably contrary to the evidence produced at trial.

A.231-32.

By 1987, General Accident possessed the CPA audit records confirming that it was API's CGL insurer, identifying the policy limits, the policy periods, and the policy numbers. General Accident also had the "CG" and "1CG" policy forms that would have completed the coverage picture. As OneBeacon's Brooke Green testified at trial:

Q: And General Accident knew that it had CG and 1CG policy prefixes on its general liability policies during the time period that we're talking about?

A: Yes.

* * *

Q: There's nothing in the General Accident or One Beacon historical file to indicate that there was any reason that Mr. Thorn could not have sent CG or 1CG policy forms to API, is there?

A: No.

Q: But he didn't do that, did he?

A: No.

Q: He simply kept writing back with all of these Exhibit Number 2 that you've heard so much about, right?

A: His letters, yes.

Tr.531,538-39. API's Loren Rachey confirmed that OneBeacon failed to disclose this critical information to API:

Q: Did they ever tell you that they had policy forms that begin with 1CG?

A: No.

Q: Did General Accident ever tell API that it knew what types of policy forms it used when it was issuing CGL policies during the 1958 to 1966 time frame?

A: No, it did not.

Tr.150. This critical, but undisclosed information would have allowed API—not to mention General Accident and OneBeacon—to reconstruct the policies General Accident sold to API. *Tr.441.*

General Accident’s claim handler admitted that when it was first presented with API’s claims for coverage in 1987, it affirmatively avoided disclosing coverage, lest it “telegraph to their defense attorneys or insured we are eager” and would therefore result in more tenders of defense. *A.327;Tr.536-37.* OneBeacon’s breach of fiduciary duty and bad faith conduct continued at the trial when OneBeacon refused to take “full responsibility for the full of the coverage provided by OneBeacon to [API] pursuant to [its] policy forms” *Tr.607.*

Armed with the critical information that would have allowed API to reconstruct the policies, OneBeacon had a duty to disclose that information to API. It did not. There was abundant evidence to support the jury’s conclusion that OneBeacon breached its fiduciary duty and acted in bad faith in concealing from API the existence of the insurance relationship, in addition to the nature and terms of coverage. Indeed, the trial court noted the lack of credibility of OneBeacon’s witnesses, Brooke Green and her supervisor Tom Ryan. *A.231.* Although OneBeacon admitted that insurance companies should be “honest” and “forthcoming” with their policyholders, *Tr.651,* the record is clear that OneBeacon simply was not.

Viewing the evidence in the light most favorable to API, and taking as true all reasonable inferences that can be drawn from that evidence, there is an abundance of evidence to support the jury's verdict that OneBeacon breached its fiduciary duty and acted in bad faith.

III. The Jury's Verdict that OneBeacon Breached Its Insurance Contracts with API Is Also Amply Supported by the Evidence.

A. Standard of Review.

OneBeacon next challenges the jury's special verdict that it breached its contracts of insurance by failing to defend and/or indemnify API. *Aplnt.Br.34-38*. OneBeacon's argument reviewed by that same standard of review applicable to reviewing JAML and new trial motions—sufficiency of the evidence—as opposed to the *de novo* standard requested here by OneBeacon.¹⁹ *Aplnt.Br.34*.

A trial court's denial of a motion for judgment as a matter of law under Rule 50.02 “must be affirmed” if there is any competent evidence in the record “reasonably tending to sustain the verdict.” *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 200 (Minn. 2000). This Court will not disturb a jury's answer to special verdict questions if it can be reconciled on any theory, and will set aside a special verdict answer only if it is “perverse and palpably contrary to the evidence.” *Hauenstein v. Locite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984). Similarly, the review of a trial court's denial of a motion for new trial based on sufficiency of the evidence

¹⁹ The case OneBeacon cites in its argument on the applicable standard of review, *Reider v. City of Spring Lake Park*, 480 N.W.2d 662, 666 (Minn. App. 1992), provides that “*de novo* review is appropriate where the trial court exercised no discretion and ruled as a matter of law that the complaining party was entitled to a new trial.” Those are not the facts here, so this case is inapposite.

requires that “the verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict” *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992).

B. There Was Ample Evidence that OneBeacon Breached Its Contracts with API.

The evidence adduced at trial showed that OneBeacon, through its predecessor General Accident, insured API from 1958 to 1966 under CGL policies, and that those policies contained the same wording as policy forms used by General Accident during this same period of time. The record also demonstrates that beginning in 1987, API tendered hundreds of claims to General Accident that fell within this coverage period. *RA.115-160*. Thomas Thibodeau, an attorney who represented API in the underlying cases, 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. *Tr.695-96*. OneBeacon presented no evidence to rebut this testimony.

