

***THE APPLICATION OF POLICY LIMITS FOR ASBESTOS BODILY
INJURY CLAIMS – A POLICYHOLDER’S PERSPECTIVE OF
CALIFORNIA LAW ON (i) PRODUCTS VERSUS OPERATIONS CLAIMS,
AND (ii) NUMBER OF OCCURRENCES***

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***Paul A. Zevnik
Michel Y. Horton
Jeffrey S. Raskin***

Morgan, Lewis & Bockius LLP

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This article provides a policyholder perspective, with a focus on California law, regarding evolving disputes over the application of liability insurance policy limits to certain types of asbestos-related bodily injury claims.¹ Specifically, we address (i) the distinction between products/completed operations claims, which are typically subject to policy limits, and “operations” or “non-products” claims, which are typically subject only to “per occurrence” limits with no aggregate limit applicable, and (ii) recent court decisions regarding the “number of occurrences” implicated by asbestos bodily injury lawsuits and the implication for aggregate limit caps on coverage. These issues are of no small moment. Literally, billions of dollars have been paid by insurers, with billions more in dispute, based on policyholder contentions that their asbestos liabilities arise from non-aggregated “operations” claims.

On the question of products versus operations exposures, this article advocates a pro-insured interpretation that questions the viability of the Fourth Circuit decision applying Maryland law – the *Wallace & Gale* case – and, instead, suggests that a Minnesota trial court decision, the *API* case, is the more likely outcome in most jurisdictions, particularly in California. On the question of number of occurrences, this article addresses the recent decision by a California Court of Appeal in *London Market Insurers v. Superior Court* (“Kaiser Cement”), where the court held that the number of occurrences was a fact-based issue and rejected the argument that all asbestos claims necessarily result from a single occurrence.

I. Asbestos Litigation is Here to Stay

Asbestos litigation continues to bedevil defendants and courts, while rewarding lawyers with a steady stream of work, throughout the country. Both substantively and procedurally, asbestos litigation has rocked the legal world for more than three decades – substantively affecting core principles of product liability, premises liability, insurance and reinsurance, and bankruptcy law, while procedurally resulting in state-by-state tort reform, state and federal court docket changes, evidentiary burdens, and statutes of limitations, to mention a few. With the recent demise of Congressional efforts to establish a federal trust fund – optimistically entitled, “Fairness in Asbestos Injury Resolution Act of 2005,” or FAIR – there appears to be no end in sight to continued litigation in the civil system. For example, a recent study by RAND Corporation provides some jaw dropping statistics:

- ◆ Tens of millions of Americans were exposed to asbestos in the workplace over many decades. With latency periods of up to 40 years between exposure and manifestation of disease, asbestos injuries and claims are expected to continue for another three decades.
- ◆ Through 2002, approximately 730,000 asbestos claims had been filed against 8,400 defendant entities. Although estimates vary widely, there appears to be consensus that less than 75% of the claims have been brought to date, and possibly only 25% of claims have been brought.

¹ The authors are partners at Morgan, Lewis & Bockius LLP and regularly represent policyholders in insurance coverage matters. The positions expressed in this article do not reflect the views of the Firm or any of its clients. Like all good lawyers, the authors reserve the right to advocate those positions that support their client’s cause.

- ◆ Total spending on asbestos litigation through 2002 was approximately \$70 billion, with defense costs accounting for more than \$21 billion and indemnity/compensation payments accounting for \$49 billion.
- ◆ Future costs of asbestos litigation could total an additional \$130 billion to \$195 billion.

“Asbestos Litigation,” Rand Institute for Civil Justice, 2005. In short, asbestos litigation appears to be a fact of life in the legal world for the foreseeable future.

II. Products Versus Operations Asbestos Claims

The Second Circuit recently described the characteristics of “products” versus “operations” asbestos claims, and the implications on policy limits, in a case involving a coverage dispute between insurers over Owens Corning Fiberglass asbestos liabilities, as follows:

“From 1952 through 1979, Travelers insured OCF for bodily injury and property damage through a series of annual primary policies. With respect to claims for bodily injury, the primary policies distinguished between “products” and “non-products” claims. Products coverage protected OCF from claims for asbestos-related injuries that occurred either after asbestos products were placed into the stream of commerce or after an asbestos-related operation was completed. Non-products coverage protected OCF from claims for asbestos-related injuries resulting from asbestos exposure on OCF’s premises or during its business operations; for example, injuries occurring during the installation or removal of asbestos products. Each primary policy had a \$1 million “per occurrence” limit of liability, regardless of whether the claims arising from that occurrence fell within the products or non-products category. Thus, for any single occurrence, Travelers was not required to pay more than \$1 million under any single primary policy.

