

NO. A06-1229

State of Minnesota
 In Court of Appeals

St. Paul Fire and Marine Insurance Company,

Plaintiff,

vs.

A.P.I., Inc.,

Respondent,

vs.

OneBeacon Insurance Company, as successor to
 General Accident Insurance Company,

Appellant,

and

The Home Insurance Company, Fireman's Fund Insurance
 Company, Great American Insurance Company, Continental
 Casualty Company, Transportation Insurance Company and United
 States Fire and Insurance Company,

Third-Party Defendants.

**RESPONDENT A.P.I., INC.'S REPLY BRIEF ON
 CROSS-APPEAL ISSUES AND SUPPLEMENTAL APPENDIX**

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Argument

OneBeacon's positions on appeal underscore how it has mistreated its insured, API. OneBeacon, and its predecessor General Accident, failed to acknowledge the very existence of its insurance relationship with API despite having proof, denied the contractual obligations and other duties it owed to API, and chose to abandon API, its insured, when API needed it most. Only on the eve of trial did OneBeacon finally admit that it issued policies to API from 1958 to 1964. Even then, however, OneBeacon still refused to acknowledge that the only policy forms in use by General Accident during that time constituted the policy terms, that API's other unrebutted evidence proved there was insurance from 1964 to 1966, or that the thousands of asbestos-related bodily injury claims that plainly fell under the terms of those policies triggered coverage. Instead, OneBeacon elected to take a risk that the jury would agree with its view of the evidence. The jury did not.

It is apparent by the positions it took at trial, and the positions it now takes on appeal, that OneBeacon will not recognize the obligations it owes to its insured or take responsibility for its conduct unless it is told by this Court it must do so. Because this reply brief is limited to responding to OneBeacon's position on the issues raised by API's Notice of Review, API is not responding to OneBeacon's latest, and most inflammatory, arguments, made in its reply brief. API's response to OneBeacon's unfounded general accusations, including that API's opening brief was "filled with [unspecified] misleading portrayals of the record" (*Applt. Reply. Br. 1*), will have to await oral argument.

With respect to the issues raised by API's Notice of Review, the evidence weighed by the jury proved that General Accident, as predecessor to OneBeacon, sold Comprehensive General Liability ("CGL") policies to API for the period 1958 through 1966. As API's insurer, OneBeacon owes certain contractual obligations and duties to API—a fact that OneBeacon attempted to conceal for twenty years and continues to avoid by this appeal.

OneBeacon insists on an "allocation" of all its insuring responsibilities, a position wholly inconsistent with the evidence, the language of the policies, and Minnesota law. To make this argument, it completely ignores the mandate of *Wooddale Builders* by advocating an end-date of allocation that will further reduce its insuring obligation, and dilute API's coverage.

Further, despite the unrebutted evidence and the unanimous jury verdict, OneBeacon still refuses to admit, even though it knows better, that it insured API under even the known minimum limits for the policies that existed during the period 1964 through 1966.

Finally, OneBeacon objects to API's request that this Court strike the incorrect and hypothetical "examples" contained in the trial court's summary judgment order and judgment even though it admits on appeal that they are not binding for any future insurance determinations.

I. Under the Facts of this Case, Allocation Is Inappropriate; But Even If Liability Were to Be Allocated, There Can Be No Allocation to API for the Years of Unavailable Coverage.

A. Standard of Review.

OneBeacon incorrectly contends that this Court should review the trial court's allocation determination under an abuse-of-discretion standard. *Aplnt.Reply.Br.22*. When a

district court grants summary judgment, the legal conclusion is reviewed *de novo*. *E.g., Auto-Owners Ins. Co. v. Forstrom*, 684 N.W.2d 494, 497 (Minn. 2004). Statutory construction and the interpretation of the language of an insurance contract are legal issues also subject to *de novo* review. Insurance coverage issues “are legal issues also subject to *de novo* review.” *Id.*; *State Farm Ins. Co. v. Seefeld*, 481 N.W.2d 62, 64 (Minn. 1992).

Allocation decisions are also properly reviewed under the *de novo* standard. *See Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283 (Minn. 2006). OneBeacon’s proposed new standard of review should therefore be rejected.

