

**NON-PRODUCTS COVERAGE  
FOR ASBESTOS-RELATED BODILY INJURY CLAIMS**

**By**

**William P. Skinner  
Covington & Burling  
Washington, D.C.**

**Presented at**

**Eurolegal Conference on Asbestos Claims  
London, United Kingdom  
May 27-28, 2002**

**TABLE OF CONTENTS**

	<i>Page</i>
INTRODUCTION .....	1
I. INSURERS HAVE THE BURDEN OF PROOF ON CLAIMS CLASSIFICATION ISSUES .....	3
A. Insurers Bear The Burden Of Proving That Coverage Is Limited By Application Of Aggregate Limits Under The Products/Completed Operations Hazard.....	3
B. The History of The CGL Policy Supports The Conclusion That Insurers Should Have The Burden Of Proof On Hazard Classification Issues .....	6
C. The Unique Nature Of Asbestos Litigation Supports Placing The Burden Of Proof On Insurers .....	8
II. CLAIMS ARISING OUT OF EXPOSURE TO ASBESTOS ON THE PREMISES OF THE POLICYHOLDER ARE NOT WITHIN THE PRODUCTS/COMPLETED OPERATIONS HAZARD. ....	9
III. CLAIMS ARISING OUT OF EXPOSURE TO ASBESTOS RELEASED WHEN INSULATION WAS INSTALLED BY POLICYHOLDERS ARE NOT WITHIN THE PRODUCTS/COMPLETED OPERATIONS HAZARD .....	10
A. Claims That Involve Exposure To The Installation Operations Of Policyholders Are Not Within The Products/Completed Operations Hazard Of The Pre-66 Policies .....	10
1. Policyholders Had Possession Of The Insulation While It Was Being Installed .....	11
2. While Insulation Was Being Installed, The Operation Was Not Complete .....	12
3. The Installation Of Insulation Manufactured By Others Is A Service That Is Not Within The Products/ Completed Operations Hazard Definition Of The Pre-68 Policies In Any Event .....	12
B. Claims That Involve Exposure To The Installation Operations Of Policyholders Are Not Within The Products/ Completed Operations Hazard Of The Post-66 Policies.....	13

1.	There Are Good Reasons To Believe That Insurers Have Consistently Classified Claims Arising Out Of Ongoing Operations As Operations Claims Under All Applicable Policies, Including Policies That First Took Effect After The Operation Was Completed.....	14
2.	The Completed Operations Hazard Applies Under The Post-68 Policies Only If Injury Commenced After The Operation Was Completed .....	15
a)	The Policy Language.....	15
b)	The Hazard Concept.....	17
c)	Existing Case Law.....	18
3.	The Dust and Debris That Are Released During Installation Are “Abandoned or Unused Materials” Under All Of The Policies.....	21
C.	The Fact That Many Of The Underlying Claims Include Products Liability Allegations For Purposes Of Tort Law Does Not Affect The Classification Of Claims For Insurance Purposes.....	24
IV.	POLICYHOLDERS ARE ENTITLED TO DEFENSE COVERAGE FOR ALL PENDING AND FUTURE CLAIMS THAT ARE POTENTIALLY EITHER OPERATIONS OR COMPLETED OPERATIONS CLAIMS UNDER ALL TRIGGERED POLICIES UNTIL THE LIMITS APPLICABLE TO BOTH TYPES OF CLAIMS HAVE BEEN EXHAUSTED .....	26
V.	POLICYHOLDERS ARE ENTITLED TO FULL INDEMNITY COVERAGE FOR “MIXED CLAIMS” INVOLVING BOTH OPERATIONS AND COMPLETED OPERATIONS EXPOSURES UNDER ALL TRIGGERED POLICIES UNLESS THE LIMITS APPLICABLE TO BOTH TYPES OF CLAIMS HAVE BEEN EXHAUSTED .....	28
	CONCLUSION.....	31

**NON-PRODUCTS COVERAGE  
FOR ASBESTOS-RELATED BODILY INJURY CLAIMS**

By  
**William P. Skinner<sup>1</sup>**

**INTRODUCTION**

Since the early 1970s several hundred thousand asbestos-related bodily injury claims have been made against scores of defendants seeking damages for injuries allegedly caused by exposure to asbestos. The defendants and their insurers have collectively paid several billion dollars in defense and indemnity costs for such claims. To date, most insurers have classified most of the costs incurred in connection with such claims as though they fell within the products/completed operations hazards as those hazards are defined in primary or excess comprehensive general liability policies. In the last few years, however, there has been an increasing number of lawsuits and ADR proceedings concerning whether or not such classifications are always appropriate.

The typical dispute involves a company that was in the business of installing asbestos-containing insulation, or a company that owns an industrial facility at which third party contractors allege that they were exposed to asbestos. The coverage question is whether claims arising out of exposure that occurs during the time when insulation was being installed by the policyholder, or at the premises of a policyholder should be classified as products/completed operations claims or as something else. The "something else" is variously referred to as a premises claim, an operations claim or a non-products claim.

The dispute over the insurance classification of asbestos-related bodily injury claims has significant economic implications. In standard form primary comprehensive general

---

<sup>1</sup> The author of this paper is a partner in Covington & Burling who regularly represents policyholders in insurance coverage disputes. The views expressed in this paper are those of the author. This paper is an updated version of a paper that was originally presented at the ABA 12<sup>th</sup> Annual Insurance Coverage Litigation Meeting in Tucson, Arizona on March 2-4, 2000, and that was published by the ABA Litigation Section Committee on Insurance Coverage Litigation in the spring of 2000 in *Coverage*.

liability policies that were issued prior to the 1980s, there is no aggregate limit for bodily injury claims that are not within the scope of the products/completed operations hazards as those terms are defined in the policies.<sup>2</sup> Many excess policies have separate aggregate limits or no aggregate limits for bodily injury claims that are not within the scope of the products/completed operations hazards. In 1996, a leading insurance publication stated that one of the "main components . . . of the [insurance] industry's \$16 billion of unfunded asbestos liabilities" is "[n]onproducts exposures stemming from installation activities associated with traditional products defendants." Eric M. Simpson, *Insurers Chip Away at E&A Liabilities*, *Best's Review -- Property & Casualty Insurance* Edition 38, 41 (April 1996).

The definitions of the products/completed operations hazards in standard-form primary CGL policies varied over time. The standard definition in the 1955 form of the CGL policy was as follows:<sup>3</sup>

The term "products hazard" means:

- (1) goods or products manufactured, sold, handled, or distributed by the named insured or by others trading under his name, if the accident occurs after possession of such goods or products has been relinquished to others by the named insured or by others trading under his name and if such accident occurs away from premises owned rented or controlled by the named insured . . . ;
- (2) operations, if the accident occurs after such operations have been completed or abandoned . . . and away from premises owned . . . by the named insured; provided further, the following shall not be deemed to be "operations" within the meaning of this paragraph: . . . (c) the existence of tools, uninstalled equipment and abandoned or unused materials . . .

The 1966 standard form included the following definitions:<sup>4</sup>

"completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or a

---

<sup>2</sup> Settlement agreements between policyholders and insurers sometimes impute aggregate limits for such claims.

<sup>3</sup> The standard definitions in the 1943 and 1947 forms were substantially the same.

<sup>4</sup> The 1973 definitions were identical. In 1973, however, the definition of bodily injury was changed to require that such injury occur "during the policy period." In the 1966 form, that requirement was included in the definition of occurrence rather than in the definition of bodily injury. Insurers may assert that this change has substantive significance for the application of the products/completed operations hazards.

warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured.

...

The completed operations hazard does not include bodily injury or property damage arising out of

(b) the existence of tools, uninstalled equipment or abandoned or unused materials . . . .

...

“products hazard” includes bodily injury and property damage arising out of the named insured’s products . . . but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

Excess policies typically include definitions of the products/completed operations hazards that are substantively the same as the definitions in standard form primary policies. Under all standard form primary policies and many excess policies, unless a claim falls within the definition of the products/completed operations hazard, it is an operations or non-products claim that is not subject to an aggregate limit.

This paper discusses some of the coverage questions that may be relevant to a dispute about the insurance classification of asbestos-related bodily injury claims that have been asserted against a company that was in the business of installing asbestos-containing insulation or a company that owns industrial facilities at which the employees of third party contractors were exposed to asbestos. It is based on work that we have done on these issues for a number of policyholders. The memorandum sets forth arguments that can be made in support of claims for premises/operations coverage.

## **I. INSURERS HAVE THE BURDEN OF PROOF ON CLAIMS CLASSIFICATION ISSUES**

### **A. Insurers Bear The Burden Of Proving That Coverage Is Limited By Application Of Aggregate Limits Under The Products/Completed Operations Hazard**

In CGL policies, the products/completed operations hazard definition has only one purpose -- to define an aggregate limit on the amount of coverage that is available under the policy for certain bodily injury claims. See WMGH Risk Management Consultants, *The*

*Umbrella Book 41* (1976) (“the only reason ‘products hazard’ is defined is to limit the annual aggregate amount which will be paid for products and completed operations occurrences.”). In other policies, the identical products/completed operations hazard definition is used to define an exclusion from coverage.<sup>5</sup> Under both types of policies, the definition of products/completed operations hazard has the effect of restricting coverage and the insurers therefore have the burden of proof.