Each primary policy also had a \$1 million “aggregate” limit of liability – but for products coverage only. Thus, if claims arising from multiple occurrences triggered products coverage, the most that Travelers had to pay under any single policy was \$1 million. Once the aggregate limit was reached, the policy was exhausted, regardless of any additional occurrences. However, if claims arising from multiple occurrences triggered non-products coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”

Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of America, 419 F.3d 181, 185 (2d Cir. 2005). The First Circuit also recently had occasion to describe these distinctions, noting:

“Asbestos non-product liability claims” are a relatively recent category of asbestos-related claims. The earlier class of claims known as “asbestos product liability claims,” claims pressed against asbestos manufacturers, are now rare: the pool of funds available to cover this type of claim was largely depleted by the 1990s as the asbestos manufacturers went bankrupt. In the late 1990s, claims were increasingly brought against firms which had been responsible for installing or servicing products containing asbestos. These new claims are referred to in the industry as “non-product liability claims.”

National Casualty Corp. v. First State Insurance Group, 430 F.3d 492, 494, n.1 (1st Cir. 2005).

The issues raised by the classification of asbestos claims was relatively dormant for several decades, not because the insurance industry was unaware of the unlimited exposure arising from operations coverage, but because many policyholders were grateful simply to have any coverage at all in light of multiple defenses raised by their liability insurers. The issue has now become acute, primarily as the result of insurers claiming exhaustion of their policies based on many years of allocating asbestos claims to aggregate limits without distinguishing between “products” and “operations” coverage provisions. As noted in a 2002 article in the ABA Journal:

“The insurance industry has long been aware of its significant and uncapped exposure to asbestos contractors for claims falling outside insurance products exclusions or limits (often called “nonproducts” claims). One reporter in 1996 identified “[n]on-products exposures stemming from installation activities associated with traditional products defendants” as one of the “main components ... of the insurance industry's \$16 billion of unfunded liabilities.”

During the early 1990s, insurers were emboldened by a series of insurance actions brought by asbestos manufacturers in which courts rejected arguments that those policyholders were entitled to coverage outside the products definition because of conduct-related allegations against those defendants. Those coverage disputes focused solely on the “arising out of” language (i.e., failure to warn and conspiracy claims) and did not involve companies engaged in installation activities or any other activities that would bring them outside the insurance products definition’s separate time and place requirements. The insurance industry, however, sought to parlay these “arising out of” cases into a general holding that all asbestos tort products liabilities were

subject either to products exclusions or to limitations on coverage imposed by the products definition.

This effort was defeated in two 1997 appellate court opinions that correctly decided that liabilities incurred by asbestos contractors arose from asbestos exposures occurring prior to the insureds' relinquishment of the asbestos product. In the wake of these opinions, insurance companies have paid out many hundreds of millions of dollars for asbestos "nonproducts" claims to policyholders engaging in asbestos contracting activities."

Lasker, *"Products Liability: A Litigator's Guide"* 31-WTR Brief (Winter 2002).

Another relatively recent phenomenon in asbestos coverage litigation is that policyholders, faced with insurer claims of exhaustion, are seeking to reclassify prior payments on asbestos claims in order to replenish limits based on the correct characterization of claims subject to aggregates and claims that are not. This trend was noted in a 2002 article on environmental and energy risk management, in which the author stated:

"Because of the unlimited amount of coverage available for asbestos premises claims, classification of the insurance claim at the outset is important, particularly when large employers, such as oil, chemical, and steel companies, utilities, railroads, and even hospitals and universities, are being hit with increasing numbers of asbestos-premises claims. In fact, many companies that have previously exhausted their products coverage are now engaged in the task of reviewing thousands of claims that might be subject to coverage under premises and operations portions of their general liability policies instead of the product liability portion of the policies. Successful reclassification of claims filed against an insured not only frees up previously exhausted insurance coverage, but also affords the insured an opportunity to file future claims under a virtually limitless policy. Accordingly, prior settlement agreements should be reviewed to determine whether the claims were classified as either products or premises claims and whether the premises coverage was released in the settlement agreement."

