

# INSURANCE COVERAGE ISSUES FOR ASBESTOS NON-PRODUCTS

HB Litigation Conferences  
“Emerging Trends in Asbestos Litigation”

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# Overview of premises/operations coverage without aggregate limits (aka non-products) for asbestos claims

# Why You Should Care?

(Policyholder Counsel, Scott Godes)

Product Hazard



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# Why You Should Care?

(Policyholder Counsel, Scott Godes)

Completed Operations Hazard



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# Why You Should Care?

(Policyholder Counsel, Scott Godes)

Premises / Operations



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# Why You Should Care?

(Policyholder Counsel, Scott Godes)

“The operations coverage is limited by a \$1 million per occurrence limit but has no aggregate cap, meaning that Travelers' exposure to asbestos claims arising from ACandS's operations during the years 1976-79 was potentially unlimited.”

-- *ACandS v. Travelers*, 435 F.3d 252 (3d Cir. 2006)



# Premises/Operations Coverage (Policyholder Counsel, Scott Godes)

## I. COVERAGE A — BODILY INJURY LIABILITY

### COVERAGE B — PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of

Coverage A — *bodily injury or*

Coverage B — *property damage*

to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking *damages* on account of such *bodily injury or property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

# Premises Coverage

(Policyholder Counsel, Scott Godes)

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# Operations Coverage

(Policyholder Counsel, Scott Godes)

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# Products Hazard

(Policyholder Counsel, Scott Godes)



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# Completed Operations Hazard

(Policyholder Counsel, Scott Godes)



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THEN



# “Completed Operations Hazard” Coverage (Insurer Counsel, Robert Berkes)

“completed operations hazard” includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. “Operations” include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (a) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (b) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (c) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

# “Products Hazard” Coverage (Insurer Counsel, Robert Berkes)

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

# Insurance Company Perspective

(Insurer Counsel, Robert Berkes)



- Injury triggers coverage, not exposure



- When is the policy period in relation to the operation (i.e., exposure)?

# Typical facts and policies for premises / operations claims

# Products / Non-Products

(Policyholder Perspective, Robert Horkovich)

- “Products Coverage:

Bodily injury arising from the named insured products...away from premises...after product has been relinquished.”

- Typical “Non-Products” Claim:

Example: Exposure to raw asbestos before conversion into a “product”.



# Completed / Non-Completed Operations

(Policyholder Perspective, Robert Horkovich)

- “Completed Operations Coverage:  
Bodily injury ... after operations have been completed or abandoned and away from premises.”
- Typical “Non-Products Operations” Claim:  
Example: Exposure to asbestos insulation while the insulation is being installed.

# Premises – Operations Coverage

(Policyholder Perspective, Robert Horkovich)

- Coverage for asbestos related injuries to Third Parties on your business premises or while your company retains control of a job site.
- Typical “Premises” Claim:  
Example: Exposure to asbestos by employee of contractor who worked on your premises or premises under your control.

# Insurer Perspective

(Insurer Counsel, Robert Berkes)

## READ THE POLICY!!!



Not all insurance policies are the same

# Special Endorsements May Apply

(Insurer Counsel, Robert Berkes)



**Special conditions or limits may apply to a particular site or job**

# Combined Single Limits May Apply

(Insurer Counsel, Robert Berkes)

Completed Operations Hazard

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Product Hazard

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“Operations” claims

= One \$ Limit

# What's the Plaintiff's Theory of Liability - Really?

(Insurer Counsel, Robert Berkes)

Strict "Products" Liability =



Negligent "Operations" =



# Get the Facts

(Insurer Counsel, Robert Berkes)

- What was policyholder's role in causing the injury?
- How was plaintiff exposed?

# Policyholder and Insurer arguments for and against premises / operations coverage



# Products Hazard

(Policyholder Perspective, Robert Horkovich)

“The ‘Products Hazard’ insurance is concerned with injury after possession of the goods or the product has been relinquished or the operation has been completed or abandoned. The nature of some of the allegations...however, concern exposure and injury occurring during the operation, such as emission of asbestos dust during the installation process.”

- *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 692-93 (1997).

# Premises – Operations Coverage

(Policyholder Perspective, Robert Horkovich)

- Premises operations insurance provides coverage even when policy lacks products hazard coverage
  
- *Commercial Union Ins. Co. v. Porter Hayden Co.*, (Md. Ct. Spec. App. 1997).