It is well settled that the insurers have the burden of proof to show the applicability of policy exclusions. *See, e.g., New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991) (“the insurer must come forth with proof that a policy exclusion applies.”).<sup>6</sup> *See also, e.g.,* 19 George J. Couch, *Couch Cyclopedia of Insurance Law* 79.315, at 256 (2d ed. 1983) (“The insurer bears the burden of proving the applicability of policy exclusions and limitations . . . .”); *Id.* § 79.418 at p. 369 (“The insurer bears the burden of establishing a limitation of its liability.”); 21 John A. Appleman, *Insurance Law & Practice* § 12097, at 47 (1980). In *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169 (1997), the New York Court of Appeals held that the insurer had the burden of proving the application of a products hazard exclusion to avoid the duty to defend.

The burden of proof with respect to the application of the products/completed operations hazard should be the same for an aggregate limit, which eliminates all coverage for such claims above a specified amount, as it is for an exclusion, which eliminates all coverage for such claims. Both function as limitations on coverage. Courts have held that the insurer should bear the burden of proving limitations on coverage, including the applicability of policy limits.<sup>7</sup> In *Harold S. Schwartz & Assocs., Inc. v. Continental Cas. Co.*, 705 S.W.2d

---

<sup>5</sup> Many liability policies have been issued with exclusions for claims within the products/completed operations hazards. *See, e.g., Aetna Ins. Co. v. Lythgoe*, 618 P.2d 1057 (Wyo. 1980); *Ornamental Iron & Stair Co. v. General Accident & Life Assurance Corp.*, 242 N.W.2d 544 (Mich. Ct. App. 1976).

<sup>6</sup> *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 764 (3d Cir. 1985) (Pennsylvania law); *Wexler Knitting Mills v. Atlantic Mut. Ins. Co.*, 555 A.2d 903, 905 (Pa. Super. 1989); *Merced Mut. Ins. Co. v Mendez*, 261 Cal. Rptr. 273 (Ct. App. 1989) (California law).

<sup>7</sup> *See, e.g., Gustafson v. Central Iowa Mut. Ins. Ass'n.*, 277 N.W.2d 609, 614 (Iowa 1979) (“The insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitation or exclusionary clause in clear and explicit terms. Additionally, the company has the burden to prove the applicability of the policy provision.”); *Bonanza of Cleveland, Inc. v. Fairfax Underwriters Servs., Inc.*,  
(continued...)

494 (Mo. Ct. App. 1985), for instance, an insured radio station sought coverage for its costs in settling a lawsuit based upon a series of allegedly slanderous radio broadcasts. The policy covered all losses arising from such broadcasts, but contained a separate provision within the occurrence definition (Section V(E)) that limited the coverage to the proportion of the total loss which the number of alleged slanderous broadcasts within the policy period bore to the total number of alleged slanderous broadcasts. The case settled without a determination as to the dates of the broadcasts in question. The issue in the coverage litigation was which party bore the burden of proving when the broadcasts occurred for purposes of the coverage limitation. In reasoning that is squarely applicable here, the court held that the insurer bore the burden:

[The insurer] contends that it is not relying on a policy exclusion. We disagree. An exclusion provision, by definition, excludes risk. It has no function to endow coverage but rather limits the obligation of indemnity. Section V(E) endows no coverage. On its face it is a limitation . . . Given [the insurer's] reliance on a policy exclusion, the burden of proof as to facts which might limit its responsibility for plaintiffs' cost rest on [the insurer]. *Id.* at 498. Since the record did not contain information from which the dates of the broadcasts could be determined, the court held that the insurer had failed to carry its burden and was thus obligated to cover the claim in its entirety.

The *Schwartz* opinion was followed in *Southern Gen. Ins. Co. v. WEB Assocs./Elec., Inc.*, 879 S.W.2d 780, 782 (Mo. Ct. App. 1994). There, the court faced the issue of whether the insured or the insurer bore the burden of proving the relationship of each underlying personal injury claimant to the insured, where the policy at issue provided different limits of liability depending upon the nature of this relationship. The court held that the insurer bore this burden, noting that the policy's limits acted as an exclusion of coverage above a certain amount: **"Although labelled a "Condition," the liability limit in the policy is actually an exclusion because it does not endow coverage, but, rather, limits the obligation of indemnity. . . . the insurer bears the burden of proving a policy exclusion to be effective."** *Id.* at 782 (emphasis added).

---

450 N.E.2d 689, 691-92 (Ohio Ct. Ap. 1981) (placing burden of proof on insurer as to applicability of limitation restricting coverage to particular individuals -- even though provision appeared in both the declarations and exclusions portion of policy -- since provision "restricts or suspends coverage which is otherwise fully effective").

The decision in *Canal Ins. Co. v. Bryant*, 325 S.E.2d 839, 841 (Ga. Ct. App. 1984), also supports placing the burden of proof on the insurers. There, an insured sought coverage for costs arising from vandalism of a truck. The insurance policy contained a limit of liability provision that provided that the insured would only be covered for the lesser of the cash value of the truck or the cost of repairs. The insurer argued that the insured bore the burden of proving which of the two alternatives was lesser as part of its general burden of establishing coverage. The court disagreed, noting the insured satisfied its burden simply by proving the existence of a loss. The court held that the **“burden of proof with reference to the provisions of the ‘LIMITS OF LIABILITY’ clause was on [the insurer] and [the insured] had no evidentiary burden in that regard.”** *Id.* (emphases added). *Accord Cox v. Bankers’ Guar. Life Co.*, 45 S.W.2d 390, 392 (Tex. Civ. App. 1931) (holding that “where a specific principal sum is provided on the face of the policy, and thereafter limitations proscribed which would . . . reduce the amount thereof, the burden rests upon the insurer to plead and prove such facts as would reduce the amount of the recovery”).

Moreover, in cases involving missing policies, courts have placed the burden on insurers to prove the existence of such limits when copies of the actual policies cannot be located. *See, e.g., Highlands Ins. Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1034 (5th Cir. 1994); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986); *Emons Industries, Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185, 189 (S.D.N.Y. 1982).<sup>8</sup>

#### **B. The History of The CGL Policy Supports The Conclusion That Insurers Should Have The Burden Of Proof On Hazard Classification Issues**

The insurance industry developed CGL policies in the 1940s to cover all risks of third party liability under one policy, rather than only certain specified risks under “schedule” policies. The industry then marketed CGL policies as “peace of mind” policies that provided

---

<sup>8</sup> Insurers may cite to *Fibreboard Corp. v. Hartford Accident & Indem. Co.*, 20 Cal. Rptr. 2d 376 (Ct. App. 1993), but that case is distinguishable. There, the insured was not seeking coverage for liabilities arising from asbestos installation activities, but for claims of civil conspiracy, concert of action, and market share liability in connection with its sale of asbestos-containing products. The court found that in the context of that issue, the products hazard was a term of coverage, and rejected the insured’s argument that the products hazard clause was in the nature of an exclusion that should be construed against the insurer.

coverage for all types of liability, unless expressly excluded. See Mielenhausen, "Insurance Coverage For Environmental and Toxic Tort Claims," 17 Wm. Mitchell L. Rev. 945, 948 (Spring 1991) ("The bedrock principle underlying the new 'comprehensive' coverage was, and remains, that any and all risks of liability for third party bodily injury or property damage are covered unless specifically excluded in the policy."); Reiter, Strasser & Pohlman, "The Pollution Exclusion Under Ohio Law: Staying The Course," 59 U. Cin. L. Rev. 1165, 1223 (1991) ("[CGL] insurance policies were actively marketed (and purchased) as comprehensive and general in their coverage, that is, as a wholesale externalization of risk for which policyholders paid dearly. Indeed the marketing strategy was to emphasize 'peace of mind' coverage."). By acquiring CGL policies rather than schedule policies, policyholders paid a premium to free themselves of any obligation to prove that a claim arose from a particular hazard to obtain coverage. Where that type of classification becomes relevant to coverage, the burden should be borne by the insurers.

A line of cases in the analogous context of first-party "all risks" property insurance<sup>9</sup> rejects the argument that the insured bears the burden of establishing that the loss arose from a category of risk that was included within the all risks coverage. "The very purpose of an all risks policy is to protect the insured in cases where it is difficult to explain the disappearance of the property; thus, the insured need not establish the cause of the loss as part of its case." *Great Northern Ins. Co. v. Dayco Corp.*, 637 F. Supp. 765, 777 (S.D.N.Y. 1986); see also *Strubble v. United Servs. Auto. Ass'n*, 110 Cal. Rptr. 828, 831-32 (Ct. App. 1973) (holding that insured does not have to establish which peril caused loss due to comprehensive nature of "all risk" coverage; insurer bears burden of proving non-coverage); *Hudson v. Prudential Property & Cas. Co.*, 450 So.2d 565 (Fla. App. 1984) (to same effect). For similar reasons,

---

<sup>9</sup> Numerous courts have recognized the "all risk" nature of CGL insurance coverage. See, e.g., *Meijer, Inc. v. General Star Indem. Co.*, No. 94-1152, 1995 WL 433592 at \*1 (6th Cir. July 21, 1995) (CGL policy is an "all risk" policy; this means that any risk not specifically and unambiguously excluded is covered"); *Transamerica Ins. Co. v. Thomas M. Durkin & Sons, Inc.*, Civ. A. No. 90-0968, 1991 WL 206765 at \*1 (E.D. Pa. October 1, 1991) (CGL policy "is an all risk contract under which insurance coverage is provided for practically any event causing bodily injury or property damage unless specifically excluded from the policy"), *aff'd*, 983 F.2d 1052 (3d Cir. 1992); accord *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991); *Snell v. Stein*, 259 So.2d 876, 880 (La. 1972); *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 881 P.2d 201, 206 (Wash. 1994) (en banc).

policyholders should not have the burden of proving which hazard applies to the claims against them.

