

ORIGINAL

At I.A.S. Part 30 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, at 60 Centre Street, New York, New York on the 31 day of August 2011

P R E S E N T:

HON. SHERRY KLEIN HEITLER

Justice.

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----- X
In Re: NEW YORK CITY ASBESTOS LITIGATION :
----- X

In Re: New York City Asbestos Litigation

v.

Robert A. Keasbey Co., et al.

Index No.: 190329 / 11

Hon. Sherry Klein Heitler
Part 30

OMNIBUS

ORDER TO SHOW CAUSE

----- X
UPON the affirmation of Loring I. Fenton, Esq., dated August 30, 2011, and the exhibits annexed thereto, and the accompanying memorandum of law,

LET Plaintiffs show cause before this Court at I.A.S. Part 30, thereof, to be held in and for the County of New York, at the Courthouse, 60 Center Street, New York, New York, Room 412, on the 15 day of September 2011 at 9:30 am or as soon thereafter as counsel can be heard, why an Order should not be issued by this Court granting Greenberg Traurig, LLP's ("GT") Motion for leave to withdraw as co-counsel for defendant Robert A. Keasbey Co.; and

SUFFICIENT CAUSE being alleged, it is


ORDERED that service of a copy of this Order and the papers on which it is based be made on or before the 2nd of September 2011, by serving copies thereof on the applicable

ORIGINAL

Plaintiff's counsel by Federal Express, and the applicable defense counsel by email and publication on the NYCAL website, and such service shall be deemed good and sufficient notice of this application, and it is further

ORDERED that service of answering papers, if any, be made on or before the ___ day of _____ 2011, by serving copies thereof on GT by Federal Express; and it is further

ORDERED that oral argument shall be required on the return date of this motion if any opposition is received by the Court.

ENTERED: 

Hon. Sherry Klein Heiter, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----- X
In Re: NEW YORK CITY ASBESTOS LITIGATION :
----- X
: Index No.: 190329/11
: In Re: New York City Asbestos Litigation :
: v. : Hon. Sherry Klein Heitler
: Robert A. Keasbey Co., et al. : Part 30
: **AFFIRMATION OF**
: **LORING I. FENTON**
----- X

LORING I. FENTON, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am a Shareholder in the law firm of Greenberg Traurig, LLP (“GT”), co-counsel for defendant Robert A. Keasbey Co. (“Keasbey”) in the New York City Asbestos Litigation and, as such, have personal knowledge of all the facts contained in the Affirmation.
2. I respectfully submit this Affirmation, pursuant to CPLR 321(b)(2), in support of GT’s motion for leave to withdraw as co-counsel for Keasbey in (a) each of the cases in which GT has appeared as Keasbey’s co-counsel, which are listed in the Schedule of Cases attached hereto as Exhibit A, and (b) any other case set forth in the list of more than 23,000 cases attached to the Court’s August 18, 2011, Order (the “Order”) to the extent that GT may be deemed to have appeared therein.
3. To avoid overburdening the Court, attached hereto as Exhibit B is a true and correct copy of the Order without its extraordinarily voluminous attachment. Pursuant to the Court’s directive, the Order, and attached schedule of cases referenced in paragraph 2(b) above, was filed with the County Clerk on August 30, 2011.

4. Attached hereto as Exhibit C is a true and correct copy of the July 29, 2011, letter from Michelle L. Stegmann, Assistant Vice-President of Resolute Management Inc. to me and Anna M. DiLonardo, Esq. of Weiner Lesniak, LLP, together with the coverage decisions referenced in, and attached to, the letter as Exhibits A and B, respectively.

5. Keasbey ceased business operations in the mid-1990s and has no tangible assets other than the insurance policies that were issued to it.

6. No prior request for the relief sought herein has been made to this or any other Court.

Dated: New York, New York
August 30, 2011

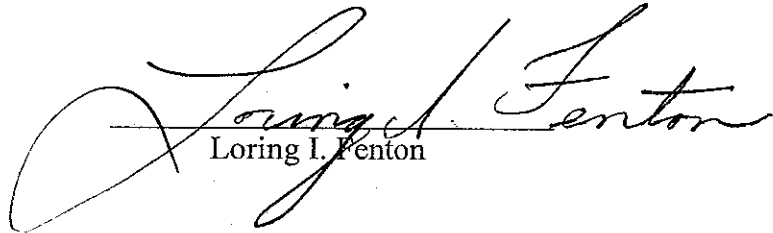

Loring I. Fenton

Exhibit A

Robert A. Keasbey Co. Cases

Plaintiff(s)	Index
Abrams, Joseph and Doris	117670/01
Abutel, Maurice	102328/96
Amato, Michael J. and Theresa	120430/01 100170/02
Ames, Jamie	107574/08
Ammirata, Frank	105488/98
Anderson, Printices and Della	112310/98
Angelella, Anthony	106368/04
Bachety, Francis X.	103846/00
Barbato, Frank A.	105481/98
Barone, Frank	102268/98
Barrett, John J. and Maureen	190157/11
Bartolomeo, Richard and Rosemarie	113040/99
Battaglia, Vincent and Anna	117461/02
Bauer, Fred	111697/98
Beauparlant, Edward	110019/98
Behr, Lutz	111191/96
Berg, Robert E, and Marie	102336/06
Berger, William	103660/98
Bittner, Edward and Nancy	113557/03
Bogovic, John	105479/98
Bolger, Ronald	101378/98
Bolte, Larry and Verna	129443/94
Bouzianis, Arthur and Catherine	100467/02
Bradford, Stephen	113416/98
Bremer, Rudolph, (Helen Bremer, Executrix)	101369/98
Brumley, Daniel and Carol	117267/02
Buckley, Ronald	118286/98
Buechler, Anton V.	102393/95
Cacciopoli, Frank	120069/98
Calderone, Philip	114928/98
Canella, John M. and Lynn	103729/07
Caputo, Angelo	104182/98
Carty, Eugene and Margaret	102755/00
Cawley, John W.	103746/07
Cirillo, Lanny and Carol	102819/01
Cogliser, Robert	109450/03
Collins, Francis and Helen	127840/93
Cope, Ronald and Loretta	112621/99
Corrigan, Terrence and Katherine	118070/01
Coughlin, John	123219/97 102347/05
Cowie, Donald and Claudette	111261/99
Cox, Philip	108196/02 114082/05
D'Alessio, Daniel E.	106886/98
Dalton, Eugene and Marsha	106052/99

Robert A. Keasbey Co. Cases

Plaintiff(s)	Index
Daly, William	102279/98
Davison, Arthur	107801/98
Dawe, Robert and Marie	124780/99
Decanio, Augustine	104009/02
DeFrancesco, Frank	110229/08
Demeri, Angelo	112888/07
Demeri, Anthony and Elaine	119796/02
DeVita, Vincent	122495-98
Diffily, Daniel and Sally	111986/94
DiSanto, Mario	111717/98
Dixon, William Irving (William Charles as Admin.)	100790/00
Doyle, Robert E.	105292/00
Dybvik, Erling and Selman	100059/97
Elefante, Sr., Nicholas and Loretta	117088/02
Ellefsen, Erling	101910/95
Erdman, Edwin G.	101186/98
Farelli, Anthony and Phyllis	101752/02
Ferraro, Vincent and Virginia	115314/02
Festa, Joseph	120430/01 100157/02
Fitton, William	118882/03
Fitzgerald, William J.	102275/98
Flanagan, Peter and Viola	132596/94
Forster, Alfred	103904/99
Franco, Patrick	101388/98
Galewski, Bernard	104002/02
Gargiullo, Alexander	111066/98
Garrett, Robert	114100/03
Garro, Anthony	103786/95
Gary, Robert E.	112128/99
Gavigan, Willis R.	126765/02
George, Alfred	110927/99
Gibbons, John	112321/98
Ginsberg, Benjamin and Eleanor	116848/00
Gorini, Robert	108715/03 107269/99
Graci, Felippo	104690/05
Graves, Robert	190080/08
Greene, Lawrence	101519/94
Greene, Raymond	101384/98
Gregorio, Joseph and Catherine	101750/02
Guzik, Joseph and Tuoi Thi	119391/00
Habeeb, Arthur	101383/98
Hannigan, Thomas and Veronica	101485/02
Hansen, John	114112/03
Hansen, Martin and Ellen	117349/01
Harvey, Frank and Catherine	100788/01

Robert A. Keasbey Co. Cases

Plaintiff(s)	Index
Hauser, George K and Marcella	190052/09
Hein, Stanley J.	109427/95
Henenberg, Edward O. and Ann	111502/00
Henry, Charles J. and Marilyn	119820/98
Hindle, John	103651/99
Holton, May (dec.)	116681/95 111074/98
Hoyt, Robert	103765/99
Iannolo, Salvatore	113399/98
Julias, Stephen D. (Estate of)	103514/98
Kerrick, Jack and Gloria	129445/94
Kuhn, Charles	133736/93
Lambo, John B and Angela	109588/06
Langstaff, Edward	103660/98
Lares, Richard	101756/02
Lepore, Martin	104692/05
LiCause, Vincent and Mary	127849/93
Lincoln, Frank E. and Phyllis A.	113709/00
Lorentz, Robert G. and Julia	111109/00 114496/05
Marino, Erasmo and Patricia	114433/98
Martin, Christopher F. and Jacque	106810/00
Martin, Robert C. and Ann Belle	119202/96
Martini, Edward	117394/06
Mason, Thomas	190178/10
Massello, Augustine P.	111636/02
Mazur, Edward (Jr.) and Barbara A.	100608/99
Mazza, Raymond and Frances	109091/01
McCann, Thomas and Joan	100489/99
McGee, James L.	190180/09
McKenna, Robert	111035/98
McSpedon, Joseph Howard and Heather	113033/96
McWilliams, Essie	104682/05
Meehan, James	100037/99
Mimnaugh, James	100652/06
Miranda, Ernesto and Diana	104346/08
Morello, Thomas and Rose	120545/94
Moriarty, Charles B.	116365/99
Mullin, Charles	109256/03
Nichols, Joseph and Margaret	117695/01
Oberfield, Albert & Richard	120543/94
O'Brien, Mark and Shirley	106318/01
O'Connell, Philip	122390/97 105232/98 111037/98
O'Connor, James	107430/03
O'Kane, Brian	104681/05

Robert A. Keasbey Co. Cases

Plaintiff(s)	Index
Olah, Robert	105686/96
Orlowsky, Stefan	116928/00
Pasquini, Nattle	126822/95
Peterson, Charles and Theresann	109411/01
Petrizzo, Anthony F. and Genevieve	113224/99
Pettit, Joseph V.	105354/03
Pirro, Carlo and Victoria	117864/02
Polotaye, Robert and Sandra L.	190028/11
Posluszny, Stanley	103447/03
Racsok, Michael and Francis	132594/94
Reynolds, Dennis	118833/96 113281/97 111041/98 125939/00
Riley, Richard M.	110820/00
Rogers, Donald & Agnes	110919/94
Roksvold, Thomas and Maryanne	120685/97
Ruocco, Peter	103766/99
Russo, Gertrude (dec.)	110414/02
Ryder, Raymond and Myriam	129394/95
Salerno, Joseph & Angie	113573/96
Scarlett, James	103903/99
Scere, Thomas	111114/00
Schanil, Edward G.	114114/03
Schumer, Marvin	105423/99
Scott, Royal E.	106071/98
Scotto, Richard	111452/98
Seidita, Giuseppe and Josephine	105629/99 190464/10
Shivers, Lawrence Sr. (Dennis as Admin)	114031/99
Siegel, Joseph	104693/05
Signorino, Thomas	110058/06
Sky, Walter A.	105281/00
Soper, James	106066/98
Stadler, William T. and Anna May	113986/99
Stagnitta, Thomas	108233/98
Stumme, George	106012/98
Stutman, Perry	124098/02
Surre, John	112820/07
Swanson, Edward	120431/01 123593/01
Taylor, Richard J.	117855/02 111191/06
Tedesco, Anthony	105507/95
Telesmanich, Roy and Isle	118992/02
Thompson, Walter and Bonnie	111726/94
Tortorici, Michael and Pauline	129441/94