Siwik, *The Crashing Wave Of Asbestos Litigation: Practical Suggestions For Staying Afloat*, 20 NO. 4 ACCA Docket 43, 49-50 (2002).

To date, there have been relatively few decisions addressing the distinction between aggregated and non-aggregated asbestos claims. However, it is clear that issues relating to characterization of asbestos claims will be litigated in multiple jurisdictions, with enormous amounts of insurance at stake, over the next several years.

III. The Application of Insurance Policy Limits to Asbestos Claims

Much of the asbestos litigation has been funded through historic liability insurance policies. Recently, a coverage issue regarding the amount of insurance and the application of policy limits has risen to the forefront insured-insurer disputes. The issue involves whether, and to what extent, standard form insurance policies provide policy limits applicable to asbestos bodily injury claims. The focus of the dispute has been on:

Products or Operations Exposures. Insureds contend that the standard form policy aggregate limits apply only to products/completed operations claims, and do not apply to “operations” exposures. On the other hand, insurers contend that the asbestos claims arise from products/completed operations exposures, such that all claims are subject to policy aggregates and eventual policy exhaustion. Alternatively, insurers contend that potentially non-aggregated coverage for “operations” exposures is limited to very narrow factual circumstances.

Number of Occurrences. Notwithstanding the dispute over products/operations coverage, virtually all insurance policies contain an express “per occurrence” limit. Both insurers and insureds have taken inconsistent positions on how many “occurrences” asbestos litigation involves, depending on the structure of a particular policyholder’s insurance program and whether the policies contain “self-insured retentions” or “deductibles.” Some insureds will argue that each asbestos claimant constitutes a single “occurrence” such that the “per occurrence” limit applies to each claim. Occasionally, under certain policies, the “per occurrence” limit will apply to all claims arising from a particular “premises location.” In either case, the “per occurrence” limit can be accessed over and over again without exhausting the policy coverage. Insurers, on the other hand, might argue that asbestos claims arise from a single occurrence – often described as the manufacturing, distribution and installation of asbestos products without adequate warning – such that all claims are bundled together in order to exhaust the policy’s occurrence limit.

IV. Products Versus Operations Exposures – The “Wallace & Gale” Argument

The application of products or operations limits was addressed by the Fourth Circuit Court of Appeals in *The Wallace & Gale Co. v. Liberty Mutual Ins. Co., et al.*, 385 F.3d 820 (4th Cir. 2004). In *Wallace & Gale*, the Fourth Circuit applied Maryland law and addressed the issue of whether, and to what extent, the standard form general liability policies at issue provide non-aggregated coverage for bodily injury lawsuits arising from exposure to asbestos in the course of a policyholder’s “operations.” In affirming the summary judgment granted in favor of the insurers by the bankruptcy court, the Fourth Circuit agreed with the lower court’s finding that:

“If a claimant's initial exposure occurred while Wallace & Gale was still conducting operations, policies in effect at that time will not be subject to any aggregate limit. If, however, initial exposure is shown to have occurred after operations were concluded or if exposure that began during operations continued after operations were complete, then the aggregate limits of any policy that came into effect after operations were complete will apply. Where [sic] a given claimant falls within this framework will have to be considered on a case-by-case basis.”

Wallace & Gale, 385 F.3d at 833, quoting and citing *In Re The Wallace & Gale Co.*, 275 B.R. 223, 241 (D.Md. 2002).

In short, the Fourth Circuit limited non-aggregated coverage for operations claims to those policies at issue in effect at the time the exposure to operations took place, and declined to extend non-aggregated coverage to policies in effect after the operations had ceased. Accordingly, an asbestos-related claim that results from exposure to operations during a particular policy period – indisputably covered under the “operations” policy provisions – is transformed into a “completed operations” claim, subject to aggregates, in later policy periods after the operations have ceased.

In contrast, a Minnesota trial court rejected the *Wallace & Gale* restrictions to non-aggregated operations coverage and, instead, determined that an operations exposure during a particular policy period would remain an operations exposure in all later policies. *A.P.I., Inc. v. Home Ins. Co.*, No. C9-02-8084 (Dist. Ct. Minn.). The *A.P.I.* decision directly addressed, and rejected, the *Wallace & Gale* approach, in the same manner that some of the discussion above would cause a California court to treat the federal court decision. The initial *A.P.I.* rulings came after the bankruptcy court decision in *Wallace & Gale* and while the appeal was pending before the Fourth Circuit. However, even after the Fourth Circuit rendered its decision, the *A.P.I.* court declined to follow *Wallace & Gale* with respect to the transformation of operations claims into completed operations claims in later policy years.