**C. The Unique Nature Of Asbestos Litigation Supports Placing The Burden Of Proof On Insurers**

A third reason for placing the burden of proof on the insurers is the unique nature of asbestos litigation. Many courts have pointed out the extreme difficulty of establishing the details of asbestos exposure and injury. As the Sixth Circuit explained in *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, much asbestos exposure took place years ago, during periods when companies usually did not retain extensive records and for which “vague testimony” is the best evidence that can be expected. 633 F.2d 1212, 1225 n.27 (1980), *clarified on different grounds on reh'g*, 657 F.2d 814 (6th Cir. 1981). Moreover, given the enormous volume of asbestos litigation, most of the underlying cases settle without fully developing the facts of exposure. See *Maryland Cas. Co. v. W.R. Grace & Co.*, 1996 WL 109068 at \*6 (S.D.N.Y. March 12, 1996).

Because of these realities, courts have been reluctant to permit insurers to escape coverage obligations for asbestos liabilities solely because of a lack of evidence of the precise date or manner of exposure in underlying cases. See *W.R. Grace*, No. 88 Civ. 2613 (JSM), 1996 WL 109068 at \*8; *Keene*, 667 F.2d at 1052 n.42 (“The injuries at issue in these cases . . . are unique and traditional procedural rules cannot be allowed to defeat [the insured’s] or its insurers’ substantive rights under the policies.”). For instance, courts have placed the burden on the insurer to rebut a presumption that a claimant was exposed to asbestos during the policy period. See *Armstrong*, 52 Cal. Rptr. 2d at 714-15; *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d at 1225 n.27 (court held that due to the “unique circumstances” surrounding asbestos exposure, it would presumptively find that exposure occurred during the relevant policy period if an insured could demonstrate that its products contributed to the underlying claims at any time). This reasoning should be applied here, and the burden of proof for proving that claims fall within the aggregate limit should be placed on the insurers.

## II. CLAIMS ARISING OUT OF EXPOSURE TO ASBESTOS ON THE PREMISES OF THE POLICYHOLDER ARE NOT WITHIN THE PRODUCTS/COMPLETED OPERATIONS HAZARD.

As a result of the bankruptcy of an increasing number of the companies that have traditionally been named as defendants in asbestos-related bodily injury claims, plaintiffs' lawyers are devoting more attention to asserting claims against the owners of commercial and industrial properties at which exposure to asbestos may have taken place.<sup>10</sup> To avoid workers compensation defenses, such claims are typically brought by employees of third party independent contractors who did work at such sites. It is generally accepted by both policyholders and insurers that such claims are not encompassed within the products or completed operations hazards of the policies.

Such claims are not within the products hazard definition because they typically do not involve exposure to any products manufactured, sold, handled or distributed by the named insured, and the exposure takes place on the policyholder's premises. Such claims are not within the completed operations hazard because the exposure took place while the policyholder was engaged in its normal on-going revenue producing operations.

The principal dispute that arises for such claims concerns the number of occurrences that are involved for purposes of per occurrence deductibles or limits.<sup>11</sup> Where policies have high deductibles, insurers have an incentive to argue for multiple occurrences. Where policies have either no or low deductibles, insurers have an incentive to argue for fewer occurrences in

---

<sup>10</sup> Such claims have also been brought against firms that were involved in the design or construction of such facilities.

<sup>11</sup> There continue to be disputes about the trigger and scope of coverage for asbestos-related bodily injury claims. Most courts have held that each occurrence policy in effect from the date of a claimant's first exposure to date of death or claim, whichever occurs first, is obligated to provide full coverage for the loss. *See, e.g., Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 52 Cal. Rptr. 2d 690 (Ct. Ap. 1996). Some courts have held that each policy in effect during the time that a claimant was exposed to asbestos is only obligated to pay a pro rata share of the loss. *See, e.g., INA v. Forty-Eight Insulations, Inc.* 633 F.2d 1212 (6<sup>th</sup> Cir. 1980). More recently, some courts have required proration of the loss over the entire time from first exposure to date of death or claim, excluding only periods when insurance for such losses was not available. *See, e.g., Stonewall Ins. Co. v. National Gypsum Co.* 73 F. 3d 1178 (2d Cir. 1995). For a complete list of cases on this issue, see W. Skinner, *Allocation Between Claims Made and Occurrence Policies*, 10 ABA Litigation Section Committee on Insurance Coverage Litigation, *Coverage* 3 (January/February 2000).

order to reduce the total amount of coverage that is available. The economic incentives for policyholders are, for obvious reasons, the opposite of the incentives for insurers.

Until relatively recently, most courts in most jurisdictions have concluded that the definition of occurrence is ambiguous in this context and have tended to adopt whatever interpretation provides the most coverage for the policyholder in question. Some recent decisions have departed from this trend. A list of the decisions is included as Attachment A to this paper. A significant majority of the courts have held that there is a separate occurrence for each individual bodily injury claimant. *See. e.g., Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.*, 765 A.2d 891 (Conn. 2001); *Dicola v. American Steamship Owners Mutual Protection and Indemnity Assoc., Inc.*, 158 F.3d 65 (2d Cir. 1998).

### **III. CLAIMS ARISING OUT OF EXPOSURE TO ASBESTOS RELEASED WHEN INSULATION WAS INSTALLED BY POLICYHOLDERS ARE NOT WITHIN THE PRODUCTS/COMPLETED OPERATIONS HAZARD**

#### **A. Claims That Involve Exposure To The Installation Operations Of Policyholders Are Not Within The Products/Completed Operations Hazard Of The Pre-66 Policies**

Claims that involve exposure to asbestos released at the time that policyholders were installing insulation are not within the products/completed operations hazard as that hazard is defined in the policies that were issued prior to 1966 because: (1) policyholders had possession of the insulation while it was being installed; (2) the installation operation was not complete; and (3) the installation of insulation manufactured by others is a service that is not within the products/completed operations hazard, even if the exposure occurred after the installation operation was completed.

The New York Court of Appeals rejected the insurance industry's position that all asbestos bodily injury claims fall under the products/completed operations hazard. *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169 (1997). In that case, the insured, an asbestos insulation contractor, was denied coverage for asbestos bodily injury claims under policies that excluded products hazard claims. The court held that the insurers owed a duty to defend the insured. The court found that the products hazard definition applies to only "one subset of products liability claims," and ruled that the products hazard exclusion did not encompass asbestos claims brought against an insulation contractor that involved

bodily injuries first occurring at a job site while the contractor still had possession of the asbestos product.

The Maryland Court of Special Appeals made a similar finding in the context of asbestos coverage. In *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. Ct. Spec. App. 1997), the court affirmed the grant of operations coverage for asbestos claims, noting that the products hazard definition did not encompass allegations against the insured that “concern exposure and injury occurring during the operation, such as the emission of asbestos dust during the installation process.” *Id.* at 1209.

**1. Policyholders Had Possession Of The Insulation While It Was Being Installed**

Policyholders had physical possession of the insulation materials while they were installing them. Under primary CGL policies issued prior to 1966, the products/completed operations hazard only applies if the “accident” that caused the injuries happened “after possession of . . . products has been relinquished to others.” Under such policies, the exposure that caused the injuries is the accident or the occurrence. Since policyholders still had possession of the insulation at the time of the exposure that caused the injuries, the products/completed operations hazard definition is not applicable to such claims. As the court explained in *Frontier*, the products hazard

cannot apply to accidents or occurrences that allegedly took place while Frontier’s installation work was in progress because the offending product -- the asbestos insulation -- was not relinquished from Frontier’s control until installation was complete. . . . Since asbestos fibers may be readily released into the air and inhaled while a contractor is cutting and sawing the product during installation, there is a reasonable possibility that any liability attributable to Frontier would stem from injuries that occurred during ongoing operations -- covered events.

*See also Pacific Indem. Co. v. Linn*, 766 F.2d 754, 764-65 (3d Cir. 1985) (products/completed operations hazard applies only after products have been “relinquished to others”); *General Cas. Co. v. Azteca Films, Inc.*, 278 F.2d 161 (9th Cir. 1960) (products/completed operations hazard applies only after insured has relinquished physical possession of the product).

**2. While Insulation Was Being Installed, The Operation Was Not Complete**

While the insulation was being installed, the installation operation was not complete. Under primary CGL policies issued prior to 1966, the products/completed operations hazard only applies if the “accident” that caused the injuries happened “after such operations have been completed.” Under such policies, the exposure that causes the injuries is the accident or the occurrence. If the operation was not complete at the time of the exposure that caused the injury, the products/completed operations hazard does not apply to claims involving such exposure. *Aetna Ins. Co. v. Lythgoe*, 618 P.2d 1057 (Wyo. 1980) (completed operations hazard does not apply because at time of accident the operation was not complete); *Lumbermens Mut. Cas. Co. v. Town of Pound Ridge*, 362 F.2d 430 (2d Cir. 1966) (a claim that arises out of ongoing snow removal operations that were not completed at the time of the accident is not within the completed operations hazard). *But see Bouchard, Inc. v. Hartford Accident & Indem. Co.*, 343 N.E.2d 372 (1976) (claim arising out of explosion that occurred after installation work had been completed is subject to completed operations hazard); *accord Neumann v. Wisconsin Natural Gas Co.*, 134 N.W.2d 474 (1965).