B. API Is Entitled to an “All Sums” Application of Coverage.

In its Reply Brief, OneBeacon ignores the over-arching principle long followed by Minnesota courts that allocation “is meant to be the exception and not the rule.” *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405, 421 (Minn. 2003). No Minnesota appellate court has ever applied a time-on-the-risk allocation to bodily injury claims. Instead, OneBeacon advocates a new, hard and fast “bright line” rule requiring allocation despite the Minnesota Supreme Court’s admonition that “*NSP* does not establish hard and fast rules” *Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724, 733-34 (Minn. 1997). Indeed, in the only Minnesota allocation decision concerning bodily injuries, the Minnesota Supreme Court ruled that *pro rata* time-on-the-risk allocation is inappropriate when the bodily injury arises from a series of discrete and identifiable events. *In re Silicone*, 667 N.W.2d at 421-22. That is precisely the type of bodily injury presented by the many claims against API.

OneBeacon ignores the undisputed evidence and mischaracterizes asbestos-related bodily injury claims as “indivisibl[e] and indetermin[ate].” The unchallenged medical evidence at trial established that these injuries are, in fact, 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*. The medical experts stated that, “from a practical sense there is no way to divide them into individual events,” *RA.92*, but both medical experts emphatically agreed that asbestos-related bodily injuries are indeed discrete events. *RA.86-87,90-92,100-02,113-14*. New injuries occur “day after day, year after year” at the cellular level and there is a “new and ongoing injury during the policy period way beyond the date – dates of exposure.” *RA.104-05*. Each breath of fiber-containing air presents a separate causal event leading to injury. The fact that medical science has not developed a method to “divide” the events is of no legal consequence, particularly in light of the Minnesota Supreme Court’s ruling that if the court “can identify a discrete and originating event that allows [it] to avoid allocation, [it] should do so.” *In re Silicone*, 667 N.W.2d at 421-22. Accordingly, the allocation exception is not applicable under the facts of this case.

Allocation is an equitable device that has been employed by the courts only in property damage situations, often in cases in which the insured was, for one reason or another, self-insured or uninsured for some period of time. *See Wooddale Builders*, 722 N.W.2d at 283; *Domtar*, 563 N.W.2d 724; *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994). Unquestionably, allocation by time-on-the-risk here results in a diminution of the insuring obligation and recovery by the insured or claimants against the

insured.¹ In this case, the claims against API are for wrongful death and injury resulting from exposure to asbestos, not property damage. This case concerns the health and lives of Minnesotans who sustained discrete injuries and are entitled to the full benefit of the insuring promise of “all sums” that was made by General Accident in return for premiums.

C. Allocation is Inconsistent with the Insurance Contracts.

Allocation is the exception to the rule because it rewrites the insurance policy when the time of injury cannot be ascertained. Indeed, OneBeacon acknowledges in its Reply Brief that the policies General Accident issued to API promise to pay “all sums which the insured shall become obligated to pay.” *Aplnt.Reply.Br.28*. The plain, unambiguous language of the policies requires that the insurer fully defend and pay all sums for claims against API which are covered by the policies. Nevertheless, OneBeacon contends that this Court can “easily . . . dispose[] of” the fact that the policies do not mention allocation. Distilled to its essence, OneBeacon urges this Court to ignore the plain language of the policies, in effect re-writing them so as to withhold from API the complete coverage for which it paid premiums, a result that is utterly inconsistent with the policies’ “all sums” promise.

Not only is such disregard for the plain policy language contrary to Minnesota law (*N. States Power Co.*, 523 N.W.2d at 661), it has been rejected by numerous other courts refusing to allocate damages for asbestos-related injury under “all sums” policy language. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1048 (D.C. Cir. 1981) (“[O]nce an

¹ The opposite was true in *Domtar* and *NSP*, in which liability coverage was afforded among insurers by time-on-the-risk because the time of the property damage (ground seepage) was unknowable due to its very nature. Rather than finding no coverage, the Supreme Court found that allocation was appropriate. The uncertainty as to the time or even the fact of property damage present in environmental property damage cases involving contamination from random ground seepage is simply not present here.

insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy's limits"); *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (holding that under the "all sums" language it is irrelevant that the injury is caused during another policy period); *Lac D'Amiante du Quebec, Ltee. v. Am. Home Assur. Co.*, 613 F. Supp. 1549, 1562 (D. N.J. 1985) ("plain language of these policies requires that each triggered policy shall respond in full" to asbestos claims); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 705-10 (Cal. Dist. Ct. App. 1996) ("all sums" language obligates each insurer to respond "in full" to a claim, but insurer has right of contribution against other insurers); *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 795 (Ohio Com. Pl. 1995) ("[O]nce an occurrence triggers the defendants' policies, each defendant is required to provide coverage, in full, for all sums which OCF becomes liable to pay . . . [and] it is within OCF's discretion to select which triggered policy will be obligated to pay in full on a particular claim.").²