# Non-Products

(Policyholder Perspective, Robert Horkovich)

“The [products-hazard] exclusion, by definition, cannot apply to accidents or occurrences that allegedly took place while Frontier’s installation work was in progress because the offending product – the asbestos insulation – was not relinquished from Frontier’s control until installation was complete.”

- *Frontier Insulation Contractors, Inc. v. Merchants Mutual Ins. Co.*, 91 N.Y.2d 169, 177 (1997).

# Non-Completed Operations Coverage

(Policyholder Perspective, Robert Horkovich)

“ACandS is still entitled to a 45% allocation of claims to the policies’ operations coverage...”

➤ *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 261 (3d Cir. 2006).

# Wallace & Gale

(Policyholder Perspective, Robert Horkovich)

“[I]f exposure which began during operations continued after operations were completed, the aggregate limits of policies which come into effect after operations would apply, but, as stated, the aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace and Gale’s operations.”

➤ *Wallace & Gale Co. v. Liberty Mutual Ins. Co.*, 385 F.3d 820, 834 (4th Cir. 2004).

# Non-Completed Operations

(Policyholder Perspective, Robert Horkovich)

“...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.”

- *Continental Cas. Co. v. Employers Ins. Co. of Wausau (Keasbey)*, No. 601037/03 (N.Y. App. Div. 12/30/08), at 29.

# Non-Completed Operations

(Policyholder Perspective, Robert Horkovich)

“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.”

- *Continental Cas. Co. v. Employers Ins. Co. of Wausau (Keasbey)*, No. 601037/03 (N.Y. App. Div. 12/30/08), at 31.

# Non-Completed Operations

(Policyholder Perspective, Robert Horkovich)

“...prior to CNA reaching the aggregate limit of its coverage in 2001, all claims were products claims.... 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.”

- *Continental Cas. Co. v. Employers Ins. Co. of Wausau (Keasbey)*, No. 601037/03 (N.Y. App. Div. 12/30/08), at 17-18.



# Who has burden of proof?

(Insurer Counsel, Robert Berkes)



# What happened to the evidence?

(Insurer Counsel, Robert Berkes)



# When was the policy period?

(Insurer Counsel, Robert Berkes)



# When did the injury result? (Insurer Counsel, Robert Berkes)



# Current status of the law on premises / operations coverage

# Status of the Law

(Policyholder Counsel, Scott Godes)

*Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. Ct. Spec. App. 1997)

*Frontier Insulation Contractors v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169 (1997)

*Travelers Ins. Co. v. McDermott, Inc.*, No. Civ. A. 01-3218, 2003 WL 21999354 (E.D. La. Aug. 22, 2003)

*Travelers Cas. & Sur. Co. v. ACandS, Inc.*, No. 103059/03, slip op. at 2 (N.Y. Sup. Ct. July 18, 2003)

# Status of the Law

(Policyholder Counsel, Scott Godes)

*In re The Wallace & Gale Co.*, 385 F.3d 820, 833-35 (4th Cir. 2004)

*Am. Employers Ins. Co. v. Eagle, Inc.*, No. Civ. A. 03-0048, 2003 WL 23305664 (E.D. La. Nov. 12, 2003), *aff'd on other grounds*, 122 F. App'x 700, 2004 WL 2790622 (5th Cir. Dec. 6, 2004)

*St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, No. C9-02-8084, slip op. (Minn. D. Ct. Sept. 27, 2005)

*Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp.*, 285 F. Supp. 2d 200, 202 (D. Conn. 2003), *rev'd on other grounds*, 419 F.3d 181 (2d Cir. 2005)

# Status of the Law

(Policyholder Counsel, Scott Godes)

*Nat'l Union Fire Ins. Co. v. Porter Hayden Co.*, No. AMD 03-3408, slip op. (D. Md. Sept. 9, 2005)

*Nat'l Cas. Co. v. First State Ins. Group*, No. 04-10167-MLW, slip op. at 5 (D. Mass. Apr. 28, 2005), aff'd, 430 F.3d 492 (1st Cir. Dec. 2, 2005)

*ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 255-56 (3d Cir. 2006)

*In re Thorpe Asbestos Coverage Cases*, No. JCCP4458, slip op., Opinion and Order on Plaintiff's Motion for Summary Adjudication as to Insurers' Equitable Defenses of Waiver, Estoppel, Laches, and Ratification (Cal. Super. June 2, 2007)