**3. The Installation Of Insulation Manufactured By Others Is A Service That Is Not Within The Products/ Completed Operations Hazard Definition Of The Pre-68 Policies In Any Event**

In primary CGL policies issued prior to 1966, there is a single definition of the products/completed operations hazard that encompasses both products and operations. Many courts have concluded that such definitions are ambiguous and can reasonably be interpreted as having no application to claims against contractors who install products manufactured by third parties, or perform services involving such products, even when the accident or occurrence that caused the loss happens long after the contractor’s operations have been completed. *See, e.g., INA v. Electronic Purification Co.*, 63 Cal. Rptr. 382 (1967); *Ornamental Iron & Stair Co. v. General Accident & Life Assurance Corp.*, 242 N.W.2d 544 (1976); *Gehrlein Tire Co. v. American Employers Ins. Co.*, 243 F. Supp. 577 (W.D. Pa. 1964); *Ocean Accident & Guar. Corp. v. Acoromy Erectors, Inc.*, 224 F.2d 242 (7th Cir. 1955); *Nielson v. Travelers Indem. Co.*, 174 F. Supp. 648 (N.D. Iowa 1959); *Youghiogheny & Ohio Coal Co. v. Employers’ Liab. Assur. Co.*, 114 F. Supp. 472 (D. Minn. 1953). *See*

generally Henderson, *Insurance Protection For Products Liability And Completed Operations* -- *What Every Lawyer Should Know*, 50 Nebraska Law Rev. 415, 421-25 (1971).

These courts have reasoned that a contractor who installs products manufactured by others would have no reason to believe that a "products hazard" definition would have any application to its business. Under that interpretation, none of the claims that is attributable to insulation manufactured by others should be classified as products/completed operations hazard claims with respect to policyholders under primary CGL policies issued prior to 1966, whether or not the exposure occurred during the time that the material was being installed.

**B. Claims That Involve Exposure To The Installation Operations Of Policyholders Are Not Within The Products/ Completed Operations Hazard Of The Post-66 Policies**

Insurers may take the position that claims arising from exposure to asbestos released when a policyholder was installing insulation: (1) should be classified as operations claims under the policies in effect at the time of the exposure; but (2) should be classified as completed operations claims under any subsequent policies which were written on standard forms first adopted by the insurance industry in 1966 or 1973. Such an argument by insurers would be wrong for three reasons.

*First*, there are substantial reasons to believe that the practice of the insurance industry has been to classify operations claims involving continuous injury as operations claims under all applicable policies. Indeed, in the *Triangle Industries* case<sup>12</sup>, Liberty Mutual successfully argued that a claim involving wastes that were disposed at a third party dump site was an operations claim under all relevant policies, including policies that first came into effect after the waste disposal operation had long since been completed. The terms of the Liberty Mutual policies that were at issue in that case are identical in all material respects to standard CGL policies issued in 1973. *See* Section III. B.1, below.

*Second*, the language of the policies, their drafting history, the basic concept of an insurance hazard and existing case law support the conclusion that claims based on injuries

---

<sup>12</sup> *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1158 (4th Cir. 1992), holding that a waste disposal claim is not within the products/completed operations hazard under a policy that first came into effect after the waste disposal operation had been completed.

that arise from ongoing operations are operations claims under all applicable policies. *See* Section III.B.2, below.

*Third*, the dust and debris that are released at the time that asbestos-containing insulation is installed are “abandoned or unused materials” within the meaning of an exception to the completed operations definition. *See* Section III.B.3, below.

- 1. There Are Good Reasons To Believe That Insurers Have Consistently Classified Claims Arising Out Of Ongoing Operations As Operations Claims Under All Applicable Policies, Including Policies That First Took Effect After The Operation Was Completed**

Insurers may contend that a claim based on exposure to asbestos released during the installation of insulation by a policyholder is an operations claim under the policy in effect at the time of the exposure but a completed operations claim under later policies any injury that occurred after exposure had ceased necessarily occurred after the installation operation had been completed. A fatal flaw in such a position is that there is no evidence that any insurer has ever classified any claim in that manner.

Claims arising out of exposure to asbestos released at the time insulation is installed are a subset of claims arising out of dust, noise, odor or waste generated during the course of manufacturing, contracting or waste disposal operations. There are good reasons to believe that insurance industry personnel responsible for drafting standard policy forms and the administration of claims have considered all such claims to be operations claims rather than completed operations claims under all relevant policies.

As pointed out above, Liberty Mutual took the position in the *Triangle Industries* case that operation claims should be classified in the same manner under all applicable policies. That case involved environmental claims arising out of the disposal of waste at a third party dump site. The Liberty Mutual policies first took effect after waste disposal operations at the dump site had been completed. They also contained an absolute pollution exclusion that had an exception for claims arising out of the products or completed operations hazards. Liberty Mutual argued that claims arising out of the disposal of waste were operations rather than completed operations claims. Brief of Liberty Mutual in *Triangle Industries*, pp. 24-25. The

court of appeals accepted Liberty Mutual's position on this point. *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1158 (4th Cir. 1992).

In a recent case, the Supreme Court of Pennsylvania stated as follows:

In the law of contracts, custom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts and does not depend on any obvious ambiguity in the words of the contract.

...

There is no requirement that an ambiguity be shown before usage can be shown, and no prohibition against showing that language or conduct have a different meaning in the light of usage from the meaning they might have apart from the usage. The normal effect of a usage on a written contract is to vary its meaning from the meaning it would otherwise have.

*Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 781 A.2d 1189, 1193 (Pa. 2001), quoting *Restatement (Second) of Contracts*, § 220, comment d (1981). See also *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1209 (3d Cir. 1995) (interpreting policy language in light of industry practice); *Occidental Petroleum Corp. v. New Hampshire Ins. Co.*, 506 F. Supp. 606, 611 (S.D.N.Y. 1981) (insurance policy should be interpreted consistently "with normal practices in the trade").

## 2. **The Completed Operations Hazard Applies Under The Post-68 Policies Only If Injury Commenced After The Operation Was Completed**

There are good reasons why insurers are unlikely to have classified a claim arising from exposure during ongoing operations as an operations claims under the policy in effect at the time of exposure but as a completed operations claim under other policies in effect at later times. Changing the classification of a claim in that manner would be inconsistent with the language of the policies, the hazard concept and existing case law.

### a) **The Policy Language**

Post-1966 CGL policies include the following definitions of the products and completed operations hazards:

"Completed operations hazard" includes **bodily injury** and property damage **arising out of operations** or reliance upon a representation or warranty made at any time with respect thereto, **but only if the bodily**

**injury or property damage occurs after such operations have been completed or abandoned . . .**

...  
“Products Hazard” **includes bodily injury** and property damage **arising out of the named insured’s products** or reliance upon a representation or warranty made at any time with respect thereto, **but only if the bodily injury or property damage occurs** away from premises owned by or rented to the named insured and **after physical possession of such products has been relinquished to others.** (emphasis added)

This language is reasonably interpreted as requiring that claims arising out of injurious exposure during an ongoing operation be classified as operations rather than completed operations claims. The definition of the “completed operations hazard” states that it includes “bodily injury . . . arising out of operations . . . but only if *the* bodily injury . . . occurs after such operations have been completed . . . .” Similarly, the “products hazard” definition states that it includes “bodily injury . . . arising out of the named insured’s products . . . but only if *the* bodily injury . . . occurs after physical possession of such products has been relinquished to others.” (Emphasis added).

Claims that are based on exposure to asbestos released during ongoing installation operations involve injury that commences prior to the time that the operation is complete or physical possession of the insulation has been relinquished to others.<sup>13</sup> In such claims, it simply is not the case that all of “*the*” bodily injury occurred after the operation was complete and physical possession relinquished. Some of “the” bodily injury occurred while the operation was ongoing and some of “the” bodily injury occurred after it was complete. Since the policy uses the definite article, “the,” it can be reasonably interpreted to mean that all of the injury must occur after the operation was completed and physical possession was relinquished in order for the hazard definitions to be applicable. At best for the insurers, the use of the definite article, “the”, makes it unclear how such claims should be classified.

Insurers may argue that the definition of bodily injury in policies that use the 1973 edition of the standard policy forms makes it clear that the only bodily injury that is relevant is the bodily injury that happened during the policy period. That argument is inconsistent

---

<sup>13</sup> *Armstrong World Ind. v. Aetna Cas. & Sur. Co.*, 52 Cal. Rptr. 2d 690, 738-39 (Ct. App. 1996).

with the drafting history of the policies. The inclusion of the phrase “during the policy period” in the definition of bodily injury was widely represented by insurance industry spokesmen to be a non-substantive change. *See, e.g.*, R.H. Elliott, Memorandum re General Liability Policy and Manual Revision Effective Jan. 1, 1973 (Jan. 4, 1973).