Robert A. Keasbey Co. Cases

Plaintiff(s)	Index
Trotta, Edward J. and Marie	108011/11
Turek, Leon (Sandra Whitmore as Executrix)	129447/94
Vitale, Alfred	123359/99 121276/99
Viviano, Matthew	106638/96
Watson, Edward	126822/95
Weaver, David and Sarah	108982/02
Weik, Henry and Joan	102818/01
Weir, Robert	109865/96
Wilkie, Victor	118313/96
Wojno, Bruce and Theresa	190062/08
Young, James and Brenda	114445/01

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----- X
In Re: NEW YORK CITY ASBESTOS LITIGATION :
----- X
:
:
:
(See Attached Schedule of Cases and Index Numbers) :
:
:
----- X

Index No.: 190329/11
Hon. Sherry Klein Heitler
Part 30

ORDER

WHEREAS, defense counsel for the Robert A. Keasbey Co. (“Keasbey”) has been informed by Keasbey’s insurers that they will no longer pay for any legal fees or disbursements incurred after July 31, 2011;

WHEREAS, Keasbey’s defense counsel, Greenberg Traurig, LLP and Weiner, Lesniak LLP, each intend to file a single Omnibus Motion to withdraw as counsel for Keasbey applicable to all cases in which they have appeared, respectively, as Keasbey’s defense counsel;

WHEREAS, Keasbey has been sued in over 23,000 cases in the New York City Asbestos Litigation (“NYCAL”); and

WHEREAS, paragraphs IV (C) (3-4) of the Amended Case Management Order governing the NYCAL require (i) the Clerk to file a copy of any motion applicable to more than one case in the separate file bearing the index number for each such case, and (ii) movant to provide sufficient copies of the motion so that the Clerk may file the motion in each such separate file;

IT IS HEREBY ORDERED that upon payment of the appropriate fee, if any, the County Clerk shall issue an index number and RJJ with the following caption: In Re New

York City Asbestos Litigation vs. Robert A. Keasbey Co., et al.;

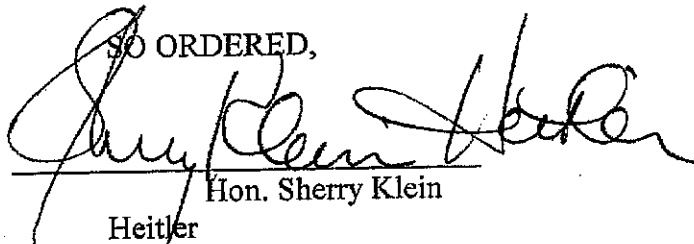
IT IS FURTHER ORDERED that each of the cases in the attached schedule shall be consolidated using this index number for the purposes of the Omnibus Motions only;

IT IS FURTHER ORDERED that this Order, the Omnibus Motions, and any Order issued by the Court with respect to the Omnibus Motions, shall be filed solely under this index number;

IT IS FURTHER ORDERED that this Order be attached to the Omnibus Motions, which shall be served on the applicable plaintiff's counsel by federal express and on the applicable defense counsel by e-mail and publication on the NYCAL website.

Dated: New York, ~~New York~~
August 18, 2011

SO ORDERED,



Hon. Sherry Klein
Heitler

HON. SHERRY KLEIN HEITLER

Exhibit C

Michelle L. Stegmann
Assistant Vice President
Midwest Division
732-274-0223 – tele
michelle.stegmann@cna.com

Midwest Division
P.O. Box 914
Dayton, NJ 08810

July 29, 2011

Loring I. Fenton
Greenburg Traurig
200 Park Avenue
New York, NY 10166

Anna M. DiLonardo
Weiner Lesniak LLP
888 Veteran's Memorial Highway, Suite 540
Hauppauge, NY 11788

Re: Robert A. Keasbey Co. ("Keasbey"): Continental Casualty Company and American Casualty Company of Reading, PA (collectively, "Continental") Withdrawal from Defense of Asbestos Actions

Dear Mr. Fenton and Ms. DiLonardo:

The New York Supreme Court, Appellate Division, First Department, previously held that there is no indemnity coverage for asbestos actions brought against Keasbey. *Continental Cas. Co. v. Employers Ins. Co. of Wausau, et al.*, 871 N.Y.S.2d 48 (N.Y.A.D. 1st Dept. 2008). Exhibit A hereto. Recently, on June 2, 2011, that same Court concluded that Continental "has no further obligation to defend or indemnify Keasbey in asbestos actions pursuant to the primary comprehensive general liability policies it issued to Keasbey covering in aggregate, the period from February 15, 1970 to February 15, 1987...." *Continental Cas. Co. v. Employers Ins. Co. of Wausau, et al.*, 2011 N.Y. Slip Op 04594. Exhibit B hereto. These opinions are final and not subject to further appeal.

Pursuant to the above authority, Continental hereby notifies you that it is withdrawing from its participation in the defense of asbestos actions against Keasbey.

Please submit your firm's final invoice to Continental and be advised that Continental will not pay for work after July 31, 2011. Thank you for all your efforts in the defense of Keasbey.

Very truly yours,

Michelle Leslie Stegmann /BS

Michelle Leslie Stegmann

Attachments

Exhibit A

Time of Request: Friday, July 29, 2011 12:41:35 EST
Client ID/Project Name: cna
Number of Lines: 628
Job Number: 1828:298654936

Research Information

Service: LEXSEE(R) Feature
Print Request: Current Document: 1
Source: Get by LEXSEE(R)
Search Terms: 871 nys2d 48

Send to: BOOTH, CHARLES
FORD MARRIN ESPISITO WITMEYER & GLESER
88 PINE ST FL 23
NEW YORK, NY 10005-1801



[*1] Continental Casualty Company, et al., Plaintiffs-Appellants-Respondents, v Employers Insurance Company of Wausau, et al., Defendants-Respondents-Appellants, Michael O'Reilly, etc., et al., Defendants-Respondents, Robert A. Keasbey Company, etc., Defendant. The Travelers Indemnity Company, Amicus Curiae.

601037/03, 2441

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2008 NY Slip Op 10227; 60 A.D.3d 128; 871 N.Y.S.2d 48; 2008 N.Y. App. Div. LEXIS 9966

December 30, 2008, Decided

December 30, 2008, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Leave to appeal denied by *Cont'l Cas. Co. v. Empls Ins. Co. of Wausau*, 13 N.Y.3d 710, 918 N.E.2d 962, 2009 N.Y. LEXIS 4020, 890 N.Y.S.2d 447 (2009)

Subsequent appeal at, Claim dismissed by, Remanded by *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 2011 N.Y. App. Div. LEXIS 4461 (N.Y. App. Div. 1st Dep't, June 2, 2011)

PRIOR HISTORY: *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 16 Misc. 3d 223, 839 N.Y.S.2d 403, 2007 N.Y. Misc. LEXIS 3336 (2007)

COUNSEL: Duane Morris LLP, New York (Thomas R. Newman and Kimball Lane of counsel), and Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Charles A. Booth and Kyle Medley of counsel), and Grippo & Elden LLC, Chicago, IL (Gary M. Elden, Todd C. Jacobs, Irving C. Faber, Marc S. Lauerman, John E. Bucheit and [*2] Brian J. Mowbray, of the Illinois Bar, admitted pro hac vice, of counsel), for appellants-respondents.

Zelle Hofmann Voelbel Mason & Gette LLP, Minneapolis, MN (Rolf E. Gilbertson of the Minnesota Bar, admitted pro hac vice, of counsel) and Seward & Kissel LLP, New York (Dale C. Christensen, Jr. of counsel), for Employers Insurance Company of Wausau, respondent-appellant.

Hardin, Kundla, McKeon & Poletto, P.A., New York (George R. Hardin and John R. Scott, of the New Jersey Bar, admitted pro hac vice, of counsel), for Employers Liability Assurance Company, respondent-appellant.

Gilbert Randolph LLP, Washington DC (August J. Matteis, Jr., David N. Webster, and Charley C. Sung of the District of Columbia Bar, admitted pro hac vice, and Richard D. Shore, Ted J. Feldman and Mark Tanney of counsel) and Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains (Philip M. Halpern and Scott M. Salant of counsel) and Weitz & Luxenberg P.C., New York (Perry Weitz of counsel), for respondents.

Simpson Thacher & Bartlett LLP, New York (Andrew T. Frankel, Mary Beth Forshaw and Elisa Alcabes of counsel), for amicus curiae.

JUDGES: Peter Tom, J.P., David H. Friedman, Eugene Nardelli, James M. Catterson, JJ. Opinion by Catterson, J. All concur.

OPINION BY: James M. Catterson

OPINION

[**130] Cross appeals from an order of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about June 11, 2007, insofar as it declared that the asbestos claims against insured Keasbey are not within the products liability coverage, and thus not subject to the policies' aggregate limits; that the defendant class is not subject to the affirmative defenses that plaintiffs may have had against Keasbey; that coverage for the defendant class is triggered by exposure and that each individual class member's exposure to conditions resulting in bodily injury constituted a separate occurrence; and that the aggregate limit of CNA's policy RDU 8047261 was not exhausted.

[***50] CATTERSON, J.

In this declaratory judgment action, plaintiff insurance companies seek a declaration that they do not have a duty to indemnify the now-defunct insured, Robert A. Keasbey Co., in pending asbestos-related claims. Although the tort claims of the defendant class (hereinafter referred to as "the claimants") have not yet been adjudicated, and even though a judgment must be entered against Keasbey before an action could be brought under *Insurance Law* § 3420(a)(2) against the plaintiffs, the insurers seek the declaration that all the pending claims in the underlying complaints against Keasbey fall within the products hazard/completed operations coverage. Such coverage is subject to aggregate limits which indisputably were exhausted after the insurers paid out more than \$ 110,000,000 in negotiated settlements on policies issued to Keasbey.

Continental Insurance Co. and American Casualty Co. (hereinafter referred to as "CNA") initiated this action first against its insured, Keasbey, as aggregate limits were being exhausted by lawsuits that had been brought against Keasbey as a manufacturer, seller and distributor of an inherently dangerous product, asbestos. In May 2001, counsel for about 20,000 claimants informed Keasbey and CNA that these claimants would be pursuing a new theory of liability (non-products or "operations" coverage), which was not subject to aggregate limits, and thus opened up Keasbey and its insurers to "perpetual coverage."

The record reflects that now-dissolved defendant Keasbey was an insulation contractor that installed, repaired, renovated and [**131] removed insulation at various sites in and around New York since the [*3] late 1800s. Keasbey distributed and installed insulation materials for industrial and commercial facilities including the powerhouses, Consolidated Edison and other utilities. Until about 1972 those insulation materials con-

tained asbestos. Keasbey also mixed [***51] and distributed two asbestos-containing finishing cements.