The evidence was also unequivocal that neither General Accident nor its successor OneBeacon ever defended or paid a single claim. *Tr.173,526-27*. OneBeacon admitted in front of the jury that it “never defended a claim,” “never participated in the defense of any of the claims,” and “refused to defend API for any of the claims that [it] tendered.” *Tr.526-27*. Trial exhibit 44 is one exemplar complaint that falls within General Accident’s policies.²⁰ *A.315;Tr.696*. There is competent evidence reasonably tending to support the jury’s verdict.

²⁰ *Gartner v. Am. Standard, Inc., et al.* *A.315*. OneBeacon makes much of the fact that the *Gartner* complaint, dated October 31, 2002, was not formally tendered to General Accident. *Applt.Br.20*. This complaint and many others were not formally tendered to General Accident given the obvious futility of doing so after twelve years of General

C. API Was Not Required to Prove the Details for Each and Every Claim It Tendered to OneBeacon.

OneBeacon essentially argues that API was required to present “better” evidence to sustain the jury’s verdict that it breached its contractual obligations. Specifically, OneBeacon argues that, in order for API to prevail on its breach of contract claim, API had to show that each and every claim summarily denied by OneBeacon and General Accident was covered under the policies. *Aplnt.Br.36*. There is no support under Minnesota law for OneBeacon’s argument, and the cases OneBeacon cites do not stand for such a burdensome proposition.

In fact, one of the cases OneBeacon cites, *SCSC Corp v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995), recognizes that an insurer’s duty to defend is triggered even when a claim that only arguably falls within the scope of the policy’s coverage is presented. The jury heard compelling evidence in this case that OneBeacon and its predecessor would not acknowledge coverage and defend no matter what information API provided. *See also Westfield Ins. Co. v. Kroiss*, 694 N.W.2d 102, 107 (Minn. App. 2005) (insurer has duty to defend underlying complaints even though complaints do not specifically allege damages during policy period and insured provided no evidence that damages occurred at that time). Competent evidence was admitted showing, at the very least, the existence of claims that arguably fell within coverage of the General Accident policies. Obviously, the jury reasonably concluded that OneBeacon breached the contracts by stonewalling its policyholder.

Accident’s rejections. *Tr.215*. A party need not exhaust conditions precedent when it would be futile to do so. *McShane v. City of Faribault*, 292 N.W.2d 253, 256 (Minn. 1980).

D. OneBeacon Cannot Use API's Other Insurers as a Shield.

OneBeacon also takes the specious position that despite its utter failure to defend or pay claims, API was not damaged by OneBeacon's breach of contract because API's defense costs were paid by one or more of its insurers. *Aplnt.Br.37*. An insurer does not escape its contractual obligations by virtue of other insurers compliance with the contractual obligations owed to a mutual insured. In fact, the court in *Westfield Ins. Co.* specifically rejected a claim that the insured lacked damages because other insurers assumed the duty to defend. *Westfield Ins. Co.*, 694 N.W.2d at 107-08.

OneBeacon is not exonerated from its liabilities because API purchased and paid for other insurance from insurers that did step forward and defend it. And OneBeacon misses the critical point: API was damaged because OneBeacon left it exposed to massive liabilities that were OneBeacon's obligations, especially once API's other insurers claimed "exhaustion" of their coverages.

By taking every inference that may reasonably be drawn from the evidence as well as the jury's evaluation of the credibility of the testimony²¹ at trial in support of the verdict, the jury's verdict finding that OneBeacon breached its contract with API must be sustained by this Court.

²¹ Indeed, the "evasiveness" of the witnesses for OneBeacon was noticed and noted by the trial judge. *A.231*.

IV. The Jury's Damage Award Is Consistent with the Damages Theory Presented to It and Is Amply Supported by the Record.

A. Standard of Review.

OneBeacon also appeals the jury's damages award because "there is no record evidence" supporting it. *Aplnt.Br.38*. In order for the Court to set aside the jury's damages award on this basis, it must be shown that the verdict was "manifestly and palpably contrary to the evidence." *Levienn v. Metro. Transit Comm'n*, 297 N.W.2d 272, 273 (Minn. 1980). An appellate court should consider the evidence in the light most favorable to a damages award. *Rayford v. Metro. Transit Comm'n*, 379 N.W.2d 161, 165 (Minn. App. 1985), *review denied*, (Minn. Feb 14, 1986).

B. OneBeacon Failed to Object to the Jury Instruction Regarding the Measure of Damages It Now Complains of on Appeal.

OneBeacon criticizes the trial court's jury instruction as to the measure of damages. *Aplnt.Br.39*. Fatal to OneBeacon's argument is the fact that it did not object to this instruction at trial or specify this alleged error in its motion for a new trial. "Where a party makes no objections to jury instructions before the jury retires, and does not specify fundamental errors in a motion for a new trial, the instructions are the law of the case and may not be challenged for the first time on appeal." *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 42 (Minn. 1982); *see also Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 124 (Minn. 1986) ("the theory upon which a case is tried below becomes the law of the case and must be adhered to on appeal"). As a result, OneBeacon's claim that the evidence the jury's damages verdict must be judged here in light of the instructions given at trial. *Marion v. Miller*, 237 Minn. 306, 309, 55 N.W.2d 52, 55 (1952); *see also Davis v. Re-Trac Mfg. Corp.*, 276

Minn. 116, 120, 149 N.W.2d 37, 40 (1967) (holding that damages awarded were not excessive under the instructions given by the trial court).