# Status of the Law

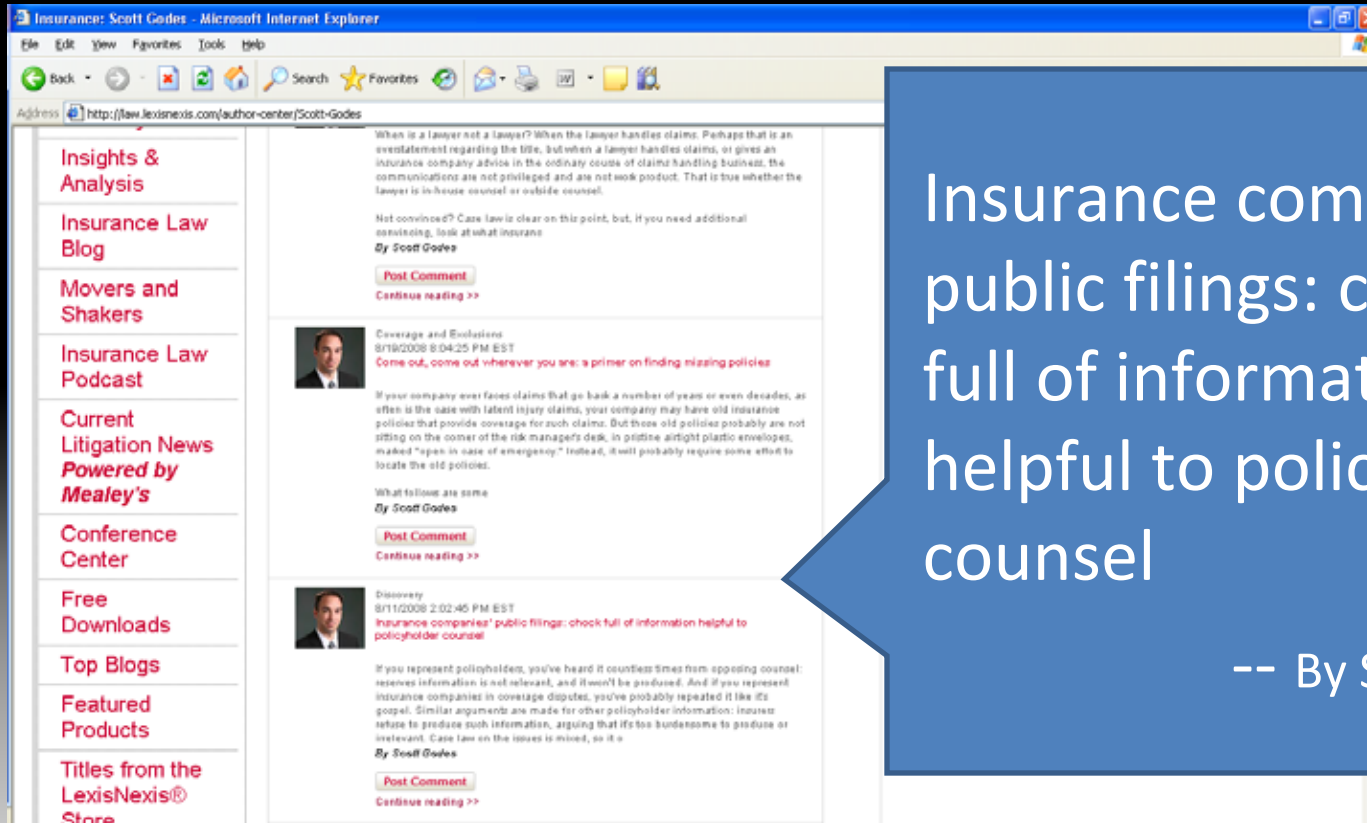
(Policyholder Counsel, Scott Godes)

*Employers Reinsurance Co. v. Superior Court (Thorpe Insulation Company)*,  
161 Cal. App. 4th 906, 74 Cal. Rptr. 3d 733 (Cal. Ct. App. 2008)

*Cont'l Cas. Co. v. Employers Ins. Co.*, 16 Misc. 3d 223 (N.Y. Sup. Ct. 2007),  
865 N.Y.S.2d 855 (1st Dep't 2008)

# Insurer and industry disclosures regarding premises / operations coverage

# Pay No Attention to Actuary Behind the Curtain (Policyholder Counsel, Scott Godes)



Insurance companies' public filings: chock full of information helpful to policyholder counsel

-- By Scott Godes

# Pay No Attention to Actuary Behind the Curtain (Policyholder Counsel, Scott Godes)

*“Non-product exposures  
have been adequately  
identified and reserved by  
reviewing over 700 accounts”*