More fundamentally, insurers would be confusing two different coverage concepts. The phrase “bodily injury during the policy period” defines the trigger of coverage under the policies -- *i.e.*, the event that must occur during the policy period in order for any coverage to be available. In the Coordinated California Asbestos Coverage Cases, many of the insurers argued that if each policy is triggered by bodily injury that occurs during the period of a policy, the amount of coverage provided by a triggered policy should be determined solely on the basis of that injury and that there should be no coverage for any injury that occurred prior to or after the period of the policy in question. The insurers argued that they were only responsible for that portion of the insured’s liability that “occurs during the policy period.” The court found that the “insurers have confused the trigger of coverage and the scope of coverage . . . the event which triggers an insurance policy’s coverage does not define the extent of the coverage.” *Armstrong World Industries Inc. v. Aetna Casualty & Surety Co.*, 52 Cal. Rptr.2d 690, at 742. The court made clear that although a policy is triggered only if bodily injury takes place during the policy period, once a policy is triggered, the insurer is obligated to respond in full for the entirety of the ensuing injury up to the policy limits. *Id.* at 706-07, 742. How the claims should be classified for purposes of the policy’s insurance hazards is a different question than what it takes to trigger their obligation to respond in the first place.

#### **b) The Hazard Concept**

The basic concept of an insurance hazard also supports the position of the policyholders with respect to the interpretation of the post-1966 CGL policies. *See Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (“a hazard is . . . danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm”). As pointed out above, the products/completed operations hazards are defined in the

policies to include only those losses that arise out of a product that has been transferred to a third party or a completed operation.<sup>14</sup>

Claims that arise out of exposure to asbestos released during the time insulation is being installed by a policyholder are claims that arise out of contracting operations of the insured while in progress. They are not claims that arise out of a product that has been transferred to a third party or claims that arise out of an operation that has been completed. The condition, events or acts which created the probability of someone suffering a loss are the conditions, events or acts that were in existence at the time of the ongoing installation operation. Accordingly, all such claims should be classified as operations claims.

### c) Existing Case Law

The insurers' likely position requires that a claim arising from exposure to asbestos released at the time of installation change its classification over time from the operations to the completed operations hazard. To our knowledge, only one court has ever accepted such an argument. See *Aetna Casualty & Surety Co. v. Wallace & Gale Co. (In re The Wallace & Gale Co.)* Civil No. PJM 94-2327, 2002 WL 417996 (D. Md. February 20, 2002). In that case, the federal district court for the district of Maryland held that an asbestos-related bodily injury claim that is based on exposure to asbestos released at the time insulation is installed by the policyholder is an operations claim under the policy in effect at the time of exposure, but a completed operations claim under policies that first took effect after the installation operation had been completed. We believe that most courts are unlikely follow that decision for two reasons.

**First**, none of the parties to that case informed the court that there was evidence that the custom and practice of the insurance industry has been to classify claims arising out of ongoing operations as operations claims under all applicable policies, including policies that

---

<sup>14</sup> *Pacific Indem. Co. v. Linn*, 766 F.2d 754, 765 (3d Cir. 1985) (products/completed operations hazard applies only after products have been "relinquished to others."); *General Cas. Co. v. Azteca Films, Inc.*, 278 F.2d 161 (9th Cir. 1960) (products/completed operations hazard applies only after insured has relinquished physical possession of the product); *Aetna Ins. Co. v. Lythgoe*, 618 P.2d 1057 (Wyo. 1980) (completed operations hazard does not apply because at time of accident the operation was not complete); *Lumbermens Mut. Cas. Co. v. Town of Pound Ridge*, 362 F.2d 430 (2d Cir. 1966) (a claim that arises out of ongoing snow removal operations that were not completed at the time of the accident is not within the completed operations hazard).

first take effect after the operation has been completed. The briefs that the policyholder submitted to the Maryland court do not discuss such evidence and the *Wallace & Gale* opinion does not refer to it.<sup>15</sup> The Supreme Court of Pennsylvania has stated that evidence of “custom in industry or usage in the trade is always relevant and admissible . . . [and may show] ‘that language or conduct have a different meaning in the light of usage from the meaning they might have apart from usage.’” *Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 781 A.2d 1189, 1193 (Pa. 2001), quoting *Restatement (Second) of Contracts*, § 220, comment d. Accordingly, even if *Wallace & Gale*’s interpretation of the policy language were correct -- and we believe that it is not -- custom and practice evidence that policyholders are likely to develop in other cases should be sufficient to support the conclusion that claims that arise out of ongoing operations should be classified as operations claims under all of the applicable policies.

**Second**, other decisions have rejected the argument that a claim is not an operations claim if the injury continues after the completion of an operation. For example, in *Mason v. Home Ins. Co. of Illinois*, 532 N.E.2d 526 (Ill. App. Ct. 1988), a restaurant sold tainted food to a number of patrons who subsequently were stricken with botulism poisoning and sued the restaurant. The insurer argued that the botulism claims were covered only under the products/completed operations hazard because the symptoms of botulism did not occur until after the patrons left the restaurant. The court rejected this argument, relying on case law in the asbestos insurance coverage context. The court reasoned that even though the symptoms of the botulism poisoning were not immediately manifested, the bodily injury, like asbestos-related injuries, began at the time of exposure (the ingestion of the food) and thus the products hazard provision did not apply even though the injuries continued after the customers left the premises. *Id.* at 531.<sup>16</sup>

---

<sup>15</sup> *Wallace & Gale* is a relatively small company that is in Chapter 11 proceedings. This issue was not all that important to that company, as evidenced by the fact that it devoted a total of only eight pages to it in its opening brief and reply briefs. In *Wallace & Gale*, the federal district court in Maryland ruled that the policyholder has full coverage without aggregate limit for all of its claims under the policies in effect at the time of exposure.

<sup>16</sup> Although the court in *Mason* interpreted the pre-1966 version of the products hazard definition, the parties agreed that the term “occurrence” in the products hazard provision referred to “the suffering of  
(continued...)

Similarly, in *Century Indemnity Co. v. Golden Hills Builders*, 2002 S.C. LEXIS 41, \*4-\*7 (S.C. March 11, 2002), the Supreme Court of South Carolina held that if moisture damage to a building commenced before construction was completed, the completed operations hazard would not apply even though most of the damage occurred after construction was over. *See also Ott v. Crews*, 830 F.2d 773, 776-77 (7th Cir. 1987) (an exclusion for products hazard claims would not apply to claims seeking damages arising out of the sale of sick hogs if the hogs first became sick while they were in the possession of the policyholder).

An insurer's attempt to segment an asbestos injury claim into pieces for purposes of assigning a different hazard classification to different pieces is also contrary to the wealth of insurance coverage case law finding that asbestos-related bodily injuries are indivisible. *See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993); *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 613 F. Supp. 1549, 1562-63 (D.N.J. 1985), *vacated in part on other grounds*, 864 F.2d 1033 (3d Cir. 1988).

Insurers are likely to cite *Johnson v. Studyvin*, 828 F. Supp. 877 (D. Kan. 1993), but *Studyvin* does not support their position. The asbestos property damage that triggered the policies in that case did not begin, and was not caused, by anything that happened prior to the time that the installation of asbestos-containing materials in the claimant's home had been completed. The court held that it was the incorporation of hazardous asbestos-containing materials in the home that damaged the home (not any fibers or dust released during the actual installation process). It also held that the owner's subsequent loss of use of the home and its contents were property damage within the meaning of the policies. Since both of these types of damage occurred only after the installation had been completed, the court held that an exclusion for claims within the completed operations hazard was applicable. *See id.* at 884.

In *Studyvin*, the court interpreted the products/completed operations hazard as applying to the risk that "the goods, products or work of the insured, **once relinquished or completed**, will cause bodily injury or damage to property other than to the product or

---

bodily injury." 532 N.E.2d at 530. The insurer's argument was focused on the time and place of the injury. *Id.* at 530-31.

completed work itself . . . for which the insured may be found liable.” *Id.* at 884 (quoting *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98, 102-03 (2d Cir. 1993) (emphasis added). That standard favors policyholders rather than insurers, because injuries caused by exposure during the time that installation work is being performed by a policyholder are caused by ongoing rather than completed operations.

Insurers may also rely on *Great Lakes Dredge & Dock Co. v. Commercial Union Assur. Co.*, 57 F. Supp. 2d 525 (N.D. Ill. 1999), *rev'd*, 260 F.3d 789 (7th Cir. 2001), but such reliance would also be misplaced. In that case, the policyholder damaged a tunnel under the Chicago River during the course of a project to replace pilings. Later, after the contractor completed its work, there was a flood that damaged office buildings in downtown Chicago. The trial court held that the damage to the office buildings should be classified as completed operations damage because it took place after the policyholder had finished its work. There was no evidence that any of that damage had occurred until several months after the policyholder had completed its work. Many cases have held that if all of the damage occurs after the contractor has finished its work, the resulting claim is a completed operation claim. *See, e.g., Harbour v. Mid-Continent Cas. Co.*, 752 P.2d 258 (Okla. Ct. App. 1987).

### **3. The Dust and Debris That Are Released During Installation Are “Abandoned or Unused Materials” Under All Of The Policies**

There is another independent reason for rejecting insurer claims. Under all of the standard CGL policy forms, including the policies that were issued after 1966, there is an exception to the products/completed operations hazard definition for “abandoned or unused materials.” The dust and debris released at a site during installation operations are “abandoned or unused materials” within the meaning of the exception to the products/completed operations hazard definition.

There has been relatively little litigation concerning the meaning of the “abandoned or unused materials” exception to the completed operations hazard.<sup>17</sup> In *U.S. Sanitary*

---

<sup>17</sup> There has been litigation concerning other exceptions to the completed operations hazard. In *Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, Civ. A. No. 83-3, 1988 U.S. Dist. Lexis 15839, at \*205 (D.D.C. September 7, 1988), the court held that environmental claims arising out of the spraying of dioxin on roads fell within the transportation exception to the completed operations hazard. Courts have also held that claims arising out of the improper installation of equipment or the installation  
(continued...)