C. The Damages Award Is Not Manifestly and Palpably Contrary to the Evidence Under the Instructions Given to the Jury.

Under the instructions, the jury's verdict can be easily reconciled with the record and Minnesota law. "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." *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979). Minnesota law holds that damages recoverable in contract actions are those which arise naturally from the breach or those which were contemplated by the parties when the contract was formed. *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983).

Damages do not need be proved with mathematical certainty. They need only be proven to a "reasonable, although not necessarily absolute, certainty." *N. Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 297 Minn. 118, 125, 211 N.W.2d 159, 166 (1973). The determination of whether damages are too speculative or remote "should usually be left to the judgment of the trial court." *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977).

In this case, the jury's \$52.5 million compensatory damages flow naturally from OneBeacon's conduct, were reasonably foreseeable given the relationship between the parties, and were expressly within the contemplation of the parties. The evidence showed that API was forced into bankruptcy as a result of OneBeacon's failure to defend and pay claims on behalf of API. *Tr.176,249-50*. Mr. Rachey testified that as a result of that same failure by OneBeacon, API was forced to negotiate a contribution of \$40,500,000 to a

bankruptcy trust to pay claims and that API had incurred costs and expenses of \$5,875,765 related to that bankruptcy as of the date of trial. *Tr.173-75*. API also had to settle its claim for excess insurance assets by discounting by \$5,500,000 the total amount available to it under its excess insurance policy with The Hartford. *Tr.155-57*.

Notwithstanding this evidence, OneBeacon contends that the verdict must be reversed 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.” *Aplnt.Br.38*. Neither of these arguments have any merit.

First, OneBeacon erroneously relies on *Indep. Grocery Co. v. Sun Ins. Co.*, 146 Minn. 214, 178 N.W.2d 582 (1920), to argue that API’s damages were too remote to have been caused by its conduct. *Aplnt.Br.41-43*. In *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979), the Minnesota Supreme Court specifically overruled *Indep. Grocery Co.* to the extent that it limited an insured in “recovering only the amount of the policy plus interest” *Id.* at 388. The Minnesota Supreme Court further held that “[w]hen 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.” *Id.* at 387-88.

All of API’s damages arose from API’s need to settle the asbestos claims against it after being abandoned and left to its own devices by OneBeacon. That was a direct cause of API’s damages for which OneBeacon is liable. *See, e.g., Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982). OneBeacon presented no evidence to the contrary. As the trial court explained in rejecting this same argument, the “jury could have determined that it is possible that if OneBeacon had accepted responsibility and defended API at any time between 1987

and 2002 (the commencement of this suit), that API may not have filed bankruptcy in 2005.” *A.237*. Thus, the trial court did not abuse its discretion in denying OneBeacon’s post-trial motions attacking the verdict. *See Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. App. 1988).

OneBeacon’s second argument that the damages awarded by the jury were somehow not foreseeable or within the contemplation of the parties “at the time they entered into an insurance contract or when API began tendering claims in 1987” is similarly flawed.

Aplnt.Br.45. Whether damages naturally arose from the breach or were contemplated by the parties is a question of fact. *Franklin Mfg. Co. v. Union Pac. R.R. Co.*, 311 Minn. 296, 298-99, 248 N.W.2d 324, 326 (1976). Contrary to OneBeacon’s argument, the evidence showed bankruptcy was indeed within the parties’ contemplation as far back as 1958, when General Accident issued the first policy to API. The “1CG” and “CG” General Accident form policies specifically state that “[b]ankruptcy or insolvency of the insured or of the insured’s estate shall not relieve the company of any of its obligations hereunder.” *A.331,334,339, 343*.

General Accident recognized early on that its insured might file for bankruptcy. An insurer intimately understands that its insured requires protection to remain in business. *Id.* Accordingly, by issuing a policy, an insurer acknowledges the risk of an insured filing for bankruptcy or becoming insolvent should the insurer breach its contractual obligations to defend and pay claims. Other courts have recognized the foreseeability of economic ruin:

Insurers are, of course, chargeable with knowledge of the basic reasons why fire insurance is purchased, and of the likelihood that an improper delay in payment may result in the very injuries for which the insured sought protection by purchasing

the policies . . . Certainly this court cannot say, as a matter of law, that at the time of contracting the [insurers] should not have contemplated that [the insured] would be in very serious financial trouble if a fire destroyed one-third of his motel and the insurers refused to perform their contractual obligations.