# Pay No Attention to Actuary Behind the Curtain (Policyholder Counsel, Scott Godes)

*“Identified a small number of accounts with actual or potential non-product exposure”*



# Pay No Attention to Actuary Behind the Curtain (Policyholder Counsel, Scott Godes)

*“Non-product’  
exposure generally  
rises from...”*



**BUT is any of this “drafting history” evidence ...  
(Insurer Counsel, Robert Berkes)**

**... Admissible?**



**Objection SUSTAINED!!**

# Do Not Pay Attention to What the Policyholder Said or Did (Insurer Counsel, Robert Berkes)



Policyholder's risk management department files and the broker's files are often filled with damaging admissions against interest

- By Robert Berkes



# Do Not Pay Attention to What the Policyholder Said or Did (Insurer Counsel, Robert Berkes)



**BUT** . . . what happened to all the policyholder's "job files" or contracts?

# Do Not Pay Attention to What the Policyholder Said or Did (Insurer Counsel, Robert Berkes)

*“Our primary coverage is exhausted! We have to tender these claims to our excess insurers.”*



Status of various cases; status of the law; discussion of the substantive/procedural issues

# You Can Get There from Here

(Policyholder Counsel, Scott Godes)



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OR



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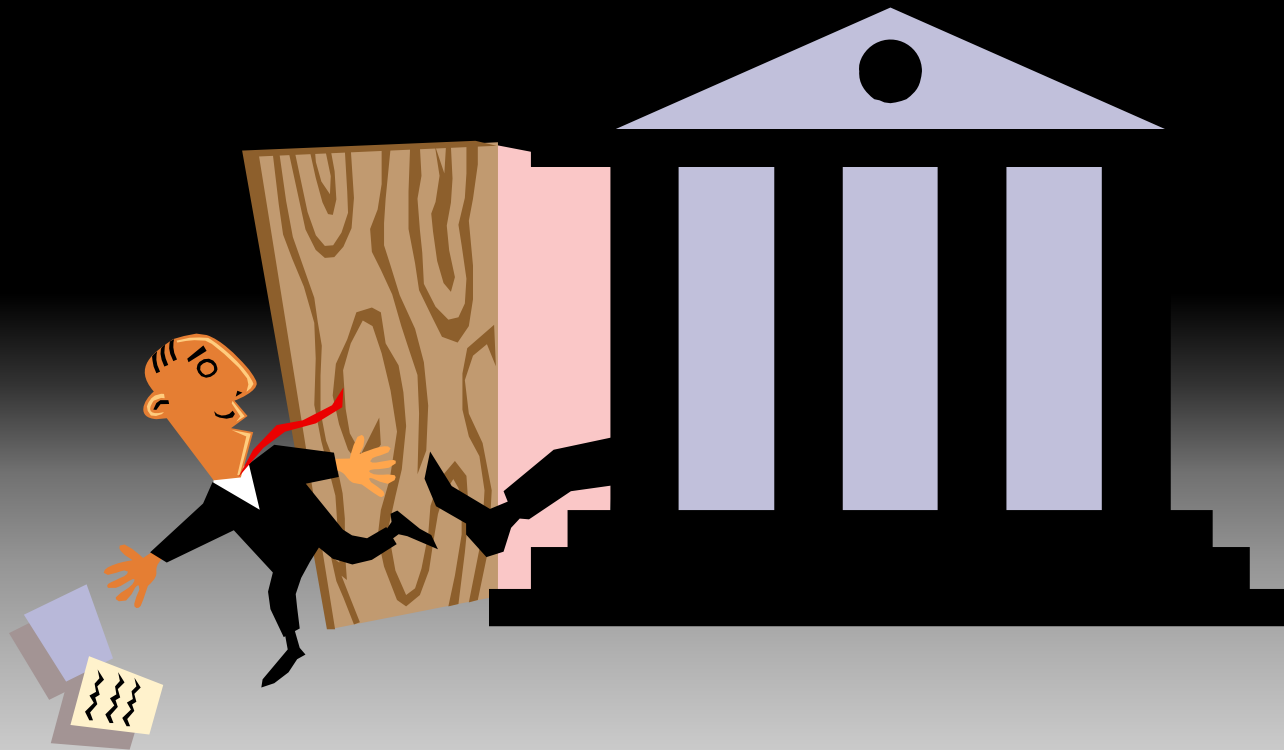


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# Not so fast, counsel . . . Maybe not.

(Robert Berkes)



# Applause!!!



# Questions