A. *Wallace & Gale* Policy Language

The pertinent policy language at issue in *Wallace & Gale* was described by the court as follows:

“The policy provisions involved are from Hartford’s policy, which is typical.

Subject to the above provision respecting ‘each occurrence,’ the total liability of [Hartford] for all damages because of (1) ***all bodily injury included within the completed operations hazard*** and (2) all bodily injury included within the products hazard ***shall not exceed the limit of bodily injury liability stated in the schedule as ‘aggregate.’***

* * *

‘[C]ompleted 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.

* * *

‘[B]odily injury’ means bodily injury, sickness or disease sustained by a person which occurs during the policy period, including death at any time resulting therefrom.’

385 F.3d at 833 (emphasis added).

Based on this language, the insurers argued, and the *Wallace & Gale* court agreed, that continuous bodily injury arising from exposure to asbestos during the insured’s operations is subject to the “completed operations” aggregate in triggered policies in effect after the operations were completed. Only those policies in effect at the time the exposure to asbestos during operations took place provide non-aggregated coverage. The insurers’ argument in *Wallace & Gale* focuses on the following propositions: (i) the insurers’ policies are triggered by “bodily injury” during their policy periods, and (ii) the “bodily injury” that takes place during the later policies occurs after the “operations” are completed. Therefore, under the definition of “completed operations,” the “bodily injury” that triggers their policies “occurs” after the operations are completed and the “completed operations” aggregate applies.

From a policyholder perspective, the *Wallace & Gale* court got it wrong. Based on the policy language, the custom and practice of the industry, and pertinent case law, policyholders contend that the *Wallace & Gale* approach is a *post hoc* attempt to distort the application of policy limits. As discussed below, the standard comprehensive general liability forms utilized by the insurance industry – and most general liability insurers with asbestos exposure during the relevant time period – restricted the application of an aggregate limit to claims or occurrences arising from the “products hazard” or the “completed operations” hazard, and did not apply an aggregate to any other claims or occurrences. It also is clear from the definition of “completed operations,” that this hazard embraces claims where “bodily injury” arises out of operations that had been completed. Correspondingly, where the “bodily injury” arises out of the insured’s ongoing operations, such claims do not meet the definition of “completed operations,” and no aggregate should be applicable.

In reaching its decision, the Fourth Circuit applied Maryland substantive law and that state’s policy interpretation principles. Of particular importance in distinguishing the Fourth Circuit’s decision from how the issue would likely be resolved under California law (and many other states that follow similar coverage principles) are the following points:

- ***Causal Connection between Specified Hazard and Resulting Injury.*** The Fourth Circuit did not address the argument that would link the “hazard” establishing the nature and scope of coverage – *i.e.*, “operations” or “completed operations” – to the ***cause of the injury***. This causal connection between the injury causing hazard and the category of triggered coverage is an important principle under insurance law. This “causal” connection between the “operations” out of which the bodily injury arises is also consistent with the only reasonable interpretation of the policy language. Additionally, expert testimony on insurance industry custom and practice appears to establish that a “causal connection” between the particular hazard – *i.e.*, operations – and the resulting “bodily injury” does not change over time or in later policies. This “causal connection” was an important consideration in the *A.P.I.* decision, as discussed below, which rejected the *Wallace & Gale* transformation approach.