Reichert v. Gen. Ins. Co. of Am., 428 P.2d 860, 864-65, 59 Cal. Rptr. 724, 728-29 (Cal. Ct. App. 1967), *vacated on other grounds*, 442 P.2d 377, 69 Cal. Rptr. 321 (1968); *see also Wooten v. Cent. Mut. Ins. Co.*, 182 So. 2d 146, 150 (La. Ct. App. 1966) (holding insured's bankruptcy-related damages against insurer were foreseeable); *Venturi v. Zurich Gen. Acc. & Liab. Co.*, 57 P.2d 1002, 1003 (Cal. Ct. App. 1936) (same).

It is disingenuous for an insurer to contend that it is unforeseeable that an insured it knows to be facing mass tort liabilities, like the thousands of asbestos-related bodily injury claims against API, might seek bankruptcy protection. OneBeacon, a sophisticated insurer, knows full well that the purpose of liability insurance is to protect the insured against claims made by third parties that “could cost significant amounts of money to defend” and to provide confidence to the public that they will be compensated for their claims. *Tr.417*. As it is “almost impossible to determine exactly what the top level of exposure is” for third-party liability claims, the insured looks to its insurance company to provide protection for these claims. *Id.* By its very definition, a contract of insurance is “the assumption of a risk of loss and the undertaking to indemnify the insured against such a loss.” COUCH ON INSURANCE § 1:9 (3d 1995).

The jury found API's bankruptcy filing and related damages were causally related to OneBeacon's conduct and contemplated between the parties. Its award is supported by the evidence, which was uncontradicted. The trial court specifically cited this evidence in

denying OneBeacon's post-trial motions. That determination was not manifestly and palpably contrary to the evidence. Consequently, the Court should reject OneBeacon's arguments against it and affirm the verdict.

V. OneBeacon's Statute of Limitations Defense is Inapplicable Due to its Own Misconduct and the Nature of This Action.

A. Standard of Review.

OneBeacon's final argument is that the six-year statute of limitation should have barred API's action because it accrued in 1987 when OneBeacon first breached its contract by refusing API's tender. When there are no material facts in dispute, the question of when a statute of limitations accrues is one of law, which this Court reviews *de novo*. *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn. 1990).

B. OneBeacon's Accrual Argument Was Not Preserved For Appeal.

OneBeacon failed to properly preserve this issue for appeal, which is fatal to its argument. OneBeacon requested a "related" special verdict question asking, for each policy, what date OneBeacon breached the contracts. The trial court refused to include the question on the jury verdict form. A request for one instruction is not, of course, an objection to what is actually given. *See, e.g., Murphy v. City of Minneapolis*, 292 N.W.2d 751, 755 (Minn. 1980). Although OneBeacon makes passing mention of this fact in its brief, it does not argue on appeal that the trial court erred in rejecting its proposed special verdict question or cite any authority to support that this constituted an abuse of discretion. *Aplnt.Br.5 n.17*. As a result, OneBeacon has failed to preserve its statute of limitation accrual argument for purposes of this appeal. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*,

558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue in the absence of adequate briefing); *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignment of error in brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).²²

C. OneBeacon’s Misconduct and the Nature of This Action Precludes the Application of Any Statute of Limitations.

As the trial court ruled, OneBeacon’s statute of limitations defense is inapplicable as a matter of law for a number of reasons. First, OneBeacon’s fraudulent misrepresentations preclude its statute of limitations argument. In denying OneBeacon’s motion for summary judgment on this issue, the trial court ruled that “[a]ssuming for purposes of summary judgment that facts could be shown at trial that there was in fact material misrepresentations by One Beacon, then any Statute of Limitations issues would be stayed and not be applicable in the period of time of the alleged fraud.” *A.130*. The jury unambiguously found that General Accident and OneBeacon made false representations to API. This finding is significant because fraudulent concealment tolls the statute of limitations under Minnesota law. *See, e.g., DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 50-51 (Minn. 1982); *Schmucking v. Mayo*, 183 Minn. 37, 39-41, 235 N.W. 633, 633-34 (1931); *Williamson v. Pasciunas*, 661 N.W.2d 645, 650 (Minn. App. 2003). OneBeacon neither contests the jury’s finding nor challenges

²² The cases OneBeacon cites are inapposite. This Court rejected similar arguments made by an insurer that the limitations period began for an insured’s claim accrued when the insurer first notified that insured it would not defend or indemnify. *See Northwestern Nat’l Ins. Co. v. Carlson*, 711 N.W.2d 821, 824 (Minn. App. 2006). OneBeacon tries to distance itself from *Carlson* by arguing that it did not “involve a claim for defense.” *Aplnt.Br.49*. However, a review of *Carlson* shows that the very notice the insurer relied on to argue for the accrual date stated it would “not defend or indemnify” the insured. *Carlson*, 711 N.W.2d at 824.

the trial court's ruling that its misconduct would toll any statute of limitations under Minnesota law.