Minnesota courts do not rewrite unambiguous policy language—Minnesota courts interpret such language in accordance with its plain and ordinary meaning. *Ostendorf v. Arrow Ins. Co.*, 288 Minn. 491, 495, 182 N.W.2d 190, 192 (1970).

For these reasons, the trial court's ruling and the novel rule proposed by OneBeacon would allow the exception to swallow the rule. This should not occur.

² OneBeacon's cite to *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 733 n. 5 (Minn. 1997), to refute the "all sums" case law is inapposite. First, asbestos injury was not before the court in *Domtar*, as it was in the above-cited cases. Furthermore, in rejecting the "all sums" decisions, the court was specifically responding to the insured's argument regarding proration to the insured for uninsured years.

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

Rather than addressing the recent and controlling Minnesota decision on this issue, OneBeacon relies upon a Seventh Circuit decision that is wholly inconsistent with Minnesota law. There is no reason to resort to this foreign law when the Minnesota Supreme Court has recently and directly decided how to allocate coverage in cases that warrant it. In *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283 (Minn. 2006),³ the Court stated that, assuming allocation applies,⁴ it should be limited only to the years of available coverage. 722 N.W.2d at 283. 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.

Under the rule of law announced in *Wooddale Builders*, if the allocation exception applies at all, it is only to that period of time during which coverage for the underlying risk, in this case asbestos liability, is available and “excludes periods during which the insured lacked coverage because no such coverage was available.” *Id.* at 298. The trial court’s ruling

³ In addition to addressing allocation, *Wooddale Builders* also has broad implications concerning the special relationship between an insurer and its insured, particularly the duty to defend. *Wooddale Builders* is of particular importance here because of OneBeacon’s continuing attempt to avoid its contractual obligations and duty to API. For example, *Wooddale Builders*’ “equal shares” rule for defense costs is particularly aimed at insurers, like OneBeacon, that sit back and let other consecutive insurers pick up their share of the defense. The court stated, “[i]f insurers know from the beginning that defense costs will be apportioned equally among insurers whose policies are triggered, the possibilities for delay will be minimized because no insurer will benefit from delaying or refusing to undertake a defense.” *Wooddale Builders*, 722 N.W.2d at 303-04.

⁴ The *Wooddale Builders* Court did not determine whether allocation properly applied to the facts of the case, repeatedly acknowledging the parties’ voluntary agreement that allocation applied, something the parties never did here, and instead only determining the end date of allocation. *Wooddale Builders*, 722 N.W.2d at 289.

on this issue in response to the summary judgment motion, however, fails to limit the allocation period to those years in which coverage was available, ignoring that asbestos coverage was unavailable for a significant period of time. OneBeacon contends that there is “no record evidence establishing that asbestos-related coverage was ‘unavailable’ after 1984.” *Apmt.Reply.Br.30*. Yet, as OneBeacon well knows, asbestos exclusions were imposed on the CGL policies issued to API after 1984. The record is clear: every policy issued to API after 1984 includes an asbestos exclusion. *RSA.1-35,186,73*. Asbestos coverage simply was not available to API after 1984 in any form. API did not decline to purchase asbestos coverage—the exclusion was imposed on API by the insurance industry, which had a policy mandating asbestos exclusions on any insured with a known asbestos risk. *RSA.59-70*. There is nothing equitable about an unfounded allocation against API in this case.

If this Court decides that allocation is required in this case, Minnesota law requires that allocation only apply to that period of time in which coverage for the underlying hazard, in this case asbestos, was available. Accordingly, this Court should rule that the allocation period, if applicable, ends with the 1984 policy year, the last date which coverage was available to API for asbestos liability.

⁵ In this brief, Respondent’s Supplemental Appendix is cited “*RSA.xx*.” API’s 1984-85 policy with St. Paul Fire and Marine Insurance Company is typical of asbestos exclusions imposed on API by its insurers beginning in 1984.