- **Contextual Analysis.** The Fourth Circuit did not apply a “plain meaning” approach in construing the pertinent policy provisions, but instead perfunctorily determined the policy was unambiguous. In California, however, it is likely that the court will focus specifically on the “literal” language of the policy. *See, e.g., Foster-Gardner, Inc. v. National Union Fire Ins. Co. of Pittsburgh PA*, 18 Cal.4th 857, 887-88 (1998) (adopting literal interpretation of insurance policy); *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal.4th 38, 75-76 (1997) (“pertinent [insurance] policies provide what they provide”). As discussed below, the operative policy provisions require a “causal” nexus between a specified hazard and the resulting bodily injury.
- **The “All Sums” Rule.** The Fourth Circuit held that, under a recent decision, Maryland state courts had rejected the “all sums” approach to coverage for continuous injury claims, and instead had adopted a *pro rata* allocation approach, citing *Mayor & City Council of Baltimore v. Utica Mutual Insurance Co.*, 145 Md.App. 256, 802 A.2d 1070 (2002). The “pro rata” approach is premised on the assumption that insurers are only responsible to pay for the discrete injury that happens during their policy periods. California, in contrast, has consistently applied an “all sums” approach to continuous injury claims. Under California’s “all sums” case law, an insurer’s policy triggered by a continuous injury claim is responsible for the entire liability, not just the portion attributable to injury during its specific policy period. *Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal.4th 1059, 1080 (2002) (“[a]pro rata allocation among insurers ‘does not reduce their respective obligations to their insured.’ The insurers’ contractual obligation to the policyholder is to cover the full extent of the policyholder’s liability (up to the policy limits)”; *Aerojet-General Corp. v. Transport Indem. Co.*, 17 Cal.4th 38, 57, fn. 10 (1997) (same). As explained below, the “all sums” approach obligates the insurers to pay the full amount of the insured’s liability to individual claimants, including the company’s liability resulting from a claimant’s exposure to asbestos during the insured’s operations that happened many years before the inception of any particular policy.
- **California’s “Concurrent Causation” Rule.** The long-settled rule in California is that a loss that is attributable to more than one risk is fully covered as long as any of the contributing losses is covered. *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94 (1973). *Wallace & Gale* recognizes that two risks contribute to the claimant’s continuing asbestos bodily injury – an “operations” risk and a “completed operations” risk. Under California law, as long as one of those risks is covered under a policy, the insurer is required to provide complete coverage for the claim. Maryland has rejected this doctrine. Thus, in California, the fact that coverage is no longer available under a general liability policy for “completed operations” claims does not mean that the same policy is not responsible to pay for the “operations” risk that contributed to the claimant’s injury.

B. Insurance Industry Commentary, Case Law, And Insurer Counsel Commentary Supports The Requirement Of A “Causal Connection” Between The Specified Hazard And Resulting Bodily Injury; This “Causal Connection” Is Negated Through The Wallace & Gale Approach

The operative definitions and the commentary all support the proposition that the “completed operations” aggregate applies only to bodily injury *caused* by a “completed operation,” and

does not apply to bodily injury *caused* by an “operation.” As noted by a well-recognized insurance industry authority on policy interpretation:

“The ‘products-completed operations hazard’ concerns itself only with bodily injury and property damage liability (Coverage A). The first test as to whether bodily injury or property damage falls within the hazard is the location of the occurrence. To fall within the hazard, the injury or damage must occur away from the insured’s premises . . . Secondly, ***the injury or damage must be caused by products that are no longer in the insured's physical possession or work that has been completed or abandoned.***”

International Risk Management Institute, Commercial Liability Insurance (6th Reprint, January 2002), V.L.39-V.L.40 (emphasis added). As further explained by California’s preeminent commentator on insurance law, Justice Croskey:

- “Operations” coverage “extends to liability for bodily injury or property damage as a result of the insured’s ‘operations in progress’ (e.g., negligent construction of building).”
- “Completed operations” coverage “extends to liability for bodily injury or property damage that arises out of the insured’s completed work – e.g., where a contractor, after completing construction on a building, is presented with a claim that someone was injured as the result of a structural failure in the building.”

Croskey, *et al.*, CAL. PRAC. GUIDE: INSURANCE LITIGATION (The Rutter Group 2004), §§ 7:19 - 7:24.

A California appellate court explained recently that premises operations coverage, not “products” coverage and not “completed operations” coverage, applies to injuries that take place during the insured’s operations:

“Premises operations coverage is involved when liability arises out of an injury or loss that occurs while the while the work or manufacturing is in progress. Examples of injuries covered under the premises-operations coverage include ***injuries suffered by a shipyard worker while installing insulation*** at the insured’s facility and injuries ***caused*** by a subcontractor’s negligent construction of a wall that fell on a worker ***while the job was in progress.***”

Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau, 130 Cal.App. 4th 99, 114 n. 6 (2005) (emphases added).

There is no language in the standard form policy that says premises operations coverage is available only as to bodily injury that results from the insured’s operations during the policy period. Bodily injury during the policy period – resulting from the insured’s operations that occurred at any time – is all that is required for coverage to exist under the policy. If the bodily injury was caused by the work in progress, the premises operations coverage applies. If the bodily injury was caused by the insured’s completed work, the completed operations coverage applies.