Second, Minnesota law is also clear that no statute of limitations applies to declaratory judgment actions. *See State v. Joseph*, 622 N.W.2d 358, 362 (Minn. App. 2001), *overruled on other grounds*, 636 N.W.2d 322 (Minn. 2001); *Fryberger v. Township of Fredenberg*, 428 N.W.2d 601, 605 (Minn. App. 1988). Relying on *Joseph*, the trial court also correctly ruled that the statute of limitations did not apply because this is a declaratory judgment action.

A.129. The declaratory judgment nature of this action also requires that OneBeacon's argument be rejected.

Finally, OneBeacon ignores the trial court's additional finding in its Order denying post trial motions that OneBeacon's repeated acts of misconduct against API also tolled any applicable statute of limitations:

The breach of contract was continuing from 1987 to immediately before trial. The breach was continuous and tolled the Statute of Limitations until One Beacon admitted the existence of the insurance policies one week before trial.

A.237. Under Minnesota law, a party's continuing wrongful conduct tolls any statute of limitations until the misconduct ceases. *N. States Power Co. v. Franklin*, 265 Minn. 391, 397, 122 N.W.2d 26, 30-31 (1963); *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 803 (Minn. App. 2001); *Wintz Parcel Drivers, Inc.*, 555 N.W.2d at 912.

Accordingly, this Court should reject OneBeacon's statute of limitations argument.

ISSUES RAISED BY RESPONDENT API'S NOTICE OF REVIEW APPEAL

- I. **Insurer Responsibility for Coverage of Asbestos-Related Bodily Injury Claims Should Not Be Allocated under Minnesota Law and the Plain Language of OneBeacon's Policies Should Govern.**

A. Standard of Review.

By Order filed on September 27, 2005, the trial court granted summary judgment to Fireman's Fund on the issue of allocation. *A.106*. The court ruled that "allocation is by time on the risk and not by the 'actual injury' rule." *A.128*. OneBeacon asserts that this ruling also applies to its policies. *Aplnt.Br.46n.14*.

In granting Fireman's Fund motion, the Court also apparently accepted its argument that the period of allocation ends with the underlying plaintiff's date of claim or death, whichever is earlier, and that defense costs should be allocated on a pro rata time-on-the-risk basis. These rulings are contrary to Minnesota law.

On appeal from summary judgment, this court looks at any issues of material fact and whether the district court erred in applying the law. *Lubbers v. Anderson*, 539 N.W.2d 398, 104 (Minn. 1995). When, as in this case, the material facts are not in dispute, the reviewing court does not defer to the trial court's application of the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989). Generally, "[i]nsurance coverage issues are questions of law for the court." *State Farm Ins. Cos. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992). Accordingly, the court reviews application of the district court's order concerning allocation *de novo*.

B. Under the Facts of this Case, API Is Entitled to an 'All Sums' Recovery.

No Minnesota court has ever applied a time-on-the-risk allocation in a bodily injury case, and this Court should not do so here. The undisputed medical evidence establishes that asbestos injury, while continuing in nature, arises from a series of discrete and identifiable events, each capable of substantially contributing to a given claimant's injuries.

Therefore *pro rata* time-on-the-risk allocation of coverage is inappropriate under the rule set forth in *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405 (Minn. 2003). Even if allocation were appropriate, the trial court’s rulings regarding the end of allocation and allocation of defense costs are contrary to Minnesota law as recently expressed by the Minnesota Supreme Court in *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283 (Minn. 2006).

In contrast to the ruling below, Minnesota follows the “actual injury” rule, under which the insurer is liable for that damage that occurs during the period of its policy. *Id.* at 295. In order to be faithful to this rule, the Minnesota Supreme Court has unequivocally held that time-on-the risk allocation “is meant to be the exception and not the rule.” *In re Silicone*, 667 N.W.2d at 421. “As with all insurance contract-related issues, courts must consider many factors when deciding this issue, including the policy language, parties’ intent or reasonable expectations, canons of construction and public policy.” *N. States Power Co. v. Fidel. & Cas. Co.*, 523 N.W.2d 657, 661 (1994).

In *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733-34 (Minn. 1997), the Court recognized that

[i]t is only in those difficult cases in which property damage is both continuous and so intermingled as to be practically indivisible that *NSP* properly applies. . . . *NSP* does not establish hard and fast rules; it offers a practical solution in the face of uncertainty.

563 N.W.2d at 733-34. For the reasons set forth below, that certainly is not present here.

To determine whether the allocation exception is appropriate, the court must first decide whether the injuries are continuous; if they are, the court must ask “whether the

continuous injury arose from some discrete and identifiable event. If it does, the policies on the risk at the time of that event are liable for all sums arising from the event. If not, allocation may be appropriate.” *In re Silicone*, 667 N.W.2d at 417-18. “If [the court] can identify a discrete and originating event that allows [it] to avoid allocation, [it] should do so.” *Id.* at 421-22; *see also SCSC Corp.*, 536 N.W.2d at 318. Courts have referred to this an “all sums” recovery. *See, e.g., Domtar*, 563 N.W.2d at 733 n.5 (citing numerous cases “that allow an ‘all sums recovery’”).