Most of the litigation against Keasbey occurred as a result of the post-World War II construction boom in the 1950s and 1960s, and the need for new and upgraded powerhouses. The increase in construction activity also increased the use of asbestos-containing insulation in powerhouses and other commercial facilities.

By 1965, however, studies conducted by Dr. Irving Selikoff and his research team at Mt. Sinai Hospital revealed the potential dangers of asbestos. Dr. Selikoff's studies sparked concern among asbestos workers, other trades and their employers, about the use of asbestos.

As a result of these developments, ConEd directed, in 1971 and 1972, that asbestos no longer be used at ConEd sites; Keasbey complied with ConEd's directive. Keasbey management also issued a written directive in the early 1970s banning the use of asbestos-containing products.

The subject insurance policies are 17 primary level comprehensive general liability (hereinafter referred to as "CGL") policies that were issued by CNA to Keasbey between February 1970 and February 1987. None of the CNA policies issued to Keasbey during this time period contained asbestos-related exclusions.¹ The primary policies generally insured Keasbey against claims for "bodily injury" caused by an "occurrence."

¹ CNA also issued excess policies.

The CNA policies have aggregate limits that apply only to claims that come within the definition of "products hazard" or "completed operations hazard." The products hazard aggregates range from \$ 300,000 to \$ 1,000,000 per policy, with combined aggregate limits of \$ 8,700,000. Under the policies, "products hazard" "includes bodily injury [...] arising out of the named insured's products [...] but only if the bodily injury [...] occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others."

The completed operations hazard is defined as: "bodily injury and property damage arising out of operations [...] but only if [**132] 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 CNA policies contain no aggregate limits for claims that are not products hazards, such as "operations" claims. The only limitation for such coverage is the per occurrence provision in each policy. Between 1972-78 CNA additionally issued Keasbey five excess policies with aggregate limits totaling \$ 50 million.

Since 1986, thousands of individuals have brought tort claims against Keasbey for asbestos-related injuries. Most of the claimants are tradesmen and other individuals who worked for other companies and who were allegedly exposed to asbestos while working in the vicinity of Keasbey insulators.

In the early 1990s, New York state and federal judges consolidated hundreds of the asbestos claims in litigation known as the "Powerhouse Cases." Keasbey was a defendant in those consolidated [*4] actions. Claimants tried the cases against Keasbey on a strict products liability and negligent "failure to warn" theory emphasizing Keasbey's role as manufacturer and distributor of asbestos products.

None of the plaintiffs in the Powerhouse Cases ever presented any evidence of Keasbey's negligent installation. Until [***52] 2001 the insured, the insurers, primary and excess carriers, and the claimants all treated Keasbey claims as strict products liability claims based on the inherently dangerous nature of Keasbey's asbestos products.

While the Powerhouse Cases proceeded, CNA, among others, engaged in settlement discussions with counsel for the claimants. As CNA emphasizes, Keasbey pushed at that time to bring in its excess carriers because the claimed damages appeared to exceed the aggregate amounts of products coverage left under the subject primary policies. Keasbey accepted the excess carriers' contributing funds to the State Powerhouse Cases, and did not object to the cost-sharing agreement among the excess carriers, which expressly treated the asbestos claims as products hazard claims subject to the aggregate limit.

Thus, by May 1992, CNA exhausted their aggregate limits of \$ 8,700,000 in the State Powerhouse Cases. Between May 1992 and May 2001, the excess insurance carriers, including CNA, paid out more than \$ 100,000,000 under their policies and, for all intents and purposes, CNA exhausted their excess policy limits [**133] also ². Keasbey ceased doing business in 1995, and was dissolved in 2001.

2 While CNA asks this Court for a declaration that four of its excess policies which paid out a total of \$ 50 million in indemnity and defense costs exhausted their products aggregates, the exhaustion of these is not contested in this appeal. The issue of exhaustion of aggregate limits remains and is determined below—with respect to only one of CNA's excess policies, RDU 8047261, which had aggregate limits of \$ 1,000,000.

By letter dated May 15, 2001, the attorneys for the majority of the remaining asbestos-injured claimants sent

a letter to Keasbey's litigation counsel asserting that the remaining claims against Keasbey were "non-products" or "operations" hazard claims that were not subject to the products hazard aggregate limits. The letter stated in relevant part:

"it is highly likely that the products/completed operations aggregate limits do not apply to these so-called non-products' claims. As a result, the actual value of Keasbey's insurance asset appears to be vastly greater than is reflected [...] The claimants therefore wish to ensure [...] that Keasbey and the carriers do not [...] otherwise extinguish the insurers' obligations that, in many cases *could be perpetual*." (emphasis added).

The letter did not identify any particular claimant, lawsuit or insurer.

CNA did not issue a disclaimer of coverage in response to the May 15, 2001 letter; instead, it [*5] commenced this declaratory judgment action in October 2001 against Keasbey and added as of right the defendant class of asbestos claimants against Keasbey. CNA asked the court to declare that it owed no duty to indemnify Keasbey for any of the pending asbestos-related bodily injury claims because *all* of the remaining claims were within the definition of products liability/completed operations coverage in the primary level policies that CNA had issued to Keasbey, that the limits of the subject policies had been exhausted, and that CNA had other defenses to further obligations under the policies.

Following a transfer of venue from Westchester County to New York County, the case was certified as a class action against the defendant class in January 2004. After extensive discovery and motion practice, a nonjury trial began on July 13, 2005, and ended on October 28, 2005. Keasbey, which had already ceased operations, defaulted in the action.

[**134] [***53] The trial court concluded, *inter alia*, that CNA had failed to carry its burden in showing that pending asbestos claims fall within the "products aggregates" of the subject insurance policies for products hazard and completed operations coverage. Moreover, it determined that the claimants were entitled to coverage under the "operations" provision.

Second, the court decided that the defunct Keasbey was guilty of laches but that the claimants were not subject to the affirmative defenses that CNA may have had against Keasbey. The court observed that such defenses as timely notice of claim, laches, ratification, estoppel

and judicial estoppel were based on Keasbey's conduct, and that any right of the members of the defendant class to sue CNA was not derived from Keasbey directly, but was derived from *Insurance Law* § 3420(a)(2). Thus, the court determined that the only defenses the insurer had against the injured claimants were those that "grow out of" the terms of the policy. The court also determined that CNA would nonetheless be precluded from asserting affirmative defenses, as it failed to timely disclaim coverage as to the class defendants.

Third, the court determined that coverage for asbestos-related injuries is triggered by exposure through inhalation and that each separate class member's exposure to conditions resulting in bodily injury constituted a separate occurrence under the subject insurance policy.

Further, the court held that CNA could not rely on the "expected or intentional" exclusion, nor on the pollutant exclusion under the primary policies; and that the aggregate limit of plaintiff's excess policy RDU 8047261 was not exhausted. Finally, the court determined that One Beacon's defense obligations extended only to claims arising out of an exposure to a Keasbey asbestos-containing product at the Indian Point Nuclear Power Plant Units # 2 and # 3.

On appeal, CNA asserts that the trial court erred in virtually every determination except the finding that Keasbey was guilty of laches. CNA argues that the "operations" provision is not applicable to the suits of the claimants because there is no evidence whatsoever that bodily injury in the plain meaning of the phrase was sustained while installation operations were ongoing or that it was incurred before the completion of any of the projects.

CNA also asserts that since Keasbey has defaulted, the claimants stand in the shoes of Keasbey, and thus the equitable [**135] affirmative defenses like laches, waiver and equitable estoppel may be used against them; that exposure/inhalation is not the trigger according to applicable policy provisions; and that the trial court was wrong about allocating the burden of proof to CNA. Additionally CNA asserts that its excess policies should be declared exhausted.

[*6] Defendant One Beacon America Insurance Company cross-appeals from that part of the order declaring that CNA's claims for reimbursement and contribution against One Beacon were not barred by CNA's failure to provide timely notice of the claims for which reimbursement and contributions were sought. Defendant Employers Insurance Company of Wausau also cross-appeals from the court's findings of fact and conclusions of law with respect to the obligations of CNA and One Beacon under their policies.

At the outset, we find that a disclaimer of coverage is not necessary in order for CNA to preserve its defenses under the policy. See *Generali-U.S. Branch v. Rothschild*, 295 A.D.2d 236, 237-238, 744 N.Y.S.2d 159, 161 (1st Dept. 2002) (commencement of a declaratory [***54] judgment action can constitute disclaimer); see also *Travelers Ins. Co. v. Volmar Constr. Co.*, 300 A.D.2d 40, 45, 752 N.Y.S.2d 286, 290 (1st Dept. 2002) (insurer has duty to disclaim only after it receives demand for defense and indemnification).

Further, for the reasons set forth below, this Court finds that the trial court erred in denying CNA the declaration it sought. As a threshold matter, it is well established that CNA has the burden of proving that it is entitled to the declarations it seeks. *Mount Vernon Fire Ins. Co. v. NIBA Constr.*, 195 A.D.2d 425, 427, 600 N.Y.S.2d 936, 937 (1st Dept. 1993) (Sullivan J., concurring). For CNA to obtain a declaratory judgment as to its obligation to indemnify in advance of trial, it must demonstrate as a matter of law that "there is no possible factual or legal basis on which the insurer may eventually be held liable under its policy." *First State Ins. Co. v. J & S United Amusement Corp.*, 67 N.Y.2d 1044, 1046, 504 N.Y.S.2d 88, 90, 495 N.E.2d 351, 353 (1986).

Notwithstanding the foregoing, the equally well established principle is that an insured must prove entitlement to the coverage sought while an insurer must prove an exclusion in the policy to defeat coverage. *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218, 746 N.Y.S.2d 622, 625, 774 N.E.2d 687, 690 (2002). Since Keasbey, the insured, defaulted and claimants stand in its shoes, claimants bear the same burden of proof. *D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 665, 563 N.Y.S.2d 24, 27, 564 N.E.2d 634, 637 (1990).

[**136] In this case, CNA demonstrated that there exists no possible basis, factual or legal, for liability outside of the products/completed operations provisions. In any event, claimants did not produce any evidence whatsoever in support of the new theory of liability; namely, that injuries arose before contracting operations by Keasbey were completed.

In the most egregious part of its determination, the trial court agreed that Keasbey was guilty of laches but that none of the equitable defenses of laches, waiver, ratification or estoppel were available to CNA against the claimants. The court found that Keasbey had never brought a declaratory judgment action asserting that there should be "operations" coverage for asbestos claims against it. It further found that CNA, as Keasbey's insurer, would be prejudiced in defending any such "operations" claims because numerous material witnesses

had died, and relevant documents are no longer available.

Indisputably, Keasbey was guilty of laches. The court found, however, that the claimants were in a different position. In so ruling, the trial court misconstrued *Insurance Law § 3420*, which deals with the rights of an injured plaintiff to proceed directly against an insurer after obtaining judgment against an insured. See *Lang v. Hanover Ins. Co.*, 3 NY3d 350, 354-355, 787 N.Y.S.2d 211, 214, 820 N.E.2d 855, 858 (2004), quoting *Coleman v. New Amsterdam Cas. Co.*, 247 N.Y. 271, 275, 160 [*7] N.E. 367, 369 (1928) (Cardozo, Ch.J.) (under New York's direct action statute, *Insurance Law § 3420*, the rights of an injured claimant against the insurer are no less and *no greater* than those of the insured). This plainly means that all the defenses available to an insurer against an insured are available also against injured claimants.