The *Travelers* court based its analysis on an earlier asbestos coverage decision. In *Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 16 Cal. App. 4th 492 (1993), the court distinguished between “products” coverage and “premises” operations coverage with reference to Appelman’s treatise on Insurance Law and Practice:

“An injury or loss may result while an activity is in progress, and prior to the completion thereof, either as a result of an act of negligence or an omission. Such liability is embraced within the ordinary liability aspect of a public liability policy under **coverage for premises-operations** . . . Once a product has been completed and sent to market . . . liability may be incurred by reason of a defect in merchandise or improper workmanship. It should be clear that the premises-operations coverage is not appropriate coverage and the individual now needs ‘products liability or ‘completed operations’ coverage. The coverages are not complementary and not overlapping.”

Id. at 500 (quoting 7A Appelman, Insurance Law and Practice (1979), § 4508, pp. 340-42)) (emphasis added). Or, in other words, “products” or “completed operations” hazard coverage “identifies a core factual nucleus, *i.e.*, products manufactured, sold or distributed by the insured, and links that nucleus to bodily injury or property damage coverage under the policy.” *Id.* at 504.

The same analysis appears in other case law. In *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 667 N.Y.S.2d 982 (N.Y. 1997), the New York Court of Appeals held that only premises operations coverage is implicated by injuries resulting from the installation of asbestos-containing insulation products:

“The [products hazard] exclusions, 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.” *Id.* at 986.

Or, in other words, “[s]ince asbestos fibers may be readily released from the air and inhaled while a contractor is cutting and sawing the product during installation, there is a reasonable probability that any injury attributed to Frontier would stem from the injuries during ongoing operations – covered events.” *See also Friestad v. Travelers Indem. Co.*, 393 A.2d 1212, 1213 (Pa. 1978) (“‘Premises-operations’ refers to injuries or losses which occur on the business premises at any time, as well as injuries or losses which arise away from the normal business premises such as a job site . . .”); *Southern Guar. Ins. Co. v. Zantop Int’l Airlines, Inc.*, 767 F.2d 795, 799 (11th Cir. 1985) (“[P]remises-operations” coverage insures against “damage arising from the ongoing activities of the operation of a particular business”); *Liberty Mutual Ins. Co. v. Triangle Industries, Inc.*, 957 F.2d 1153, 1158 (4th Cir. 1992) (wherein Liberty Mutual successfully argued, and the court so held, that loss associated with wastes disposed at a site should be allocated to operations coverage under all relevant policies, even those that first took effect *after* the waste disposal ceased).

Moreover, noted insurer commentators have correctly distinguished “completed operations” from “operations” claims by focusing on the cause of the loss and recognizing that “operations” claims often do not have aggregate limits:

“The ‘completed operations hazard’ provision limits an insurer’s liability for bodily injury or property damage to losses that occur away from the insured’s premises *and that arise from the insured’s operations after those operations have been completed.* (Citations omitted.)

Many CGL policies also limit coverage under the completed operations and/or products hazard provisions by providing for an *‘aggregate’ limit of liability that is applicable only to claims falling within the completed operations and products hazards.*”

Ostrager & Newman, Handbook on Insurance Coverage Disputes, § 7.02[b][1] (11th Ed.) (2002) (emphasis added).

Other insurer counsel agree that “completed operations” coverage applies only to injury or damage resulting from the policyholder’s completed operations, and not the policyholder’s work-in-progress. For example, in his California Insurance Law Handbook, Paul E.B. Glad of Sonnenschein Nath & Rosenthal notes that premises coverage, not “completed operations” coverage, applies to liability arising from “premises and ongoing operations”:

“Premises and operations policies and [completed operations product liability] policies thus provide different types of coverage: the former providing coverage for liability arising from premises and ongoing operations, the latter providing coverage for liability arising away from the premises after the product has been relinquished or the work has been completed.”

DiMugno and Glad, California Insurance Law Handbook, § 49:1 (2005 ed.).

Wallace & Gale therefore stands alone. It is the only case that has departed from the understanding of the insurance industry and the courts that “completed operations” coverage applies *only* to injury or damage actually caused by the insured’s “completed operations.” Claims asserted by workers suffering injury “while installing insulation” are caused by operations and thus are premises operations claims. *Travelers*, 130 Cal.App.4th at 114, n.6. They are only subject to the “per occurrence” limits in the standard form policy, and not the aggregate limit for “completed operations” claims.

C. *A Contextual Analysis Of The Standard Form Policy Does Not Support The Wallace & Gale Approach*

The standard form policy typically defines “Completed Operations Hazard” as follows:

“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 or rented by 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.”