The medical evidence here is unequivocal: the asbestos-related bodily injuries and death at issue at this case were caused by many *discrete, separate events, any one of which is a substantial contributing factor to injury or death*. *RA.86-87,90-92,100-02,113-14*. These discrete events are the repeated ingestion of asbestos fibers and the repeated injuries caused by fibers lodged in the body (exposure-in-residence). *RA.86-90,96-99,100-05,107-11*. Both experts agreed that *multiple* injuries occurred over time, on a continuous and ongoing basis, *RA.84-85*, and a new injury is occurring “day after day, year after year” and that there is a “new and ongoing injury during the policy period way beyond the date -- dates of exposure.” *RA.104-05*. The fact that the discrete events in this case are multiple does nothing to change the fact that the injuries are discrete events.

The trial court failed to recognize the fact that these asbestos-related injuries are akin to the discrete injuries at issue in *In re Silicone Implant Coverage Litig.*, which led the Minnesota Supreme Court to reject time-on-the-risk allocation. In that case, the accepted medical testimony established that the immune system reacts immediately to the presence of silicone gel in the body. However, the parties offered conflicting opinions as to the timing of the

injury. *In re Silicone*, 667 N.W.2d at 414. The district court concluded that “injury occurs on a cellular basis shortly after implant.” *Id.* at 415. The court adopted the district court’s findings regarding the timing of injury, and refused to allocate coverage on a time-on-the-risk basis. Instead, it held that “those insurers on the risk at the time of implantation are liable up to the limits of their respective policies.” *Id.* The analysis in *In re Silicone*—that policies on the risk for discrete injuries are liable for all sums—applies to this case for injuries due to either inhalation of asbestos, “exposure-in-residence,” or both, taking place during the insurer’s policy periods.

Allocation is also inconsistent with the insurance contract. The policies do not promise to pay fractions of their limits. There is no reason that an asbestos claimant’s injury should be entitled to less coverage than, for example, injury to another coworker who manifested a specific injury during the policy period that worsened afterward. That would be unfair and, worse, contrary to the language of the OneBeacon policies.

That language includes a basic coverage grant promising to pay “all sums which the insured shall become legally obligated to pay . . .” *A.329,333,337,341*. There is no mention of “allocation” in this insuring agreement or any language providing for payment of only a fraction of its limits for a covered loss. Allocation is contrary to the language of the General Accident policies, contrary to the medical evidence of actual injury and contrary to Minnesota law. Other courts have readily allowed recovery of “all sums” in the appropriate case. *See, e.g., Domtar*, 563 N.W.2d at 733 n.5 (citing numerous cases that allow an “all sums recovery” including *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047-48 (D.C. Cir. 1981)).

For these reasons, the trial court's ruling regarding time-on-the-risk allocation would have the exception swallow the rule.

C. If Liability Should Be Allocated, the Allocation Period Should Be Limited to Years of Available Coverage.

Assuming *arguendo* that allocation applies in any way to this action, allocation should be limited to the years of available coverage under *Wooddale*. See *Wooddale*, 722 N.W.2d at 283.²³ That case was decided after the trial court's order and entry of judgment and mandates that the court must consider issues such as (1) each insurer's time on the risk; (2) the total period over which liability is to be allocated; and (3) the total damages to be allocated. *Id.* at 291. The total period over which liability is to be allocated determines "whether the insured should be responsible for all or part of any time periods during which the insured lacked insurance coverage." *Id.* at 296.

The rule set forth in *Wooddale* is that allocation ends "with the end of the policy year in which [the insured] received notice of the claim or with the end of the last period of insurance coverage . . . whichever is earlier." *Id.* at 298. In other words, allocation applies *only* to that period of time in which coverage for the underlying risk, in this case asbestos, is available: "the period over which damages are to be allocated excludes periods during which the insured lacked coverage because no such coverage was available." *Id.* at 298.

If the Court applies allocation in this case, Minnesota law mandates that allocation only apply to that period of time in which coverage for the underlying risk, in this case asbestos, was available. API's insurers' imposed asbestos exclusions on CGL policies issued

²³ *Wooddale* also provides that when *pro rata* by time on the risk applies to allocation of liability, defense costs are not apportioned to the insured. *Wooddale*, 722 N.W.2d at 304.

to API after 1984—API did not decline to purchase coverage or voluntarily choose to be self-insured. Although API was unable to purchase coverage for asbestos claims after 1984, the trial court did not enter findings of fact on the unavailability of coverage after that year. As recognized in *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, the insurance policies issued to the insured from 1985 on all contained asbestos exclusions and “no coverage was available for asbestos claims after 1985.” 73 F.3d 1178, 1202, 1204 n.4 (2d Cir. 1995); *cf. Asbestos: Alternatives Where No Insurance is Available*, 382 PLI/Comm 51, 59 (1986) (“[p]roducers are turning to [market] alternatives due to unavailability of insurance coverage [for asbestos]”). Accordingly, if this Court decides that allocation is required, it should rule that the allocation period ends with the 1984 policy year, the last date which coverage was available to API for asbestos liability.