In its departure from New York law, the trial court appeared to rely on *Rucaj v. Progressive Ins. Co.* (19 AD3d 270, 797 N.Y.S.2d 79 [1st Dept. 2005]), in which this Court held that an insurer's defenses in a *section 3420* action against a claimant are [***55] those it would have against the insured. Then, without the support of any legal authority, the court stated: "That should not be held to mean that all of the insurer's defenses against the insured are available against an injured claimant." Instead of relying on case law that was precisely on point, the trial court relied on two cases that had nothing to do with rights derived from *Insurance Law § 3420*.

The principle that neither party in a *section 3420* action has any rights greater or lesser than if the action were between insurer and insured has been consistently applied by the Court [**137] of Appeals and intermediate appellate courts, which have found that those rights include the equitable affirmative defenses available against a policyholder. See *D'Arata*, 76 N.Y.2d at 665, 563 N.Y.S.2d at 27. In *D'Arata*, the plaintiff, a victim of an assault, brought an action under *section 3420*, seeking to compel the insurer to pay a judgment on behalf of the insured defendant up to the limit of the policy. The insurer used collateral estoppel as an affirmative defense asserting that the plaintiff was estopped from relitigating the issue of insured's intent to inflict bodily injury. *Id.* at 662, 563 N.Y.S.2d at 25 (analysis related to whether a finding in a criminal proceeding could be used to satisfy the expected and intended exclusion of the policy).

In considering whether the defense barred the claim, the Court of Appeals first observed that the affirmative defense of collateral estoppel is an "equitable doctrine [...] grounded on concepts of fairness and should not be rigidly or mechanically applied." *Id.* at 664; 563

N.Y.S.2d at 26. The Court further held that the plaintiff was subject to the same affirmative defenses that would apply against the insured, and explained: "Plaintiff by proceeding directly against [insurer] does so as subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured." *Id.* at 665, 563 N.Y.S.2d at 27; see also *Zimmerman v. Tower Ins. Co.* of N.Y., 13 AD3d 137, 138-139, 788 N.Y.S.2d 309, 310-311 (1st Dept. 2004) (plaintiff subrogee of insured's rights is subject to whatever rules of estoppel that would apply to insured); *Van Gordon v. Otsego Mut. Fire Ins. Co.*, 232 A.D.2d 405, 648 N.Y.S.2d 306 (2d Dept. 1996) (noncooperation of insured party is ground upon which insurer was denying coverage and may be asserted by insurer as defense in action on a judgment by injured plaintiff pursuant to *Insurance Law § 3420(a)*).

Thus, the issue is not whether claimants engaged in delay and are guilty of laches. The issue properly framed is whether claimants can obtain coverage under a newly asserted theory of liability when the insured engaged in acts or omissions that would preclude that coverage had the insured brought this claim. The answer must be, as precedent demands, that equitable affirmative defenses are available to CNA against the claimants who stand in Keasbey's shoes, and that if laches is available against Keasbey, it may be used against the claimants.

Laches is an equitable doctrine based on fairness. Courts have invoked the doctrine to prevent stale claims and the prejudice that can result. Whether the doctrine is applicable, however, depends on [*8] the facts of the case. See *Orange & Rockland Util.* [**138] *v. Philwold Estates*, 70 A.D.2d 338, 343, 421 N.Y.S.2d 640, 643 (3rd Dept. 1979), modified, 52 N.Y.2d 253, 437 N.Y.S.2d 291, 418 N.E.2d 1310 (1981).

In this case, the inequity would be particularly egregious. As the amicus curiae brief asserts in behalf of Keasbey's insurers, CNA would be in a position to [***56] owe "perpetual and virtually unlimited obligations to provide coverage for a never-ending torrent of asbestos claims" under a theory of coverage "never before asserted by Keasbey," and yet they would be "hampered in their ability to defend [...] because of the loss of evidence." Here, counsel for claimants raised the possibility of "perpetual coverage" under a new theory of liability in May 2001 as the products aggregates were being exhausted. As a result of negotiated settlements, eventually more than \$ 110,000,000 was paid out over 10 years, largely to the clients of the law firm of Weitz & Luxenberg. Of that, CNA paid out \$ 8.7 million on its primary policies and more than \$ 50,000,000 as an excess insurer.

Moreover, testimony at the bench trial in this case adduced the following: that until 2001, Keasbey was

sued as a manufacturer, distributor and seller for strict products liability and failure to warn. Keasbey argued in each case that it was an installer (which should have triggered "operations" coverage for alleged negligent installation), but Keasbey always lost that argument. Claimants, or rather counsel for claimants, apparently did not want to be involved in cases where they would have to prove that bodily injury was tied to a specific accident or occurrence of negligent installation in a specific period of time when the installer had used a specific manufacturer's asbestos product.

Indeed, the simplest route to recovering damages for asbestos-related claims after 1973 was to assert products liability against the manufacturer, distributor or seller based on asbestos being "unreasonably dangerous." See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 969, 95 S.Ct. 127, 42 L.Ed.2d 107. Under *Borel*, which was followed in New York, claimants were obligated to prove only that (1) they had been exposed to defendant's product and (2) show an asbestos-related disease. Additional relief for claimants appeared in 1986 when a legislative amendment to the statute of limitations meant that the clock started running upon "discovery" of disease rather than actual injury.

The foregoing events led to the biggest mass tort litigation of our time with courts in New York creating asbestos dockets where cases, sometimes hundreds at a time, were consolidated and special asbestos rules allowed standard complaints and [**139] discovery requests to be used in cases where, as CNA asserts, facts were tried for a few and then special verdicts were applied to all. Cases against Keasbey were brought mainly in New York by a handful of law firms, the most prolific of which were Weitz & Luxenberg, and Wilentz Goldman.

Testimony further adduced that a typical claimant filed a standard asbestos complaint generally against a list of defendants which typically read: "During the course of [plaintiff's] employment, plaintiff was exposed to the defendants' asbestos and asbestos containing materials to which exposure directly and proximately caused him to develop an asbestos related disease." All claimants alleged that Keasbey was a manufacturer and seller who "should have known" about the health hazards of products and warned others of those hazards.

The record reflects that in the State Powerhouse consolidation trial of 1992, two claimants obtained multi-million damages verdicts after claimants' counsel opened the proceedings by pointing to [*9] Keasbey's role as a manufacturer with a "resultant obligation" to understand [...] its resultant potential liability for a failure to warn." Counsel closed by calling Keasbey a "mur-

derer." After 1992 and until 2003, [***57] only a few Keasbey cases began trial and all settled before verdict

As to settlement negotiations, testimony at trial further adduced the following: In late 1991, court-supervised settlement negotiations began in the State Powerhouse Cases combined with Federal Powerhouse Cases. In cases from both jurisdictions, hundreds of claimants, dozens of defendants and insurers for each defendant participated in negotiations. CNA was part of the discussions as Keasbey's primary insurance carrier; subsequently Hartford, Keasbey's excess carrier, joined the discussions, as did excess carriers INA and Fireman's Fund, a second-level insurer.

As CNA asserts, it was understood that excess carriers would pay for Keasbey's asbestos cases only if prior products cases had exhausted the aggregate limits in the primary policies and if the pending cases were all products-hazard cases. Since insurers at the time were aware that a "non-products" argument could avoid aggregation, Hartford, INA and Fireman's Fund scrutinized the evidence on these issues to satisfy themselves that the claims indeed fit within the products-hazard coverage and thus were subject to aggregate limits.

Indeed, trial exhibits established that Keasbey's counsel discussed coverage issues including whether to file a declaratory [**140] judgment coverage action arguing for coverage beyond aggregate limits such as would be available in claims pursuant to "operations" coverage. As determined by the trial court, Keasbey never filed such an action, and in fact testimony at trial established that until 2001, when CNA was paying the last of its excess coverage, nobody questioned that Keasbey asbestos claims were products claims subject to products aggregate limits. By the time aggregate limits were reached, claimants had received more than \$ 110,000,000 in satisfaction of their claims.

Ultimately, the prejudice in defending against a new theory of liability (see discussion below) that is particularly dependent on establishing facts for each individual claimant is obvious when witnesses have either died or are suffering from faded memories, and relevant documents have been lost. Given the foregoing, it is patently false for claimants to argue that CNA knew that asbestos claims against Keasbey are likely to be "operations" claims. On the contrary, prior to CNA reaching the aggregate limit of its coverage in 2001, all claims were products claims. Thus, CNA had no reason to preserve evidence or perpetuate testimony (even had it been able to depose claimants), or seek declaratory relief regarding any particular insured.

The well-established rationale for the doctrine of laches is to prevent a party from injustice that would arise from the assertion of stale claims. See *Marcus v. Village*

of *Mamaroneck*, 283 N.Y. 325, 332, 28 N.E.2d 856, 859 (1940) (defense of laches is based upon the principle that plaintiffs have delayed to the prejudice of defendants). Thus, the trial court correctly found that laches is applicable in this case.

However, contrary to the court's findings, there is nothing at all inequitable in applying the doctrine to the claimants. Even if the Insurance Law did not require such application to the subrogee claimants, in this case it is fittingly applied to them. It is worth noting that as late as 2003, a Keasbey trial brought by claimant Michael O'Reilly opened and closed in a fashion consistent with all prior cases. Keasbey was sued as manufacturer, seller or distributor on theories of strict products liability and failure to warn. In this case, the same Michael O'Reilly stands as the class representative, typical [*10] of all class members, who apparently would sue Keasbey [***58] for sustaining bodily injury during Keasbey's negligent installation of asbestos under a non-products theory simply because the theory provides a new set of deep pockets. In another case, where a claimant is now also a member of defendant class, counsel defeated a summary judgment [**141] motion filed by Keasbey by arguing that Keasbey was a manufacturer and seller of asbestos-containing products. No evidence was presented that Keasbey was negligent in installation. The summary judgment motion was argued in October 2003, more than two years after counsel had raised the issue of non-products claims against Keasbey.

We find therefore that laches in this case is a valid affirmative defense against the claimants who stand in defendant Keasbey's shoes, and it bars the claim of the defendant class. Thus, there exists no legal basis on which the insurer may eventually be held liable for operations coverage under its policy.

Furthermore, the trial court erred in holding that a factual basis exists for CNA's liability under the non-products/operations provisions because it incorrectly relied on the holding in *Frontier Insulation Contrs. v. Merchants Mut. Ins. Co.* (91 N.Y.2d 169, 667 N.Y.S.2d 982, 690 N.E.2d 866 [1997]). The court erred in its extrapolation from that case that exposure by inhalation constitutes an injury that triggers coverage. The instant case is simply not controlled by *Frontier*.

Frontier involves only the very narrow issue of an insurer's duty to defend where allegations before the court included those of negligent installation. In fact, the Court started its opinion with the words: "The narrow issue before us [...] is whether the products hazards' exclusions in the insurance policies at issue relieve defendant insurers of the duty to defend their insured, an asbestos insulation contractor." *Id.* at 173-174, 667 N.Y.S.2d at 984.