⁶ CNA issued policies it said inadvertently that omitted the asbestos exclusion, but those policies were reformed to include an exclusion after API was unable to overcome the substantial proof that CNA had imposed the exclusion systematically. Thus, even CNA’s policies were subject to an asbestos exclusion.

II. API is Entitled to a Finding that the 1964-1966 CGL Policy, Found by the Jury to Exist and to Contain the Same Wording as Used in General Accident's Policy Forms, Has Minimum Liability Limits.

OneBeacon, which admitted on the eve of trial that it did, in fact, insure API under CGL policies issued by General Accident to API from 1958 to 1961 and from 1961 to 1964, (after denying that fact for years) continues in its unabashed attempt to avoid its insuring obligations and the duty owed to API for the policy in effect from 1964 to 1966. Consistent with its pattern of refusing to acknowledge the very existence of insurance and the obligations it owes to API under those policies, OneBeacon denies the existence of coverage in the face of clear and uncontested evidence, as well as the jury's unequivocal conclusion that OneBeacon insured API for the period between 1964 through 1966. It asks this Court to ignore the uncontroverted evidence introduced at trial of *minimum* policy limits that existed in the OneBeacon policy issued for the period 1964 through 1966. The evidence, however, mandates a finding that API, at a minimum, maintained policy limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations during the 1964 through 1966 policy period. The trial court abused its discretion by failing to issue amended findings of fact and conclusions of law on this issue. *See, e.g., Nat'l Union Fire Ins. Co. v. Everson*, 439 N.W.2d 394, 398 (Minn. App. 1989).

API proved that it always maintained CGL policies in accordance with the minimum policy limits required by its contract customers. *Tr.107-09,111*. Testimony and exhibits established that during the relevant time period, 1964 to 1966, API performed work under a contract with NSP which required API to maintain a CGL policy with minimum limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 in the aggregate for products-

completed operations coverage. *RA.350;Tr.109-11*. This evidence was unrefuted at trial and remains unrefuted by OneBeacon in this appeal. No contrary evidence was presented. Indeed, OneBeacon does not dispute this evidence. Rather, it simply contends that the evidence, no matter how clear and necessary to the determination of OneBeacon's insuring obligations, somehow does not warrant a finding on this point. *Ap/nt.Reply.Br.32*. There can be no doubt that the policy General Accident issued for the period 1964 through 1966 contained some policy limits—at the very least, the minimum limits established by the uncontradicted evidence.

OneBeacon wants to render the policies it issued for the period 1964 to 1966 meaningless by arguing that API failed to meet its burden of proof as to these policies. The absurdity of OneBeacon's stance toward its insured is illustrated by the verdict itself. The jury unanimously found that General Accident issued a CGL policy to API for the years 1964 to 1966, that this CGL policy contained the same wording as that used by General Accident in its policy forms and that the aggregate limit of that same 1964 to 1966 policy did not apply to all coverages. The jury was never asked the broader question that API requested of the district court: What were the minimum policy limits of the insurance policies General Accident and/or its successor-in-interest OneBeacon issued to API from 1964-1966? As this question was not submitted to the jury, the trial court may make the necessary finding based on the uncontested evidence. *See Minn. R. Civ. P. 49.01(a); 52.02*. The fact that the trial court did not make this finding leaves a substantial question unanswered; one that is necessary for the parties to know their respective rights and obligations for the 1964 to 1966 coverage period.

The trial court abused its discretion when it denied API's motion for an amended finding on the minimum policy limits and this Court should find, as a matter of law consistent with the uncontradicted evidence, that the 1964 through 1966 policy contained minimum limits of \$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations.

III. OneBeacon Admits That the Improper Advisory "Examples" Contained in the Trial Court's Summary Judgment Order Are Non-Binding.

The trial court's summary judgment order and judgment includes a number of "examples" of circumstances in which the insurer's indemnity payments might fall outside the policies' "operations" coverage. Those "examples" are incorrect, as a matter of law. OneBeacon acknowledges that the trial court provided "a series of hypothetical scenarios" in its summary judgment order and appears to agree with API that such hypothetical examples "are not binding determinations." *Aplnt.Reply.Br.33*. If, as it seems to contend, OneBeacon is in agreement that the "examples" are not in any way binding, then it should have no objection to this Court properly striking such "examples" from the trial court's Order and judgment; rather, it should join in this request. *See Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290 N.W. 802, 804 (1940) (declaratory judgments may not give an "opinion advising what the law would be upon a hypothetical state of facts."). This Court should not be persuaded by OneBeacon's attempt to conjure possible future disputes by leaving these advisory findings in place. The incorrect and advisory "examples" should be stricken, as a matter of law, from the Order and judgment. In the alternative, there should be a ruling that the "examples" are not an adjudication of any issue, as OneBeacon concedes.