II. A Limited Number of Issues Must be Decided and Vacated in Order to Resolve this Declaratory Judgment Action.

Following the return of the jury’s special verdict, the trial court issued Findings of Fact, Conclusions of Law and Order for Judgment on December 15, 2005. *A.195*. In doing so, it stated that “the Court adopt[ed] the Special Verdict of the Jury” *A.196*. In its Conclusions of Law, the trial court stated that “based on a jury verdict Third Party Plaintiff has prevailed in this matter.” *Id.* API moved the court for Amended Findings of Fact, Conclusions of Law and Order for Judgment, requesting that the Court make detailed findings and conclusions in accordance with Rules 49.01 and 52.02 of the Minnesota Rules of Civil Procedure. The court denied API’s motion. *A.223*.

A. Standard of Review.

The trial court's denial of a post-trial motion for amended findings will not be disturbed absent an abuse of discretion. *Zander v. State of Minn.*, 703 N.W.2d 845 (Minn. App. 2005). To reverse a trial court's denial of a motion for amended findings, the moving party must show that the trial court was compelled to make the requested findings and failed to do so. *Id.* at 857.

B. Further Findings Are Required in this Declaratory Judgment Action.

API's action against OneBeacon presents claims for declaratory relief which require a further determination of the minimum policy limits of the policy issued to API for 1964 to 1966, and a ruling, as a matter of law, striking the incorrect and improperly advisory "examples" contained in the trial court's summary judgment order. *A.71*. Either this Court, or the trial court on remand, must issue these rulings in order to resolve this dispute.

In a declaratory judgment action such as this, Minnesota law is clear that the trial court must issue detailed findings. Failure to issue detailed findings will result in a remand. *See, e.g., Woodrich Constr. Co. v. State*, 287 Minn. 260, 263, 177 N.W.2d 563, 565 (1970) (remanding declaratory judgment action for further findings); *Nat'l Union Fire Ins. Co. v. Everson*, 439 N.W.2d 394 (Minn. App. 1989). Rules 49.01 and 52.02 of the Minnesota Rules of Civil Procedure provide for additional findings to be made by the trial court. Minn. R. Civ. P. 49.01(a) (the trial court may make a finding on issues omitted from the jury); 52.02 ("the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered").

1. Based on the Record, API Is Entitled, as a Matter of Law, to a Finding Regarding Policy Limits for the Period 1964 to 1966.

The trial court should have issued findings and conclusions concerning the policy limits of the CGL policy issued to API for 1964 to 1966. By failing to do so, it abused its discretion. Although the jury found that General Accident had, in fact, issued a policy from 1964 to 1966 and that the policy contained the same wording as the policy forms in evidence at trial (findings not challenged by OneBeacon on appeal), the jury did not make a determination of the minimum limits of that policy. Rather, the jury simply found that the policy limits for that period were not \$300,000 per person, \$1,000,000 per occurrence and \$1,000,000 in the aggregate. *A.189*. No jury determination was made as to the *minimum* limits for the policies issued between 1964 through 1966, and the trial court declined to do so despite API's request that for a finding. It is axiomatic that the CGL policy issued by General Accident for the period between 1964 and 1966 had policy limits. In order for the parties to fully understand their rights and obligations going forward, the Court should issue a finding as to the minimum policy limits for that period.

That finding should be based upon the uncontradicted evidence at trial showing that API always maintained CGL policies in accordance with the insurance requirements of its contract customers and maintained, at the very least, the minimum limits required by its customers. *Tr.107-09,111*. There was specific, uncontested evidence at trial that API contracted with Northern States Power during the period between 1964 and 1966 for the installation of insulation materials and that during that period, Northern States Power *required* that its contractors maintain minimum insurance coverage, including CGL policies with

minimum limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations. *R.A.350; see also Tr.109-11.*

The trial court should have issued findings consistent with the clear record — at a minimum, API maintained policy limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations during the 1964 through 1966 period. As a matter of law, API is entitled to an amended finding consistent with the undisputed evidence presented at trial. Accordingly, this Court should find, as a matter of law, that the 1964 through 1966 policy contained minimum limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations.