The insurer in *Frontier* sought a ruling that all of the claims against its policyholder should be considered products-hazards claims since injuries arose out of the inherently dangerous nature of the product. *Frontier* however, was not a manufacturer or seller like Keasbey, but only an installer of insulation products. The tort claims arising against it were not based on a manufacturer's or seller's duty to warn or based on what a seller or manufacturer should know about a product they put into the stream of commerce, but were based on a theory of negligent installation. The Court of Appeals ruled against the insurer, as it found that products liability coverage "cannot apply to accidents or occurrences that allegedly took place while *Frontier's* installation work was in progress because the offending product the asbestos installation was not relinquished from *Frontier's* control until installation was complete." *Id.* at 177, 667 N.Y.S.2d at 986 (emphasis added).

[**142] Rather, the Court observed that at least some of the suits "expressly allege" that negligent installation of asbestos caused their personal injuries. The Court then added that:

"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, 667 N.Y.S.2d at 986.

Much has been made of this foregoing observation in the trial court's decision and by the claimants on appeal. Mistakenly so, since it should not be considered as anything more than dicta.

[***59] First, the issue before the *Frontier* court was the duty to defend, which is a much broader duty than the duty to indemnify. *Atlantic Mut. Ins. Co. v. Terk Tech. Corp.*, 309 A.D.2d 22, 28, 763 [*11] N.Y.S.2d 56, 60 (1st Dept. 2003) (the duty to indemnify does not turn on the pleadings but rather on whether the loss as established by the facts is covered by the policy). The duty to defend is decided solely on the allegations in the complaint which must be accepted by a court as true, and which here included allegations of personal injuries arising out of negligent installation.

Further, the declaration sought in *Frontier* was that all the claims fell within the products-hazard exclusion, and there was no distinction made as to whether the injuries happened before or after operations were completed.

More significantly, the insurers did not present any evidence as to the scope or timing of the injury, and so there was no such analysis by the *Frontier* Court. In other words, there was no evidence, as there is in the instant case, as to what constitutes injury in an asbestos claim, and whether that injury can in fact occur while operations are ongoing and before they are completed. Ultimately, the *Frontier* Court was constrained to rule against the insurer because it found there was a "reasonable possibility" of liability.

To the extent that there was no evidence before the *Frontier* court, and therefore no analysis, on the issue of "injury," we decline to follow the suggestion that injury happens on inhalation, as it is obiter dictum. The trial court, therefore, incorrectly interpreted the *Frontier* decision to stand for the proposition that injury in asbestos-related claims occurs upon exposure by inhalation of fibers.

To reach that point in this case, the trial court made the distinction between three different theories of liability: (1) [**143] products hazard coverage for insurable risks due to a defective product that has been put into the stream of commerce; (2) completed operations coverage, which covers risks of loss for injuries that arise out of operations of the insured that have been completed and occur away from the premises of the insured, and (3) premises/operations coverage, which covers risks that arise due to injuries from the defective product while the work with the product is still in progress. *16 Misc 3d 223, 230-231, 839 N.Y.S.2d 403, 410-411 (2007)*. "If relinquishment has not occurred, and the operations have not been completed, then operations coverage applies." *Id. at 231, 839 N.Y.S.2d at 411*.

The court then held that CNA had not demonstrated that the injuries of claimants occurred after relinquishment of the asbestos products or after operations were completed. The court observed that: "When defendant Keasbey cut, sawed, mixed, and removed asbestos-containing materials as part of its installation operations at various job sites, other individuals at those sites were exposed to asbestos dust." *Id. at 229, 839 N.Y.S.2d at 410*. Without pointing to any other evidentiary material, the court then concluded: "*the evidence has shown that the injuries happened while the installation operations of defendant Keasbey were ongoing.*" *Id. at 231, 839 N.Y.S.2d at 411* (emphasis added).

In its discussion as to when coverage is triggered for malignant and non-malignant asbestos-related injuries, the court stated that "coverage is triggered under the subject insurance policies when a bodily injury occurs." *Id. at 241, 839 N.Y.S.2d at 418*. In the next paragraph however, citing to *Appalachian Ins. Co. v. General Elec. Co.*, (19 AD3d 198, 796 N.Y.S.2d 609 [1st Dept. 2005],

aff'd, 8 NY3d 162, 831 N.Y.S.2d 742, 863 N.E.2d 994 (2007)) and *Matter of Midland Ins. Co.*, (269 A.D.2d 50, 709 N.Y.S.2d 24 [***60] [1st Dept. 2000]), the court held that, "it is an occurrence that triggers coverage, and an occurrence is the exposure to asbestos by inhaling it [...] not an injury therefrom." Therefore coverage for both types of injuries is "triggered by exposure to asbestos during [*12] the policy periods." *16 Misc 3d at 241, 839 N.Y.S.2d at 418*.

Finally, in addition to these conflicting determinations, the trial court observed: "[t]he risks of injuries during operations grows out of the use of the asbestos products during the operations." *Id. at 231, 839 N.Y.S.2d at 411*.

Setting aside the fact that the timing of the risks of injuries is irrelevant, the court, in relying on *Matter of Midland Ins. Co.* and *Frontier* [that occurrence not injury triggers coverage] ignored the applicable policy provisions relevant to this case; and in holding that "injuries happened" during installation [**144] operations, disregarded New York law. The court all but ignored the testimony of medical experts that went largely uncontroverted at trial.

As a starting point for any analysis as to what triggers coverage, the Court must look at the applicable policy provisions. As noted, in this case, the policies at issue are 17 primary level CGL policies. The policies between 1970 and 1987 cover bodily injury and property damage which occur during the policy period. Three pre-1973 policies under the CGL provisions state that CNA is obligated to pay "all sums" for an occurrence defined as an "accident including continuous or repeated exposure to conditions which results *during the policy period in bodily injury.*"

In the 1973-1987 primary policies, "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person which occurs during the policy period." "Occurrence" is defined as "an accident including continuous or repeated exposure to conditions which results in bodily injury [...] neither expected nor intended from the standpoint of the insured."

Quite clearly then, under the 17 subject policies, it is "bodily injury" that triggers coverage, and an insured in order to recover under the policy must show that an injury occurred during the policy period and that it occurred as a result of an accident or injurious exposure. Further, to recover under the "operations" provisions, an insured must show that the injury occurred before any such contracting operations were completed.

Testimony at trial indicated that a typical instruction for claims handlers looking at claims falling within "operations" coverage stated: "This type of loss relates to

injuries that allege injury to the claimant resulting from exposure while the insured is using a substance or causes a substance to be released." The example given in the instructions was of an employee of the insured -- as for example a Keasbey installer would be -- repairing a chemical tank on the premises of corporation "A". During repair the insured ruptures the tank causing an employee of corporation "A" to suffer chemical burns.

This simple example of a visible injury sustained contemporaneously with the negligent act or occurrence however is not particularly useful to any analysis of asbestos-related claims. The undisputed fact that both malignant and non-malignant asbestos-related diseases require periods of long, intensive exposure rather than a single period of inhalation coupled with the fact that the full-blown version of both types of disease [**145] develop only after a long latency period almost always prompts the question of what constitutes injury in an asbestos-related claim. Moreover, in an "operations coverage" case, establishing [***61] the when and the how of the injury is especially crucial since injury must be shown to arise before the completion of an operation.

The question of what constitutes injury in asbestos-related claims has vexed state and federal courts across the nation since the 1980s. See *Insurance Co. of N. Am. v. Forty-Eight Insulations Inc.*, 633 F.2d 1212, 1222 (6th Cir. 1980), cert. denied, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 [*13] (1981) ("cumulative, progressive disease does not fit the disease or accident situation which the policies typically cover"). The Sixth Circuit majority explained the dilemma as follows: "There is usually little dispute as to when an injury occurs when dealing with a common disease or accident. [In the case of asbestosis] there is considerable dispute as to when an injury [...] should be deemed to occur." *Id.* at 1222. Hence the pertinent question is: what constitutes sufficient bodily injury to trigger coverage. See *Continental Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 650, 593 N.Y.S.2d 966, 970-971, 609 N.E.2d 506, 510-511 (1993).

Testimony by CNA's medical experts as to how malignant and non-malignant types of asbestos-related diseases develop was largely uncontroverted. It established that adverse health effects from asbestos are "due to the inhalation of fibers in concentrations sufficient to overwhelm the normal pulmonary defense and clearance mechanisms." Researchers, acknowledged to be authoritative by the claimants' expert, testified that "most workers with asbestos exposure, as well as members of the general population who inhale asbestos fibers from ambient air, show no evidence of [subclinical] fibrosis."

Medical experts for both sides at trial agreed that there is a threshold fiber dose below which asbestosis is

not seen, although the claimants' expert did not offer an opinion as to when it was reached. CNA, however, introduced testimony based on leading studies that showed the following statistics: that asbestosis is usually observed in individuals who have had many years of high-level exposure, typically asbestos miners and millers, asbestos textile workers and asbestos insulators like Keasbey employees (who are not members of the class in the instant case because workers compensation laws prevent them from suing Keasbey). The Selikoff studies showed that for asbestos insulators asbestosis occurs in 92% of those with more than 40 years exposure but in only 10% of those with 10-19 years of exposure.

[**146] Typical "bystanders" on the other hand, who comprise the majority of the claimants, here have normal lungs 71% of the time if they had less than 30 years of exposure. Based partly on these studies, one of CNA's medical experts opined that the threshold is typically not reached for "bystanders" for at least "several years" - which CNA asserts is longer than any Keasbey contracting job took to complete.

Dr. Edward Philip Cohen, for CNA, testified as follows as to the development of asbestos-related diseases:

"Each inhalation of asbestos fibers results in alterations that contribute in a significant manner to the cumulative disease process. I would not use the word injury [...] but certainly the presence of asbestos fibers indirectly results in damage to cells and alterations of cellular material that over a period of 20-40 years can result in the development of impairment." (Emphasis supplied).

Testifying about the point where cell mutation becomes irreversible in malignant asbestos related diseases like mesothelioma, Dr. Cohen stated:

"to say that cancers develop well before clinical manifestations is true but not for [***62] mesothelioma [...] once the last mutation occurs the cells take off and grow very, very rapidly and the evidence from that is the time of death from the time symptoms first [*14] appear."

As for what causes mesothelioma, he testified:

"mesothelioma is common in individuals who have been exposed to asbestos however [...] many individuals with mesothelioma have no such exposure history

[...] and even in individuals who have [it] and have an exposure history does not necessarily prove that mesothelioma was a consequence of the earlier exposure to asbestos and the only way to prove [that] is to examine the mesothelioma and look for presence of asbestos bodies."

As for lung cancer, Dr. Cohen testified that studies have shown "a synergistic increase in the risk of lung cancer is present in individuals who both smoked and were exposed to asbestos."

Hence, testimony and evidence established that it can take 20 to 40 years after exposure for actual impairment of bodily functions to develop, that it is a progressive, cumulative disease that [**147] starts with alterations of tissue cells and subclinical tissue damage and could progress, though not necessarily progress, into full-blown asbestosis, mesothelioma or lung cancer.

Further, medical evidence submitted in this case established that while those with asbestos-related diseases can usually track the illness back to asbestos exposure of some type, it is not axiomatic that exposure results in asbestos-related injury, sickness or disease. The conclusion to be drawn therefore is that factors other than mere initial or one-time exposure to asbestos fibers are implicated in the development or progression towards asbestos-related injury sickness or disease. Whether these factors are related to the length of exposure or intensity of exposure, or whether there are catalysts like smoking or genetic predisposition involved is not established. However, one indisputable fact to emerge from medical evidence in the plethora of asbestos cases litigated in many different jurisdictions is that actual injury generally develops over time depending on a range of circumstances and conditions, but does not occur upon exposure by inhalation.