The definition starts with the words “completed operations hazard.” Something is completed when it is concluded, ended or finished. *Webster’s New World Dictionary, Second College Edition, 1976*, p. 290. “Operations” refers to activities that are a part of some work or operations. *Webster’s New World, supra*, p. 997. A “hazard” refers to a risk, peril, danger. *Webster’s New World, supra*, p. 643.

The balance of the definition confirms it applies only to dangers, perils or risks causally connected to finished work. After the words “completed operations hazard,” the definition contains the phrase “includes bodily injury or property damage ***arising out of*** operations . . . ,” and then limits the scope of this clause by the “***but only*** if the bodily injury or property damage occurs after ***such operations*** have been ***completed or abandoned***” language that follows. Accordingly, the words “but only if” serve to limit the application of the preceding clause “bodily injury . . . arising out of operations” if certain conditions are met.

One of those conditions is that “the bodily injury . . . occurs after “***such operations***” are “completed or abandoned.” Here the words “such operations are completed or abandoned” refers to the operations mentioned in the definition’s initial clause, *i.e.*, “arising out of operations.” The phrase “arising out of” as used in insurance policies refers to a causal connection or causal nexus that must exist between two different items or things. *State Farm v. Partridge*, 10 Cal.3d 94, 100-101, fn. 8 (1973); *Acceptance Ins. Co. v. Syufy Enterprises*, 69 Cal.App.4th 321, 328 (1999); *Kramer v. State Farm*, 76 Cal.App.4th 332, 340 (1999); *Fiberboard Corp. v. Hartford*, 16 Cal.App.4th 492, 502-505(1993). Accordingly, the aggregate limit only applies to claims alleging bodily injury arising out of “completed operations,” and does not apply to claims arising out of operations.

1. California Principles of Insurance Policy Interpretation

Under California’s policy interpretation principles and precedent, it is unlikely that a court would reach the *Wallace & Gale* conclusion. California law is firm that policy language and party intent will control contractual obligations, regardless of public policy considerations. Questions of “fairness” or “equity” or other fuzzy concepts will not supersede policy language. *AIU*, 51 Cal.3d at 818 (California courts will not add, take away or otherwise modify the contract for “public policy considerations”); *Foster-Gardner*, 18 Cal.4th at 888 (courts will not “rewrite an insurance policy” because it purportedly is in “everyone’s best interest”). In *Aerojet*, the California Supreme Court elaborated on this principle in rejecting allocation of loss to the policyholder in a continuous damage environmental case as follows:

“Beneath the Court of Appeal’s concern about ‘fairness’ and ‘justice’ is, apparently, a belief that, without an approach like the one it adopted, Aerojet might get a windfall from the insurers. That is not the case. We shall assume for argument’s sake that Aerojet has enjoyed great good luck over against the insurers. But the pertinent policies provide what they provide. Aerojet and the insurers were generally free to contract as they pleased. (Citation

omitted.) They evidently did so. They thereby established what was ‘fair’ and ‘just’ inter se. We may not re-write they themselves wrote. (Citation omitted.) We must certainly resist the temptation to do so here simply in order to adjust for chance – for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert [sic] (Citations omitted.) As a general matter at least, we do not add to, take away from, or otherwise modify a contract for ‘public policy considerations. (Citing *AIU*) We shall therefore allow whatever ‘gains’ and ‘losses’ there may be to lie where they have fallen. (Footnote omitted.)”

Aerojet, 17 Cal.4th at 75-76. See also *Montrose Chem. Corp. of California v. Superior Court*, 6 Cal.4th 287, 301 (1993) (in ruling that insured is entitled to defense of environmental lawsuit based on mere “potential” of coverage, and that insurer has the burden to demonstrate conclusively the absence of such potential in order to avoid defense, court held: “Any seeming disparity in the respective burdens merely reflects the substantive law.”); *Certain Underwriters at Lloyds of London v. Superior Court (Powerine Oil Co.)*, 24 Cal.4th 945, 959-960 (2001) (court will not rewrite policy provision for “considerations of public policy”: “Our reason was that we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose.”).