2. This Court Should Strike the Improper Advisory “Examples” Contained in the Trial Court’s Summary Judgment Order.

On January 19, 2006, the trial court entered Judgment in this matter, including entry of its prior summary judgment orders. By Order filed on September 27, 2005, the trial court correctly stated Minnesota law:

if the injury to the asbestos [claimant] arose from API’s operations while the policy was in effect, then any underlying claim arising from such exposure triggers the policy. The insurer must then show that the injury is subject to the products-completed operation aggregate limit as contained in the policies issued to API.

A.221; see, e.g., Gopher Oil, 588 N.W.2d at 756 (actual injury occurring during insured’s operations is an accident or occurrence); *Anderson v. Connecticut Fire Ins. Co.*, 231 Minn. 469, 479, 43 N.W.2d 807, 814 (1950) (insurer has burden to prove coverage limiting liability has become operative). However, the trial court’s order and judgment contains *dicta* that includes “examples” of the circumstances in which the insurer’s indemnity payments fall

outside the policies “operations” coverage which are incorrect, as a matter of law. For instance, the court hypothesized that:

Another example would be if the claimant is a carpenter working for XYZ Corporation working along side the employees of API who have installed the insulation as part of the operations of API. The claimant would never have participated in API’s operations and therefore may not fall under the unlimited operations clause of the policies. Here, the completed product is the insulation and the occurrence is the bodily injury. The injury was caused by the installation of the insulation in which the employee of XYZ was not a participant in the operation of API.

A.118-19. This “example” is clearly an incorrect statement of the law as applied to those facts.²⁴ See, e.g., *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. Ct. Spec. App. 1997) (shipyard workers’ injured from operations of insulation installer covered by premises-operations coverage); *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 667 N.Y. Supp. 2d 982, 986 (1997) (same).

Although API requested the trial court enter Amended Findings of Fact and Conclusions of Law correcting the *dicta* in its order, the trial court denied API’s motion.²⁵ The *dicta* “examples” used by the trial court in its Memorandum are incorrect, hypothetical and improperly advisory in nature. See *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290

²⁴ Other examples used by the court are also incorrect, as a matter of law, but need not be fully examined here.

²⁵ Upon reviewing the trial court’s Order, API immediately advised the Court that the “examples” used in the Memorandum were an inaccurate statement of the law and inconsistent with the remainder of the Order. RA.35. The trial court responded with a letter advising that “the examples used by the court in its memorandum filed on September 27, 2005, are just examples and are not exhaustive of all possible claims.” RA.41. However, the court did not acknowledge that the examples were incorrect as a matter of law.

N.W. 802, 804 (1940) (declaratory judgments may not give an “opinion advising what the law would be upon a hypothetical state of facts”).

The trial court should have made Amended Findings of Fact, Conclusions of Law and Order for Judgment. It did not. Accordingly, API respectfully requests that the Court strike the “examples” from the trial court’s order as they are incorrect and constitute an improper advisory opinion.²⁶

Conclusion

For the foregoing reasons, API respectfully requests that this Court affirm the trial court’s denial of OneBeacon’s motions for judgment as a matter of law and new trial on the breach of fiduciary, bad faith and breach of contract claims, the jury’s compensatory damages award and OneBeacon’s unpreserved statute of limitations defense. API further respectfully requests that this Court rule, as a matter of law, that allocation does not apply to asbestos-related bodily injury claims, rule as a matter of law on the minimum policy limits for the period 1964 through 1966 and strike the incorrect and advisory “examples” contained in the trial court’s summary judgment Order and Judgment.

This case presents a record replete with evidence of shameless misconduct on the part of OneBeacon. It seeks a rule that would reward its dishonesty, which resulted in damages in the tens of millions of dollars, and expects no consequences. It asks this Court to afford it broad immunity for its bad acts, no matter how adverse the effect on

²⁶ In the alternative, if the *dicta* “examples” are not stricken by this Court as a matter of law, API is entitled to a ruling that the “examples” do not constitute an adjudication of the issue.

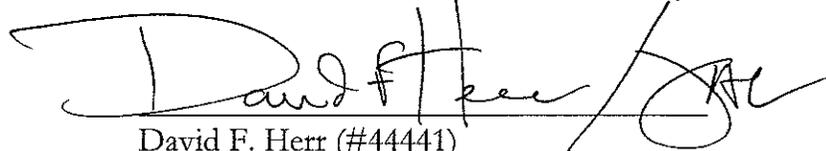
Minnesota's insureds or the public. That is not and cannot be the law in Minnesota. The jury verdict against OneBeacon should be upheld in all respects.

Dated: December 11, 2006.

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A large, stylized handwritten signature in black ink, appearing to read "David F. Herr". The signature is written over a horizontal line.

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Certificate of Compliance

Pursuant to Rule 132.01, subd 3(a)(1), of the Minnesota Rules of Civil Appellate Procedure, I certify that the attached brief is proportionally spaced, using a typeface of 13-point Garamond, and contains 14,163 words. The name and version of the word processing software used to prepare this brief is Microsoft Word 2003.



Jason A. Lien