*Specialties Corp. v. Globe Indem. Co.*, 204 F.2d 774, 777 (7th Cir. 1953), the court held that the exception did not apply to wax that was applied to a floor as part of a sales demonstration but stated that it would apply to “materials which on completion of an operation should have been removed by the assured from the premises where the operation occurred but which, instead, were abandoned . . . .” Dust and debris released during the course of the installation of asbestos would satisfy that test. Accordingly, claims arising out of exposure to such materials are within the exception to the definition of the completed operations hazard.

Insurers may assert that the dust that is released at the time insulation is installed is analogous to wax applied to a floor. That simply is not so. Wax that is applied to a floor to make it shiny is like insulation that is wrapped around a pipe to preserve the temperature of its contents. A shiny floor is the completed operation that is being sold by a wax installer and an insulated pipe is the completed operation that is being sold by an insulation installer. Dust or debris that is released when the insulation is installed is not part of the completed insulation operation that is being sold. They are similar, rather, to wastes or byproducts, such as drops of spilled wax, that should have been cleaned up and removed. Such materials are thus within the exception for abandoned or unused materials in accordance with the reasoning of the court in *Sanitary Specialties*.

This interpretation of the exception is consistent with the policy language, and the case law. See *Southern Guar. Ins. Co. v. Zantop Int’l Airlines, Inc.*, 767 F.2d 795, 799 (11th Cir. 1985) (“in the context of a building contractor’s liability protection, completed operations coverage is an approximate analogue to products liability insurance for the manufacturer of goods”); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 832 F. Supp. 114, 118 (E.D. Pa. 1993) (completed operations coverage is “the counterpart of products hazard coverage”). Accordingly, waste and by-products of contracting operations should be viewed in the same light as waste and by-products from manufacturing. Neither is part of the finished product or

---

of the wrong equipment are within the “uninstalled equipment” exception to the completed operations hazard. *Chancier v. American Hardware Mut. Ins. Co.*, 712 P.2d 542 (Idaho 1985) (improperly installed equipment); *U.S.F. & G. v. National Tank & Machine Works, Inc.*, 402 So.2d 925 (Ala. 1981) (installation of the wrong equipment); *Cf. Maretti v. Midland Nat’l Ins. Co.*, 190 N.E.2d 597 (Ill. App. Ct. 1963) (products/completed operations hazard does not apply to claim against fireworks exhibitor arising out of explosives left at a site following a performance).

completed project that is being sold by a manufacturer or a contractor to its customers. *See, e.g., Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203, 207 (5th Cir. 1991) (environmental contamination was not within the products-completed operations hazard).<sup>18</sup> Claims arising from asbestos fibers released in an installation operation are clearly analogous and should also be classified as operations claims under all of the policies at issue in this proceeding.

\* \* \*

For all of the reasons discussed above, where injury arises out of exposure to asbestos released during ongoing installation operations, the claim should be classified as an operations claim under all applicable policies. That is the only interpretation that is consistent with: (1) how the insurers are likely actually to have classified operations claims involving continuing injury or damage; (2) the language of hazard definitions; (3) the “abandoned or unused materials” exception to the definition of the completed operations hazard; (4) the drafting history of the policies; (5) the historical purpose and function of the hazard concept in insurance policies; and (6) existing case law.

Moreover, there are good reasons to follow this interpretation even if the literal language of the policies would arguably support a different result. In *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194 (3d Cir. 1995), the Third Circuit approved a decision of an arbitrator appointed under the Wellington Agreement that refused to give effect to the literal meaning of policy language. In that case, the policy at issue stated that an insurer had no obligation to provide coverage for defense costs unless it had given written consent to the incurring of such costs. In that case, there was persuasive evidence that the practice of the insurance industry was to interpret such consent clauses as though they imposed an obligation

---

<sup>18</sup> *See also Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1158 (4th Cir. 1992); *Hydro Sys., Inc. v. Continental Ins. Co.*, 717 F. Supp. 700 (C.D. Cal. 1989) (air pollution claims are not within the products/completed operations hazard), *aff'd*, 929 F.2d 472 (9th Cir. 1991); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 386 (D. Md. 1978) (same); *CPS Chem. Co. v. Continental Ins. Co.*, 489 A.2d 1265 (N.J. Super. Ct. Law Div. 1984) (industrial waste claims), *rev'd on other grounds*, 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985); *Mraz v. American Universal Ins. Co.*, 616 F. Supp. 1173, 1180-81 (D. Md. 1985) (waste product claims), *rev'd on other grounds sub nom, Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

on the insurer to provide coverage for all defense costs that were reasonably incurred. The court of appeals approved the decision of the arbitrator to interpret the policies in accordance with that practice rather than their literal language. *See also Sunbeam Corp. v. Liberty Mutual Ins. Co.*, 781 A.2d 1189, 1193 (Pa. 2001) (evidence of “custom in industry or usage in the trade is always relevant and admissible . . . [and may show] ‘that language or conduct have a different meaning in the light of usage from the meaning they might have apart from usage’”).

**C. The Fact That Many Of The Underlying Claims Include Products Liability Allegations For Purposes Of Tort Law Does Not Affect The Classification Of Claims For Insurance Purposes**

Insurers may suggest that the classification of claims should be based on the pleadings in the underlying tort suits rather than on the actual facts from which a policyholder’s liability has arisen -- namely, its historical involvement in the business of installing asbestos-containing insulation. The suggestion is that many, if not all, of the complaints in the underlying tort suits include allegations consistent with product liability tort claims and that such pleadings should control the classification of claims for purposes of the insurance policies.

That assertion has no merit. In the first place, a products liability claim can be either an operations or a completed operations claim. The New York Court of Appeals has squarely rejected the insurers’ efforts to classify all products liability claims under the products hazard:

Defendant insurers contend that all of the claims in the underlying complaints fall wholly within the policies’ exclusions for products hazard because they all allege that bodily injuries resulted from exposure to Frontier’s asbestos products. This claim misses the mark, however, because the focus in determining whether a products-hazard exclusion applies is not simply whether an insured’s product caused the loss at issue, but rather is dependent on the location of the accident and the possession of the product. Defendants’ argument fails to appreciate that an exclusion for products hazards governs only one subset of products liability claims.

*Frontier*, 91 N.Y.2d at 175; *see also Porter Hayden*, 698 A.2d at 1209.

The typical complaint in the underlying suits asserts claims against numerous defendants in the broadest possible terms. Most contain a blanket listing of dozens of defendants and cite numerous activities allegedly giving rise to liability under a variety of

products liability theories, including negligence and strict liability. Some of the complaints expressly refer to installation activities by the defendants:

At all times herein mentioned, defendants, and each of them, were and are engaged in the business of researching, manufacturing, fabricating, designing, labeling, assembling, distributing, leasing, buying, offering for sale, selling, inspecting, servicing, **installing**, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising a certain substance, the generic name of which is asbestos, and other products containing said substance. (emphasis added)

Other complaints do not expressly refer to installation activities by the defendants but are pleaded broadly to permit proof at trial of exposure to fibers released during the course of installation activities by defendants, and to cover claims against outright sellers (such as manufacturers) and installer-sellers of asbestos-containing insulation.

In general, the form of action in an underlying litigation giving rise to liability does not determine the nature or existence of insurance coverage.<sup>19</sup> Thus, in *Grant v. North River Ins. Co.*, 453 F. Supp. 1361 (N.D. Ind. 1978), a liability policy for injury arising out of an “accident” provided coverage, even though the underlying action was pleaded as a federal Civil Rights Act violation. Similarly, in *Aetna Cas. & Sur. Co. v. Starrett*, 115 S.E.2d 641 (Ga. Ct. App. 1960), an “accident” liability policy provided coverage, even though the underlying judgment was rendered in contract, not tort. *See also CNA Cas. of Cal. v. Seaboard Sur. Co.*, 222 Cal. Rptr. 276, 280-81 (1986)(concluding that a claim is within the coverage of an insurance policy even though it was pleaded as an antitrust action and the policy did not, by its terms, provide coverage for antitrust claims).

The need to look beyond the pleadings to make coverage determinations is especially compelling in this situation because it is often impossible to determine definitively from the underlying pleadings the extent to which exposure to a policyholder’s products occurred

---

<sup>19</sup> As one leading insurance treatise puts it:

As with many coverage problems, there is a tendency [in products liability cases] to confuse the question of coverage with liability when in fact they are not the same. There may be coverage with no liability just as there may be liability and no coverage.

Appleman, *Insurance Law and Practice* . 4508.

during installation operations. A significant number of the complaints allege "installation" as one of the actions giving rise to liability, thus potentially placing the claim outside the products/completed operations hazard. But even these complaints typically do not identify which defendants were engaged in installation. Under these circumstances, claims should be classified on the basis of evidence about the historical nature of a policyholder's contracting operations, the relative health risks associated with the installation of insulation, and the nature of the underlying claims from the perspective of those responsible for their defense and resolution.