Conclusion

Nearly fifty years ago, API, a local distributor and insulation contractor in St. Paul, Minnesota paid thousands of dollars in insurance premiums for CGL coverage from its insurer, General Accident. API did that to protect itself as well as members of the public who could be injured or damaged as a result of activities to which the insurance policies applied. Twenty-five years later, when API was named as a defendant in what would become a deluge of asbestos-related bodily injury lawsuits, with no end in sight, it asked General Accident, its insurer, to perform on its promises. General Accident, for its own financial gain, “did not want to telegraph to [API’s] defense attorneys or insured [it was] eager” to assist its insured. *A.327;Tr.536-37*. So, for eighteen years, General Accident, and later OneBeacon, denied its insurance obligations, refusing to defend or pay claims on behalf of its insured.

Now, OneBeacon blames API for the consequences of its own unscrupulous conduct, claiming, once again, that there is insufficient evidence of coverage from 1964 to 1966, that the unrebutted evidence does not support the verdict in this regard and that, despite its refusal to comply with its contractual and fiduciary obligations, it is not responsible for API’s damages. OneBeacon is wrong. Even today, OneBeacon twists the facts and law to attempt to escape its contractual and fiduciary obligations.

As a matter of Minnesota law, allocation is inapplicable to asbestos-related bodily injury claims in which the medical evidence clearly establishes that such injuries are discrete and identifiable events, not subject to allocation. The allocation exception is inapplicable as it is contrary to the language of the General Accident policies, which expressly promise to

pay “all sums” on behalf of the insured—not the fractional sums as advocated by OneBeacon. Finally, because allocation is an equitable remedy only employed by the Minnesota courts in environmental property damage cases in which the time of any property damage was unknown and often when the insured was, for whatever reason, uninsured for some period of time, allocation is not proper in this situation. The claims for which OneBeacon seeks to diminish its insurance obligations are claims of Minnesota residents whose injuries have left them dead or dying or seriously injured. It is the victims of asbestos disease who will lose the benefit of OneBeacon’s promise of “all sums” if this Court accepts OneBeacon’s attempt to dilute its plain and simple contractual obligation by allocation.

Moreover, while OneBeacon fails to recognize the import of the verdict in this case, the jury determined that OneBeacon issued a CGL policy to API for the period 1964 through 1966, that the policy contained the same wording as the policy forms and that the aggregate limits of the policy did not apply to the policy’s operations coverage. The jury was not required to determine the minimum limits of this policy. The trial court failed to decide the issue despite the unrebutted evidence that API maintained, at the very least, the minimum limits required by its contract customers. Therefore, this Court should rule, as a matter of law, that the limits of the 1964 through 1966 policy were, at a minimum, those limits required by NSP—\$100,000 per person, \$300,000 per occurrence and \$300,000 product/completed operations.

Finally, OneBeacon objects to API’s request that this Court strike the incorrect and admittedly “non-binding” “examples” contained in the trial court’s summary judgment order and judgment—an objection that raises serious questions about OneBeacon’s hope to avoid

its obligations by creating a swamp of future litigation on a case-by-case basis. This Court should solve this problem directly and on the full record before it by striking the incorrect and advisory examples from the trial court's summary judgment order and judgment.

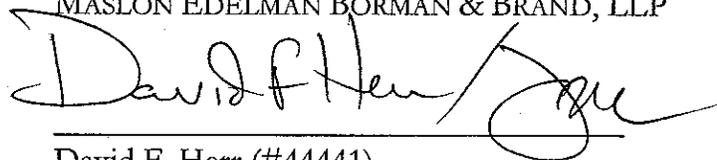
For the reasons set forth above and in API's opening Brief, API respectfully requests that this Court grant the relief requested with respect to API's cross-appeal in this case, and affirm the judgment against OneBeacon in its entirety.

Dated: February 5, 2007

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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 3,990 words. The name and version of the word processing software used to prepare this brief is Microsoft Word 2003.



Jason A. Lien

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).