As one judge of the Sixth Circuit eloquently stated in his dissent in *Insurance Co. Of N. Am. v. Forty Eight Insulations Inc.*:

"The [exposure] rule is not satisfactory because some asbestos may be safely inhaled without the disease ever developing. With more exposure, some harm may later develop but remain latent for a significant number of years. Insurance law does not impose liability or coverage until some identifiable harm arises. An indemnifiable act does not occur at the time of the negligent act, but at the time the legally recognizable harm appears [...] [a]

the time of initial exposure, a victim could not successfully bring an action against the manufacturer because at that time he has suffered no compensable harm." 633 F.2d at 1229 (*Merritt, J.*).

There are jurisdictions like the Sixth Circuit that subscribe to the exposure theory holding that even minimal tissue damage is injury. It is the theory that the trial court appears to favor. But that is not the law in New York. The Court of Appeals declined to subscribe to an exposure theory in *Continental Casualty Co. v. Rapid America Corp.* (80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d [*15] 506 (1993)), and instead appeared to approve of injury-in-fact as a trigger for coverage. It explained:

[**148] [***63] "Decisions on when coverage is triggered for asbestos-related injury generally may be divided into four categories: (1) on exposure to asbestos; (2) on manifestation of disease; (3) on onset of disease, whether discovered or not ('injury-in-fact'); and (4) all of the above in other words, a continuous trigger.' Federal courts have concluded that the injury-in-fact rule is most consistent with New York law." *Id.* at 650-651, 593 N.Y.S.2d at 971 (internal citations omitted).

Indeed, an injury-in-fact test rests on when the injury, sickness, disease or disability actually began and, of the four categories, comports most closely with general principles of tort and insurance law. In *American Home Prods. Corp. v. Liberty Mut. Ins. Co.* (565 F.Supp. 1485 [S.D.N.Y. 1983], *aff'd in part, modified in part*, 748 F.2d 760 [2d Cir. 1984]), the court stated:

"although exposure to asbestos does not usually injure seriously enough to constitute an occurrence' in the context of a liability insurance policy, a finder of fact might, nevertheless, find that a particular exposure or period of exposure contemporaneously caused a compensable injury [...]" 565 F.Supp. at 1498.

"[A] real but undiscovered injury proved in retrospect to have existed at the relevant time would establish coverage irrespective of the time the injury became manifest." *Id.* at 1497.

But the court stated unequivocally that "injury-in-fact" requires the insured to demonstrate actual damage or injury during the policy period. *Id.* at 1497.

Claimants in the instant case offered no evidence whatsoever that any of them sustained an injury-in-fact in any one of the policy periods arising out of "ongoing operations." Not surprisingly since the burden on claimants to prove so would be insurmountable given not only the absence of evidentiary material, but the difficulty if not impossibility of pinpointing when any subclinical tissue damage tipped over into actual impairment. In *Matter of Midland Ins. Co.*, this Court determined that "[t]here exist at present no medical techniques capable of specifically identifying and quantifying the progression of asbestos-related injury, sickness or disease actually sustained in each year from and after a first exposure to asbestos fiber." 269 A.D.2d at 58, 709 N.Y.S.2d at 30.

The Fifth Circuit echoed that view, observing: "[t]he challenge in adopting the injury-in-fact approach [**149] is that, in each case [...] a mini-trial must be held to determine at what point the build-up of asbestos in the plaintiff's lungs resulted in the body's defenses being overwhelmed. At that point, asbestosis could truly be said to occur." *Guaranty Natl. Ins. Co. v. Azrock Indus.*, 211 F.3d 239, 246 (5th Cir. 2000) (internal quotation marks and citation omitted).

Thus, each claimant in the instant case would have to produce medical evidence that the point where asbestos fibers overwhelmed the body's defenses happened in one of the 17 years of the subject insurance policies. Further, and crucial to recovery under non-products/operations coverage, they would have to establish that the injury was sustained before a contracting operation was completed. [*16] This means that a claimant would have to show one of two sets of conditions occurred: (1) contemporaneous injury, that is, injury-in-fact stemming from an ongoing operation in the same policy year, but the probability of such a situation appears highly unlikely given the absence of evidence that any Keasbey installation project lasted long enough for the sort of lengthy intensive exposure required for asbestosis to develop in the same year; or, possibly (2) injury-in-fact arising in the policy year but as [***64] a result of exposure during an ongoing operation years, maybe decades, prior. In the latter case, a claimant would have to show that he was exposed only during that ongoing operation and that he was never exposed to asbestos after a Keasbey installation project was completed. In other words, setting aside the lack of documentary evidence or witness testimony to establish such, the claimant would be obligated to prove a negative, that is, he was never exposed to asbestos after Keasbey completed its installation operations.

This would be impossible for claimants who typically were "bystanders," that is tradesmen and utility workers who worked alongside Keasbey installers during installation projects and then continued working in the plant after operations were completed, and were thus exposed to the installed asbestos.

Indeed, no such evidence was presented at trial for any group of claimants, never mind the class. Claimants rely on the assertion that CNA acknowledged in the prior "products hazards" claims that the claims arose out of plaintiffs' exposure to asbestos dust during contracting operations, in effect admitting that injuries were sustained during an ongoing operation.

They are mixing apples and oranges. CNA acknowledged that claimants were exposed during operations, and that at some [**150] future point in time, sometimes decades later, claimants manifested asbestos-related disease. Recovery under products liability claims is not dependent, as it is here, on the timing of the actual injury nor the particular stage of installation projects at which actual injury may have taken place. The claimants are making an impermissible leap if they believe they can go forward and prove injury during ongoing operations simply by a conclusory assertion: claimant was exposed, claimant developed full blown asbestos-related injury decades later, ergo, injury was sustained at time of exposure.

In rejecting the contention that manifestation of asbestosis 40 years later is proof that injury occurred when the first asbestos dust was inhaled, it is perhaps worth considering the view of Judge Learned Hand in 1939 when he wrote on a health insurance case: "A disease is no disease until it manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted." *Grain Handling Co. v. Sweeney*, 102 F.2d 464, 465-466 (2d Cir. 1939) cert. denied, 308 U.S. 570, 60 S.Ct. 83, 84 L.Ed. 478 (1939).

In any event, injecting a conclusory assertion into what is essentially a products liability argument is not enough to establish a basis for coverage under ongoing operations provisions of the subject policies. The only conclusion that can be reached is that injury did occur sometime before manifestation and after exposure. However, in order for claimants to establish their entitlement to limitless liability and perpetual coverage they must show, under the relevant provisions of the subject policies, that the actual injury occurred in the policy period and that it arose solely out of an ongoing operation. The burden on a claimant to come forward with the necessary medical evidence or documentation or witnesses to support that his or her only exposure occurred during an ongoing project rises to the level of factual impossibility.

[*17] We find, therefore, that CNA has demonstrated that there is no factual or legal basis for liability other than under the products/completed operation provisions of the policies, and so the declaration sought by plaintiffs that they have no duty to indemnify is warranted by the record.

[**65] Finally, we are persuaded that as to excess policy RDU 8047261, the aggregate limit of \$ 1,000,000 is exhausted. More than a year after CNA filed its declaratory action in 2001, CNA settled six claims for \$ 2,865,000. At the time of the settlements, [*151] CNA did not know there was a 1971 excess policy with \$ 1,000,000 in untapped products coverage. Consequently, it accounted for the settlement of the six claims by labeling them with an accounting code that indicated bodily injury claims rather than products cases. The defendant class assert that CNA cannot now reclassify the claims and so have the excess policy declared exhausted. We disagree.

As CNA points out, the claims were settled on six trial-ready cases that CNA was not ready to defend. It argues that it used a catch-all accounting code for bodily injury because no other code applied once aggregate limits appeared exhausted. But CNA rejects the contention that it made a deliberate coverage decision to classify the claims as operations claims. It settled the claims to avoid default judgment. Indeed, by bringing the declaratory judgment action in the prior year, we would agree that CNA reserved its right to apply the \$ 2,865,000 against the later-discovered products policy, thus exhausting the aggregate limit of the policy.

In light of the foregoing, we find the remaining issues raised by plaintiffs on appeal and defendants One Beacon and Wausau on cross appeal academic, and therefore decline to rule on them.

Accordingly, the order of the Supreme Court, New York County (Richard F. Braun, J.) entered on or about June 11, 2007, insofar as it declared that the asbestos claims against insured Keasbey are not within the products liability coverage, and thus not subject to the policies' aggregate limits; that the defendant class is not subject to the affirmative defenses that plaintiffs may have had against Keasbey; that coverage for the defendant class is triggered by exposure and that each individual

class member's exposure to conditions resulting in bodily injury constituted a separate occurrence; and that the aggregate limit of CNA's policy RDU 8047261 was not exhausted, should be reversed, on the law, with costs, and it is declared that (1) claims arising out of Keasbey's asbestos insulating activities are included within the products hazard/completed operations coverage (2) defendant class is subject to the affirmative defenses that CNA may have had against Keasbey (3) coverage for defendant class is not triggered by exposure, but by injury-in-fact and each individual class member's exposure to conditions resulting in bodily injury does not constitute a separate occurrence (4) the aggregate limit of CNA's excess policy RDU 8047261 is exhausted.

[*18] **M-6192 Continental Casualty Company, et al v Employers Insurance Company, etc.**

Motion seeking leave to file amicus brief granted.

Squib inserted here:

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about June 11, 2007, reversed, on the law, with costs, and it is declared that (1) claims arising out of Keasbey's asbestos insulating activities are included within the products hazard/completed operations coverage, (2) defendant class is subject to the affirmative defenses that CNA may have had against Keasbey, (3) coverage for defendant class is not triggered by exposure, but by injury-in-fact and each individual class member's exposure to conditions resulting in bodily injury does not constitute a separate occurrence (4) the aggregate limit of CNA's excess policy RDU 8047261 is exhausted. Motion seeking leave to file amicus brief granted.

Opinion by Catterson, J. All concur.

... end squib insert.

[**152] Tom, J.P., Friedman, Nardelli, Catterson, JJ.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 30, 2008

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Exhibit B

Continental Cas. Co. v Employers Ins. Co. of Wausau

2011 NY Slip Op 04594

Decided on June 2, 2011

Appellate Division, First Department

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This opinion is uncorrected and subject to revision before
publication in the Official Reports.

Decided on June 2, 2011

Mazzarelli, J.P., Friedman, Renwick, Román, JJ.

601037/03 1949

**[*1]1948-Continental Casualty Company, et al., Plaintiffs-Appellants-
Respondents,**

v

**Employers Insurance Company of Wausau, et al., Defendants-
Respondents-Appellants, Robert A. Keasbey Company, a corporation
dissolved in 2001, Defendant.**

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York
(Alfred L. D'Isernia of counsel), for appellants-respondents.
Hardin, Kundla, McKeon & Poletto, P.A., New York (George
R. Hardin of counsel), for Employers Liability Assurance
Company, respondent-appellant.
Seward & Kissel LLP, New York (John J. Galban of counsel)
and (Rolf E. Gilbertson of the bar of the State of Minnesota
admitted pro hac vice), for Employers Insurance Company of
Wausau, respondent-appellant.

Gilbert LLP, District of Columbia (August J. Matteis, Jr., of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Michael O'Reilly, appellant.