**IV. POLICYHOLDERS ARE ENTITLED TO DEFENSE COVERAGE FOR ALL PENDING AND FUTURE CLAIMS THAT ARE POTENTIALLY EITHER OPERATIONS OR COMPLETED OPERATIONS CLAIMS UNDER ALL TRIGGERED POLICIES UNTIL THE LIMITS APPLICABLE TO BOTH TYPES OF CLAIMS HAVE BEEN EXHAUSTED**

An insurer's obligation to provide defense coverage to its policyholder is very broad. Under the well-settled law of most jurisdictions, a liability insurer has a duty to provide defense coverage as long as the underlying complaint against the policyholder alleges facts raising a *possibility* that the claim could fall within the policy's indemnity coverage. *E.g.*, *Montrose Chem. Corp. v. Superior Court*, 24 Cal. Rptr. 2d 467 (1993); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 179 (3d Cir. 1994) (applying Pennsylvania law).<sup>20</sup> To establish its right to defense coverage, a policyholder need not demonstrate that the underlying claims are actually covered by the policy. As long as the underlying allegations do not *preclude* the bare potential for coverage, the insurer must provide defense coverage. *Montrose*, 24 Cal. Rptr. 2d at 474-75. Once the policyholder establishes a potential for indemnity coverage, the insurer must provide defense coverage unless it can "establish *the absence of any such potential*". In other words, the insured need only show that the underlying claim *may* fall within the policy coverage; the insurer must prove it *cannot*." *Id.* at 475 (emphasis added).

---

<sup>20</sup> See also *Horace Mann Ins. Co. v. Barbara B.*, 17 Cal. Rptr. 2d 210, 213 (1993); *Gray v. Zurich Ins. Co.*, 54 Cal. Rptr. 104, 113 (Cal. 1966); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 510 (Pa. 1993).

If some but not all of the underlying claims potentially fall within the terms of the policy, the insurer has a duty to pay for the defense of the entire underlying action. See *Aerojet-General Corp. v. Transport Indem. Co.*, 70 Cal. Rptr. 2d 118, 137-38 (Cal. 1997); *Frontier*, 91 N.Y.2d at 175 (“If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action.”).

The tort plaintiff’s “characterization of the causes of action alleged in a complaint are not always controlling.” *Curtis v. Nutmeg Ins. Co.*, 612 N.Y.S.2d 256, 258 (N.Y. App. Div. 1994). “To deny [the insured] an insurance-company sponsored defense under these circumstances merely because the attorney for the plaintiff in the main action accidentally mischaracterized [the insured’s] role would be to afford the insurer an undeserved windfall at the expense of its insured.” *Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90, 94 (N.Y. 1991); see *Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 509 (N.Y. 1993).

Since the basic purpose of the “litigation insurance” provided by the defense clause in the policies is to protect the insured from the disruption and expense of litigation, any doubt concerning the scope of the defense obligation is resolved in favor of the insured. See *Montrose*, 24 Cal. Rptr. 2d at 474. This principle is a corollary of the settled rule that policy terms are strictly construed against the insurer-draftsman and “in the insured’s favor, according to his reasonable expectations.” *Id.*, accord *Gray*, 54 Cal. Rptr. at 107 n.3.

Two recent cases are directly on point, and hold that the insurers have the duty to defend asbestos-related bodily injury claims brought against an asbestos insulation contractor. The New York Court of Appeals recently held that the insurers had the duty to provide defense coverage for all asbestos-related bodily injury claims brought against an asbestos insulation contractor. *Frontier*, 91 N.Y.2d at 178. The policies at issue completely excluded products hazard claims. The insurers argued that all of the asbestos claims in the underlying complaints fell entirely within the product hazard exclusion because they alleged that bodily injury resulted from exposure to the policyholder’s asbestos products.

The Court rejected the insurers’ argument, and found that the insurers “will only be relieved of their duty to defend on the basis of these product-hazards exclusions if they can show that all of the underlying claims fall squarely within those clauses and are susceptible of

no other interpretation.” *Id.* at 177. The Court reasoned that the exclusions were not applicable to accidents that took place while the policyholder’s installation work was in progress: “Since asbestos fibers may be readily released into the air and inhaled while a contractor is cutting and sawing the product during installation, there is a reasonable possibility that any liability attributed to Frontier would stem from injuries that occurred during ongoing operations -- covered events.” *Id.* at 177-78. Accordingly, the Court concluded that the insurers had a duty to provide defense coverage for the claims. *Id.* See also *Porter Hayden Co.*, 698 A.2d at 1208.

All or virtually all of the asbestos claims against a policyholder that was historically engaged in the business of installing asbestos-containing insulation have the potential of being operations claims. The insurers plainly cannot meet the heavy burden required to show that all of the claims fall squarely under the products/completed operations hazard and are susceptible to no other interpretation. See *Frontier*, 91 N.Y.2d at 177. Accordingly, it is clear that the insurers should be required to provide defense coverage for all, or virtually all, pending and future asbestos bodily injury claims against policyholders who were engaged in the business of installing asbestos-containing insulation.

**V. POLICYHOLDERS ARE ENTITLED TO FULL INDEMNITY COVERAGE FOR “MIXED CLAIMS” INVOLVING BOTH OPERATIONS AND COMPLETED OPERATIONS EXPOSURES UNDER ALL TRIGGERED POLICIES UNLESS THE LIMITS APPLICABLE TO BOTH TYPES OF CLAIMS HAVE BEEN EXHAUSTED**

Some of the asbestos bodily injury claims against policyholders who were engaged in the business of installing asbestos-containing insulation may involve liability that is attributable to more than one source, such as: (1) exposure to asbestos released when asbestos-containing insulation was being installed by the policyholder (operations exposure); and (2) exposure to asbestos released from such materials that were sold outright to third parties for installation by them (a products hazard exposure). Policyholders are entitled to coverage for such “mixed claims” under all triggered policies for which the coverage applicable to either operations or products/completed operations claims has not yet been exhausted.

In most jurisdictions, a loss that is attributable to more than one cause is fully covered by an insurance policy so long as any of the contributing causes is covered. One of the

leading cases on this issue is the decision of the Supreme Court of California in *State Farm Mut. Ins. Co. v. Partridge*, 109 Cal. Rptr. 811 (1973). In that case, the issue was whether there was insurance coverage under a homeowner's policy for a loss that was caused by both negligent driving and negligent modification of a gun that was accidentally fired in a car causing bodily injury. The homeowner's policy in question excluded losses arising out of the negligent operation of a vehicle but included losses arising out of the negligent modification of the gun. The Supreme Court of California held that where two risks constitute the concurrent proximate cause of a loss, there is full coverage under the policy so long as at least one of the risks is covered by the policy. *State Farm*, 109 Cal. Rptr. at 817.

This rule was reaffirmed by the California Supreme Court in 1989 and has been followed by a substantial majority of other courts across the United States. *Garvey v. State Farm Fire & Cas. Co.*, 257 Cal. Rptr. 292 (1989); see also *State Farm Mut. Auto. Ins. Co. v. Roberts*, 697 A.2d 667 (Vt. 1997) (coverage for an included loss may not be denied merely because an excluded risk was an additional cause of loss); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn. 1995) (the policyholder is entitled to full coverage for an environmental claim if it shows that at least one cause of the loss is covered by the policy); *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 350 S.E.2d 66 (N.C. 1986).<sup>21</sup> See generally *7 Couch on Insurance* 3d . 101.57 (1997) (under the concurrent cause rule, which is employed in many jurisdictions, "coverage should be allowed whenever two or more causes do appreciably contribute to the loss, and at least one of the causes is an included risk under the policy.") (citing cases).

A 1995 article in an ABA publication concluded that this concurrent causation rule is followed in 34 states, including California, Illinois,<sup>22</sup> and Pennsylvania.<sup>23</sup> Francis J.

---

<sup>21</sup> See also *Mattis v. State Farm Fire & Cas. Co.*, 454 N.E.2d 1156, 1161 (Ill. App. 1983); *Comstock Ins. Co. v. Thomas A. Hanson & Assocs.*, 550 A.2d 731, 739 (Md. Ct. Spec. App. 1988); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978, 985, 991 (S.D. Ohio 1975); *Centermark Properties, Inc. v. Home Indem. Co.*, 897 S.W.2d 98, 101 (Mo. Ct. App. 1995) ("it is widely accepted that where an insured risk and an excluded risk constitute concurrent proximate causes of an accident, a liability insurer is liable so long as one of the causes is covered by the policy"); *Eichelberger v. Warner*, 434 A.2d 747 (Pa. Super. 1981); *Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 278 N.W.2d 857, 863 (Wis. 1979) (quoting *Essex House*).

<sup>22</sup> *Comstock Ins. Co. v. Thomas Hanson & Assocs., Inc.*, 550 A.2d 731 (1988) (applying Illinois law) (coverage found where injury was caused by a negligent cost estimate, an excluded risk, and negligence, (continued...))

MacLaughlin, *Third Party Liability Policies: The Concurrent Causation Doctrine and The Pollution Exclusion*, ABA Brief, 24-SPG Brief 20, \*22-23 (Spring, 1995), available on Westlaw and Lexis. According to that article, only four states have rejected the doctrine -- Colorado, Maryland, Michigan and Washington. *Id.* at \*23.

Courts that have adopted the concurrent cause doctrine sometimes impose a requirement that the covered cause of loss be independent of the excluded cause so as to be sure that there are really two separate causes, at least one of which is covered by the policy. That requirement is plainly satisfied here. Comprehensive general liability policies provide separate coverage for premises/operations and products/completed operations claims; indeed, these coverages can be purchased separately under separate policies. A claim that arises from both premises/operations and products/completed operations exposures has two separate and independent causes for purposes of the policies. Accordingly, policyholders are entitled to full coverage for "mixed claims" that arise from both causes under all policies that are triggered by such claims until all of the applicable limits of those policies have been exhausted.