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered April 22, 2009, after a nonjury trial resulting in findings of fact and conclusions of law (same court and Justice), dated October 14, 2008, as amended November 24, 2008 and December 5, 2008 (also brought up for review), declaring, inter alia, (1) that plaintiffs Continental Casualty Company and American Casualty Company of Reading, Pa. (collectively, CNA), defendant Employers Insurance Company of Wausau (Wausau) and defendant Employers Liability Assurance Company n/k/a OneBeacon America Insurance Company (OneBeacon) each had and has an equal duty to defend defendant Robert A. Keasbey Company (Keasbey) in past and future asbestos-related personal injury actions (asbestos actions) against Keasbey from the commencement of each asbestos action until it is established that the asbestos exposure alleged therein did not occur at a work site or within a time period covered by the insurer's policy, (2) that CNA is entitled to be reimbursed by OneBeacon for one quarter of the cost of defending Keasbey in the asbestos actions to the date of judgment, and (3) that indemnity obligations with respect to each asbestos action are to be allocated pro rata to each year of asbestos exposure at a given site, with each insurer obligated to pay for years and sites within its coverage and with any OneBeacon coverage to be deemed primary to any CNA or Wausau coverage, unanimously reversed, on the law and the facts, without costs, the judgment vacated, Supreme Court's findings [*2] of fact reversed to the extent inconsistent herewith and new findings substituted as set forth below, and it is declared that

(1) CNA has no further obligation to defend or indemnify Keasbey in asbestos actions pursuant to the primary comprehensive general liability insurance

policies it issued to Keasbey covering, in aggregate, the period from February 15, 1970 to February 15, 1987, and Wausau has no further obligation to defend or indemnify Keasbey in asbestos actions pursuant to the primary comprehensive general liability insurance policies it issued to Keasbey covering, in aggregate, the period from February 15, 1968 to February 15, 1970,

(2) CNA is not entitled to be reimbursed by OneBeacon for any portion of the costs of defending Keasbey in asbestos actions from March 1, 2003 to September 30, 2007, or for any portion of the costs of defending the same actions after September 30, 2007, because CNA has failed to establish that it gave OneBeacon timely notice of any of those actions,

(3) to the extent CNA has paid for Keasbey's defense in any asbestos actions commenced against Keasbey after September 30, 2007, any claim by CNA against OneBeacon for reimbursement of such defense costs is barred unless CNA establishes that it provided OneBeacon with timely notice of that particular action under the terms of the OneBeacon policies,

and CNA's complaint dismissed to the extent it seeks relief different from, in addition to, or inconsistent with the foregoing, and the matter remanded for entry of judgment consistent herewith.

Keasbey (which ceased operating in the mid-1990s and was dissolved in 2001) installed asbestos insulation at numerous sites in the tri-state area over many years. Wausau issued Keasbey two successive primary comprehensive general liability (CGL) policies covering the period from February 1968 to February 1970, and CNA issued Keasbey 17 successive primary CGL policies covering the period from February 1970 to February 1987. None of the foregoing CNA and Wausau policies contains an asbestos exclusion.

Although Keasbey never purchased a policy directly from OneBeacon, it was covered by two "wrap-up" policies issued by OneBeacon, each of which provided liability coverage to all contractors on a specified construction project at the Indian Point Nuclear Power Plant for claims arising from work on that project during the policy period. Specifically, OneBeacon issued one wrap-up policy covering all contractors involved in construction work at Unit 2 at Indian

Point from February 1966 to April 1974 and another, similar, policy covering all contractors involved in construction work at Unit 3 at Indian Point from June 1967 to July 1977. During the periods of these policies, Keasbey installed asbestos-containing insulation in the turbines at Unit 2 and Unit 3 at Indian Point, which in each case involved approximately two months of work. Each of the foregoing OneBeacon policies provides that it "applies only to work performed at the [specified] project." Neither OneBeacon policy contains an asbestos exclusion provision.

Pursuant to its policies' products/completed operations coverage, CNA began defending Keasbey in asbestos actions in the 1970s. This coverage under Keasbey's primary CNA policies was exhausted by 1992, as was similar coverage under the Wausau policies and all other primary [*3]policies. Thereafter, excess insurers, including CNA under policies other than those at issue on this appeal, assumed Keasbey's defense. CNA continued to defend Keasbey as an excess insurer until August 2000, when it believed its excess coverage had been exhausted ^(FN1). Another excess insurer continued to defend Keasbey until 2002.

In May 2001, attorneys for claimants in the asbestos actions sent CNA a letter asserting that Keasbey's exposure to asbestos liability fell within the scope of the CNA primary policies' operations coverage, which (unlike the long-exhausted products/completed operations coverage) has no aggregate limit. CNA responded by filing suit against the claimants in October 2001, seeking a declaration that Keasbey's potential asbestos liability is not within the CNA policies' operations coverage. To avoid default judgments, however, CNA took over Keasbey's defense in 2002.

The claimants' assertion that their claims fell within CNA's operations coverage prompted CNA to undertake a review of Keasbey's records to determine whether any other primary coverage was available. Since the 1980s, those records had been in the possession of the law firm CNA had retained to defend Keasbey in the asbestos cases. In February 2003, CNA found evidence in Keasbey's records that Keasbey was covered by the aforementioned OneBeacon wrap-up policies. By letter dated February 24, 2003, CNA notified OneBeacon of an asbestos action brought by a claimant (Michael O'Reilly) allegedly exposed to asbestos while working at Indian Point from 1968 to 1975, and tendering the defense of the case to OneBeacon. Thereafter, in April 2003, CNA commenced the present declaratory judgment action (superseding the action commenced in October 2001), naming as defendants (in addition to the personal injury claimants, who have been certified as a class) OneBeacon and Wausau ^[FN2]. CNA's complaint seeks a judgment declaring, inter alia, (1) that Keasbey's potential asbestos liability falls under the exhausted products/completed operations coverage of the CNA policies (not the operations coverage), (2) that OneBeacon is obligated to assume Keasbey's defense in present and future asbestos actions, and (3) that OneBeacon is obligated to reimburse CNA for the amounts the latter has spent on Keasbey's defense in asbestos actions since March 1, 2003 (after the February 24, 2003 letter). ^[FN3]

On the appeal taken from the order entered after the Phase I trial in this matter (60 AD3d 128 [2008], *supra*), this Court, reversing the trial court's order, determined that Keasbey's [*4]potential asbestos liability falls under the exhausted products/completed operations coverage of the CNA policies, not the operations coverage, from which it follows that CNA has no further obligation to defend or indemnify Keasbey in asbestos actions ^[FN4]. The Phase II trial was

conducted before the Phase I appeal was decided, and resulted in a judgment (the Phase II judgment) declaring, inter alia, that the four insurers before the court (the two CNA subsidiaries, OneBeacon and Wausau) are obligated to share equally the cost of Keasbey's defense in all asbestos actions (past, present and future) and that OneBeacon's coverage is primary as to indemnity (although apparently not as to the duty to defend). All parties now appeal from the Phase II judgment, each to the extent it is aggrieved thereby. Given the disposition of the Phase I appeal and CNA's failure to prove that it gave OneBeacon timely notice of any underlying asbestos action, the Phase II judgment must be reversed.

As noted, the trial court held that defense costs should be shared equally among the two CNA subsidiaries, OneBeacon and Wausau. This ruling cannot stand. Given this Court's determination on the Phase I appeal that the only applicable coverage under the subject CNA primary policies was the coverage for products/completed operations, which (it is undisputed) was exhausted almost 20 years ago, there is no occasion to allocate coverage between CNA and other primary insurers with regard to the defense costs at issue, namely, those that may be incurred in the future or that CNA has incurred since March 1, 2003. However, that CNA did not owe Keasbey any coverage when it defended Keasbey in asbestos actions since March 2003 does not necessarily mean that CNA is entitled to reimbursement for such costs from OneBeacon. While OneBeacon raises a number of arguments against CNA's reimbursement claim, we need address only the argument based on lack of timely notice, which is dispositive.^[FN5]

Where an insured gives only one of two insurers timely notice of a claim, the insurer that received notice may obtain reimbursement from the other

insurer only if it gives the other insurer notice of the claim that is reasonable under the circumstances (*see Matter of Crum & Forster Org. v Morgan*, 192 AD2d 652, 654 [1993]). Here, although each OneBeacon policy contained a notice-of-claim provision requiring the insured to "immediately forward to [OneBeacon] every demand, notice, summons or other process received by him or his representative," it is undisputed that Keasbey never furnished any notice of any asbestos claim to OneBeacon. Hence, CNA's ability to seek reimbursement from OneBeacon for the costs of defending any given claim against Keasbey "turns on whether [CNA] provided notice [of that claim] to [OneBeacon] within a reasonable time under all the circumstances" (*State of New York v Blank*, 27 F3d 783, 795 [2d Cir 1994] [citing *Crum & Forster*, 192 AD2d at 654]). Contrary to CNA's arguments, it plainly failed to provide OneBeacon with such notice.

CNA contends that it gave OneBeacon sufficient notice of all the asbestos actions for which it now seeks reimbursement — namely, all the thousands of actions that it defended on [*5]behalf of Keasbey between March 1, 2003 and September 30, 2007 — by sending the February 24, 2003 letter advising OneBeacon of the O'Reilly claim, which was about to be scheduled for trial, and inviting OneBeacon (without identifying any other claim against Keasbey) "to contact us as soon as possible so that we can discuss the range of possible strategies for defense of this and comparable other Keasbey asbestos cases." To the extent further notice was required, CNA contends that it was furnished by the complaint it served to commence this coverage action in April 2003, to which is appended a schedule setting forth the names of 174 claimants against Keasbey and the law firms representing them. CNA also refers to a number of e-mails and letters it subsequently sent to OneBeacon's coverage counsel

during the pendency of this action discussing a number of the asbestos actions against Keasbey.

In our view, the February 24, 2003 letter, the complaint in this action, and CNA's subsequent correspondence with OneBeacon's coverage counsel do not constitute reasonably timely notice even of the claims to which they refer, much less to the thousands of other claims for which CNA seeks reimbursement. To begin, CNA cites no authority for deeming a notice as to certain claims against an insured to constitute notice of other claims not identified in the notice. Even as to the claims referenced by name in the documents on which CNA relies, however, notice was not sufficient. The OneBeacon policies required that any process against Keasbey be "immediately forward[ed]" to OneBeacon; CNA does not identify a single case in which this occurred. With regard to the O'Reilly claim referenced in CNA's letter of February 23, 2003, for example, the letter apprised OneBeacon of the case just as it was about to be scheduled for trial — by which time the case presumably already had a substantial history. CNA argues that it contacted OneBeacon promptly after it first learned of the existence of the OneBeacon policies in February 2003, and could not have been expected to provide notice any earlier than that. We disagree. The Keasbey records from which CNA learned of the OneBeacon policies had been in the possession of asbestos defense counsel chosen and paid by CNA since the 1980s. CNA could have reviewed those records for evidence of additional insurance at any time it chose. It did not see fit to do so until 2003, when the claimants sought to revive its long-expired primary policies on the theory (rejected on the preceding appeal) that operations coverage applied to the asbestos actions. While CNA's sudden interest in finding an untapped primary insurer in response to this unexpected development may be understandable, it does not change the fact that the means

to discover the OneBeacon policies had been available to CNA for more than a decade. Further, the possibility of prejudice to OneBeacon from the delay in notice is obvious, given that the OneBeacon policies, unlike the comprehensive CNA policies, covered Keasbey only for work at two particular sites where Keasbey had been present, in the case of each site, for only about two months. Given the vast difference in the scope of coverage between the CNA policies and the OneBeacon policies, it cannot be assumed that OneBeacon's interests were adequately protected by CNA's defense of Keasbey in the asbestos actions (*see State of New York v Blank*, 27 F3d at 797).^[FN6] [*6]

We reject the theory apparently adopted by the trial court after the Phase I trial (*see* 16 Misc 3d 223, 253-254 [2007], *revd on other grounds* 60 AD3d 128 [2008], *lv denied* 13 NY3d 710 [2009]) that OneBeacon received adequate notice of an action as against Keasbey if it received notice of the action from a different insured under the wrap-up policies. Where each insured has an independent duty to give timely notice under the policy, notice by one insured cannot be imputed to another (*see National Cas. Co. v Paxson Communications Corp.*, 304 AD2d 391, 394 [2003]; *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [2002]; *American Mfrs. Mut. Ins. Co. v CMA Enters.*, 246 AD2d 373, [1998]).

In view of the foregoing, we need not reach the parties' remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST
DEPARTMENT.

ENTERED: June 2, 2011

CLERK

Footnotes

Footnote 1: An additional CNA excess policy that was later discovered also has been exhausted, as we determined on the preceding appeal in this matter (60 AD3d 128, 150-151 [2008], *lv denied* 13 NY3d 710 [2009]).

Footnote 2: Although Wausau has since settled with CNA, it participated in this appeal.

Footnote 3: CNA claims that, from March 1, 2003 to September 30, 2007 (about a month before the Phase II trial began), it spent \$31,360,874.01 on Keasbey's defense in asbestos actions. This amount excludes the cost of one settlement reached in 2007 after a jury returned a verdict against Keasbey. CNA represents that it does not seek reimbursement for that settlement or for the defense and settlement costs it incurred before March 1, 2003.

Footnote 4: It is not disputed that the same reasoning applies to the Wausau policies.

Footnote 5: The notice issue was raised but not resolved on the preceding appeal. Contrary to CNA's contention, the oblique reference to the notice issue in the decision on the preceding appeal does not constitute law of the case precluding our consideration of the issue on the merits on this appeal.

Footnote 6: At the Phase II trial (which opened in October 2007), CNA presented evidence of defense costs it incurred through the end of September 2007 in support of its reimbursement claim. Accordingly, this decision disposes of any claim for reimbursement as to any asbestos action commenced in September 2007 or earlier. To the extent CNA has defended Keasbey in any asbestos actions commenced after September 2007, it can seek reimbursement from OneBeacon for defense costs incurred in each such action only if it establishes that it provided OneBeacon with timely notice of that particular action in accordance with the terms of the OneBeacon policies.

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----- X
In Re: NEW YORK CITY ASBESTOS LITIGATION :
----- X

In Re: New York City Asbestos Litigation :
v. :
Robert A. Keasbey Co., et al. :

Index No.: 190329/11

Hon. Sherry Klein Heitler
Part 30

RULE 130 CERTIFICATION

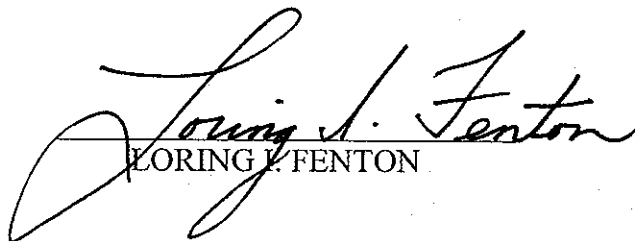
----- X
LORING I. FENTON, an attorney duly admitted to practice in the courts of the State of New York, affirms the following under the penalties of perjury:

1. I am a Shareholder in the law firm of Greenberg Traurig, LLP ("GT"), co-counsel for defendant Robert A. Keasbey Co. ("Keasbey") in the New York City Asbestos Litigation in the above-referenced matters.

2. I hereby certify, pursuant to 22 NYCRR 130-1.1 and 130-1.1(a), that to the best of my knowledge, information and belief, formed after a reasonable inquiry under the circumstances, the following papers are not frivolous as defined in 22 NYCRR 130-1.1(c):

- (a) Order to Show Cause;
- (b) Affirmation of Loring I. Fenton, dated August 30, 2011; and exhibits annexed thereto;
- (c) Memorandum of Law in Support of GT's Motion for Leave to Withdraw as Counsel for Defendant Robert A. Keasbey Co.; and
- (d) Proposed Order.

Dated: New York, New York
August 30, 2011


LORING I. FENTON

Greenberg Traurig, LLP (“GT”), pursuant to CPLR § 321(b)(2), respectfully submits this memorandum of law in support of its motion for leave to withdraw as co-counsel¹ for defendant Robert A. Keasbey Co. (“Keasbey”) in all cases in which GT has appeared, or could be deemed to have appeared, in the New York City Asbestos Litigation (“NYCAL”).²

STATEMENT OF RELEVANT FACTS

By letter dated July 29, 2011, Keasbey’s insurers advised GT (and its co-counsel Weiner, Lesniak LLP) that, based on the now final judicial determination that Keasbey’s insurers have “no further obligation to defend or indemnify Keasbey in asbestos actions,” Keasbey’s insurers will no longer pay GT (or Weiner, Lesniak) to defend Keasbey in asbestos actions after July 31, 2011. See July 29, 2011, Letter from Michelle L. Stegmann to Loring I. Fenton, Esq. of GT and Anna M. DiLonardo of Weiner, Lesniak (“Termination Letter”).³ As this Court is aware, Keasbey ceased business operations in the mid-1990s and has no tangible assets other than the insurance policies that were issued to it. (Fenton Aff. at ¶ 5) Accordingly, GT seeks leave to withdraw from representing Keasbey in the NYCAL because its continued representation of Keasbey under these circumstances will result in an unreasonable financial burden on GT.

ARGUMENT

It is well settled that an attorney will be permitted to withdraw from employment where a client refuses to pay reasonable fees. Galvano v. Galvano, 193 A.D.2d 779, 780, 598 N.Y.S.2d

¹ GT is co-counsel with the firm of Weiner Lesniak, LLP in all cases in which GT has appeared.

² A Schedule of Cases in which GT has appeared as Keasbey’s co-counsel in the NYCAL is attached to the August 30, 2011, Affirmation of Loring I. Fenton (“Fenton Aff.”) as Exhibit A. A list of all NYCAL cases in which Keasbey has been named as a defendant is attached to the Court’s August 18, 2011, Order (the “Order”), which is attached, without exhibits, to the Fenton Aff. as Exhibit B. The Order, together with the extraordinarily voluminous schedule of cases attached thereto, was filed with the County Clerk on August 30, 2011.

³ A true and correct copy of the Termination Letter and referenced coverage decisions is attached to the Fenton Aff. as Exhibit C.

268, 269 (2d Dep't 1993); see also Kay v. Kay, 245 A.D.2d 549, 550, 666 N.Y.S.2d 728, 729 (2d Dep't 1997). Stated otherwise, when a client repudiates a reasonable fee arrangement, there is no obligation on the part of counsel to finance the litigation or render gratuitous services. Holmes v. Y.J.A. Realty Corp., 128 A.D.2d 482, 513 N.Y.S.2d 415 (1st Dep't 1987); see also Stephen Eldridge Realty Corp. v. Green, 174 A.D.2d 564, 565, 570 N.Y.S.2d 677, 678 (2d Dep't 1991). Indeed, the New York Lawyers Code of Professional Responsibility expressly permits a lawyer to withdraw from representing a client if the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." DR 2-110(C)(1)(f).

And that is precisely what has occurred here. As the Termination Letter makes crystal clear: the insurers will no longer pay GT for the defense of Keasbey. As such, GT should be granted leave to withdraw from its representation of Keasbey. E.g., Ruiz v. Frog Co., LLC, 77 A.D.3d 513, 513, 913 N.Y.S.2d 7, 7 (1st Dep't 2010) (affirming grant of leave to withdraw where insurer had notified counsel that the insured's policy limits had been reached and it would no longer pay for the insured's defense); Appolino v. Delorbe, 24 A.D.3d 252, 252, 807 N.Y.S.2d 19, 20 (1st Dep't 2005) (insured's counsel permitted to withdraw following "a determination that the insurer had no duty to defend or indemnify defendants" because, otherwise, counsel would be placed in "an untenable position by being directed to continue an attorney/client relationship that was no longer viable"); see also Cullen v. Olins Leasing, Inc., 91 A.D.2d 537, 457 N.Y.S.2d 9 (1st Dep't 1982), appeal dismissed, 61 N.Y.2d 867, 474 N.Y.S.2d 479 (1984) (permitting withdrawal where client's insurer placed in liquidation); Dordal v. Laces Roller Corp., 143 A.D.2d 727, 533 N.Y.S.2d 291 (2d Dep't 1988) (same); Farkash v. Williamsbridge Manor Nursing Home, 34 A.D.2d 908, 311 N.Y.S.2d 512 (1st Dep't 1970) (same).

CONCLUSION

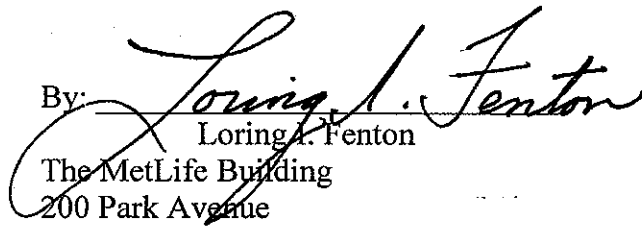
Based on the foregoing, GT respectfully requests that the Court grant leave to Greenberg Traurig, LLP to withdraw as co-counsel for Defendant Robert A. Keasbey Co. in all cases in which GT has appeared, or could be deemed to have appeared, in the New York City Asbestos Litigation.

Dated: New York, New York
August 30, 2011

Respectfully submitted,

GREENBERG TRAURIG, LLP

By:



Loring A. Fenton

The MetLife Building
200 Park Avenue

New York, New York 10166

Tel.: (212) 801-9200

Attorneys for Defendant Robert A. Keasbey Co.

SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

----- X
In Re: NEW YORK CITY ASBESTOS LITIGATION :
----- X

In Re: New York City Asbestos Litigation :
v. :
Robert A. Keasbey Co., et al. :
----- X

Index No.: 190329/11
Hon. Sherry Klein Heitler
Part 30
ORDER

This matter having been opened to the Court by Order to Show Cause, by Greenberg Traurig, LLP, for leave to withdraw as co-counsel for Defendant Robert A. Keasbey Co., and the Court having reviewed the moving and opposition papers, if any, and for good cause shown;

IT IS on this ____ day of _____, 2011,

ORDERED that the motion of Greenberg Traurig, LLP is hereby GRANTED and that, effective immediately, Greenberg Traurig, LLP is no longer co-counsel for Defendant Robert A. Keasbey Co. in any case venued in the New York City Asbestos Litigation; and it is further

ORDERED that a copy of this Order shall be served on the applicable Plaintiff's counsel by Federal Express, and the applicable defense counsel by email and publication on the NYCAL website, and such service shall be deemed good and sufficient service.

Hon. Sherry Klein Heitler, J. S. C.