It is particularly appropriate to apply the concurrent causation rule to coverage for asbestos-related bodily injury claims. Many courts have recognized that asbestos-related bodily injury claims are "indivisible" for purposes of insurance coverage, in the sense that it is not possible to determine how much of any claimant's injuries are attributable to particular exposures to particular products at particular times under particular circumstances. *See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507-08 (Pa. 1993). Where it is not possible, as a practical matter, to distinguish costs that are covered by a policy from costs that are excluded, the insurer should be required to pay the full loss.

In the context of defense costs, the California Supreme Court recently discussed coverage for a "mixed claim," where one part of the claim was potentially covered because it

---

an included risk); *United States Fidelity & Guar. Co. v. State Farm Mut. Auto. Ins. Co.*, 437 N.E.2d 663 (Ill. App. Ct. 1982) (duty to defend found where injury was caused by use of motor vehicle, an excluded risk, and negligence, an included risk).

<sup>23</sup> *Eichelberger v. Warner*, 434 A.2d 747, 751-52 (Pa. Super. Ct. 1981) (finding coverage where injury was caused by use of automobile, an excluded risk, and negligence, an included risk).

involved triggering harm within the policy period and another part of the claim was not potentially covered because it involved harm outside the policy period. *See Aerojet-Gen. Corp. v. Transport Indem. Co.*, 70 Cal. Rptr. 2d 118 (1997). The court found that the insurers have a duty to defend the entire “mixed claim.” *Id.* at 138-39. The court also rejected the insurers’ argument that their defense coverage obligations are limited to that part of a “mixed claim” that falls within their policy period because some harm also was caused by an occurrence outside the policy period. According to the court, “the duty to defend embraces all the parts of a claim in which some such harm may possibly have resulted, whether within the policy period or beyond.” *Id.* at 138. The court found that an insurer may allocate a portion of defense costs to the insured for “mixed claims” only if it can prove by the preponderance of the evidence that costs can be allocated between the parts of the “mixed” claim that are potentially covered, and those parts that are “not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an included occurrence.” *Id.* In this case, there is no feasible way to establish the relative impact of each asbestos exposure on the ultimate injury. Thus, the insurers should provide coverage for mixed claims under all triggered policies for which any applicable coverage has not yet exhausted.

### CONCLUSION

This paper discusses certain coverage questions that may arise in connection with a dispute about the proper insurance classification of asbestos-related bodily injury claims that are asserted against a company that owned industrial premises at which exposure to asbestos occurred, or a company that was historically engaged in the business of installing asbestos-containing insulation. Other questions that may arise in connection with such a dispute include: the statute of limitations and the doctrines of laches, waiver and estoppel. There may also be disputes about the significance of a prior course of conduct with respect to the insurance classification of claims.

\*\*\*

## Attachment A

This attachment lists cases that have ruled on the number of occurrences that are involved in asbestos-related bodily injury claims.

### 1. CASES HOLDING THAT THERE IS A SEPARATE OCCURRENCE FOR EACH CLAIMANT

*Metropolitan Life Ins. Co. v. Aetna Casualty and Surety Co.*, 765 A.2d 891 (Conn. 2001). The court held that the exposure of each claimant to asbestos was a separate occurrence. The effect of the court's ruling was that the policyholder was unable to access its excess insurance because it was unable to demonstrate that it had exhausted applicable underlying per occurrence limits which were not subject to any aggregate limit.

*Dicola v. American Steamship Owners Mutual Protection and Indem. Assoc, Inc. (In re Prudential Lines, Inc.)*, 158 F.3d 65 (2d Cir. 1998). The court held that each claim on behalf of each individual arose from a separate occurrence, and therefore was subject to a separate deductible. The court also found that, under New York law, a reasonable insured would have expected that each claimant's initial exposure to asbestos was a separate occurrence.

*Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. Ct. Spec. App. 1997). The court held that each claimant's exposure to asbestos was the immediate cause of injury and therefore a separate occurrence. The result was to provide the policyholder with greater insurance by increasing the number of per occurrence limits.

*Babcock & Wilcox Co. v. Arkwright-Boston Manufacturing Mut. Ins. Co.*, 53 F.3d 762 (6th Cir. 1995). The court found that the company's decision to use asbestos was not an event giving rise to liability. Rather, each individual's exposure to asbestos was the event causing liability, and therefore each claimant's exposure constituted a separate occurrence. In this case, that ruling favored the insurers rather than the policyholder because the policies had high per occurrence deductibles with no aggregate limit.

*Asbestos Ins. Coverage Cases*, Judicial Council Coord. Proc. No. 1072 (Cal. Super. Ct. Jan. 24, 1990). The trial court held that each claim on behalf of an individual claimant is a separate occurrence for purposes of the per occurrence limits of an insurance policy. The result was to increase the amount of insurance available under a policy that had per occurrence limits but no aggregate limit.

*Pittsburgh Corning v. Travelers Indem. Co.*, No. 84-3985, 1988 U.S. Dist. LEXIS 655 (E.D. Pa. Jan. 21, 1988). The court held that, under Pennsylvania law, the definition of occurrence is ambiguous. The court resolved the ambiguity in favor of the policyholder and held that, for purposes of per occurrence limits, each claimant's exposure was a separate occurrence.

*Cole v. Celotex Corp.*, 588 So.2d 376 (La. App. 1991), *aff'd*, 599 So.2d 1058 (La. 1992). Under Louisiana law, there is a separate occurrence for each claimant for each year of exposure. The result is that the per occurrence limits of each policy in effect during each year of exposure may be stacked to provide coverage for each claims.

## **2. CASES HOLDING THAT EACH EXPOSURE SITE IS A SEPARATE OCCURRENCE**

*Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178 (2d Cir. 1995). In reversing the trial court's finding of a single occurrence (the policyholder's decision to manufacture and sell asbestos-containing products), the court looked to the "event" that caused liability -- exposure to asbestos. Finding the deductible provision unambiguous, the court ruled that each location where the policyholder's products were found was a separate occurrence, and subject to a separate deductible. This result favored the insurers because the policies had high deductibles.

*Fina, Inc. v. Travelers Indem. Co.*, 2002 WL 171714 (N.D. Tex. Jan. 30, 2002). Stating the position that Texas courts look to the events that cause claims to determine the number of occurrences, the court found that each claimant's exposure to asbestos was a separate occurrence, and rejected the insurer's position that there was only one occurrence arising out of the policyholder's general "failure to protect its employees." Under the policy's "batch" clause, however, all claimants who were exposed at the same location at the same time constituted a single occurrence. The policy in question contained a \$300k per occurrence liability limit but had no aggregate limit applicable to the types of premises claims that were at issue.

## **3. CASES HOLDING THAT ALL ASBESTOS CLAIMS ARISE OUT OF A SINGLE OCCURRENCE**

*United States Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226 (Ill. App. Ct. 1995). The court overruled the trial court's finding that each discovery of asbestos was a separate occurrence, and therefore subject to a separate deductible. The court found that the policyholder's continuing process of manufacturing and selling asbestos containing products was the cause of the damage and that, as a result, there was only one occurrence. This ruling favored the policyholder because the policies had high deductibles.

*Owens-Illinois, Inc. v. United Ins. Co.*, 264 N.J. Super. 460, 625 A.2d 1 (N.J. Super. Ct. App. Div. 1993), *rev'd on other grounds*, 650 A.2d 974 (N.J. 1994). In a case involving policies with high deductibles, the court ruled in favor of the policyholder that the decision to manufacture and sell asbestos-containing products constituted a single occurrence.

*Stonewall Ins. Co. v. National Gypsum Co.*, 1992 U.S. Dist. LEXIS 7607 (S.D.N.Y. May 26, 1992). In a case involving policies with high deductibles, the court ruled in favor of the policyholder that the decision to manufacture asbestos-containing products constitutes a single occurrence.

*Colt Indus. Inc. v. Aetna Cas. & Sur. Co.*, No. 87-4107 (E.D. Pa. Dec. 5, 1989). The court ruled, under Pennsylvania law, that the decision to manufacture asbestos-containing products constituted a single occurrence. The case involved the application of both deductibles and policy limits.

*Air Products & Chems., Inc. v. Hartford Acc. & Indemn. Co.*, 707 F. Supp. 762 (E.D. Pa. 1989), *aff'd in part, vacated in part on other grounds*, 25 F.3d 177 (3d Cir. 1994). In a case involving policies with high deductibles, the court ruled in favor of the policyholder that all asbestos-related claims arise out of a single occurrence.

*Morton Thiokol, Inc. v. Aetna Cas. & Sur. Co.*, No. A-8603799 (Hamilton C'ty CCP, Ohio, Dec. 28, 1988). In a case involving the number of occurrences for purposes of a stop loss provision in a retrospective rating plan, the court ruled in favor of the policyholder that the corporate decision to manufacture and sell asbestos-containing brake components constitutes one occurrence.

#### 4. OTHER RULINGS

*International Surplus Lines Ins. Co. v. Certain Underwriters and Underwriting Syndicates at Lloyd's of London*, 868 F. Supp. 917 (S.D. Ohio 1994) - In finding reasonable the reinsured's determination that the all asbestos-related bodily injury claims against the underlying policyholder constituted a separate single occurrence for each applicable policy during which exposure occurred, the court noted that Ohio courts look to "the underlying circumstances which resulted in the claims for damages." Further, the choice of an occurrence basis rather than a per claim basis makes clear the intention to gauge coverage on something other than the number of individuals claiming damage.