2. California Principles Of Insurance Contract Interpretation Will Permit Extrinsic Evidence To Demonstrate, Or Resolve, Any Ambiguity In An Insurance Policy, Including Drafting History

Wallace & Gale was decided on summary judgment, apparently without any extrinsic evidence on the parties’ intent or industry custom and practice, based on the court’s determination that the policy provisions were clear and unambiguous. *Wallace & Gale*, 385 F.3d at 834 (“we see no ambiguity in the terms of the policy and so apply the terms of the insurance contract itself to the facts at hand.”) However, in California, the court is required to accept – even if only “provisionally” – extrinsic evidence to ascertain whether a contract is reasonably susceptible of a particular meaning. As held by the Court of Appeal:

“Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (Citation omitted). Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (Citation omitted).”

Wolf, 114 Cal.App.4th at 1350-51, citing and quoting *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 39-40 (1968). And, it goes without saying, that once an ambiguity is demonstrated, extrinsic evidence is appropriate to resolve the dispute. As held by the Supreme Court, drafting history is an appropriate tool to utilize in interpreting insurance contracts:

“Most courts and commentators have recognized, however, that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues In this case, we find the drafting history relevant in evaluating [insurer’s] argument that, from a public policy standpoint, the insurance industry will be harmed by the adoption of a continuous trigger that the industry assertedly never anticipated would be applied to these policies.”

Montrose, 10 Cal.4th at 670-71.

In *Montrose*, the court discussed the extensive written record on the 1966 revisions to the standard CGL policy form, recognizing that such materials are helpful in establishing contemporaneous intent. The California Supreme Court has noted that the **absence** of drafting history supporting an insurer’s current interpretation of its standard form policies is probative on original intent. *MacKinnon*, 31 Cal.4th at 653.

Accordingly, in any coverage dispute over the products/operations coverage, the parties will be permitted to introduce extrinsic evidence – including industry custom and practice – with respect to these policy provisions.

3. California Has Adopted Pro-Policyholder Interpretative Principles For Construing Insurance Policies And Relying Upon Drafting History

More recently, the California Supreme Court articulated the policy interpretation principles that control the construction of insurance contracts, as follows:

- ◆ “While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.”
- ◆ “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties Such intent is to be inferred, if possible, solely from the written provisions of the contract If contractual language is clear and explicit, it governs.”
- ◆ “A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable The fact that a term is not defined in the policies does not make it ambiguous Nor does ‘[d]isagreement concerning the meaning of a phrase,’ or ‘the fact that a word or phrase isolated from its context is susceptible of more than one meaning.’ ‘[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract.’”
- ◆ “If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured’s reasonable expectation of coverage.”

Powerine Oil Co., Inc. v. Superior Court, 37 Cal.4th 377, 390-91 (2005) (citations omitted). The *Powerine* court went on to address how these principles are applied to standard form policy provisions:

“In *Powerine I*, we explained further that standard form policy provisions are interpreted under the same rules of construction. “[W]hen they are examined solely on a form, i.e., apart from any actual agreement between a given insurer and a given insured, the rules stated above apply mutatis mutandis. That is to say, where it is clear, the language must be read accordingly, and where it is not, in the sense that satisfies the hypothetical insured's objectively reasonable expectations.””

Powerine, 37 Cal.4th at 391 (citations omitted.)

Additionally, with respect to insurance contracts, the following interpretative rules must be utilized:

- ◆ Insuring grants are construed broadly in favor of coverage. *Montrose Chemical v. Admiral Insurance*, 10 Cal.4th 645, 667 (1995) (“We generally interpret the coverage clauses of insurance policies broadly [in order to protect] the objectively reasonable expectations of the insured.”); *Silberg v. California Life*, 11 Cal.3d 452, 464-466 (1974). Here, the *Wallace & Gale* interpretation undermines the broad “occurrence” coverage afforded by these standard form CGL policies.
- ◆ Exclusions and limitations are construed narrowly and liberally interpreted in favor of coverage. *Delgado v. Heritage Life*, 157 Cal.App.3d 262, 271 (1984); *Safeco Ins. v. Robert S.*, 26 Cal.4th 758, 766 (2001) (Interpreting ambiguous illegal acts exclusion in light of broad promise of coverage provided by the policy); *Shade Foods, Inc. v. Innovative Products Sales & Marketing*, 78 Cal.App.4th 847, 867 (2000) (Narrowly interpreting exclusion for personal property in the care, custody or control of any insured.)
- ◆ Exclusions and limitations must be “conspicuous, plain and clear” to be enforced. *State Farm v. Jacober*, 10 Cal.3d 193, 201-202 (1973); *Haynes v. Farmers Ins. Exchange*, 32 Cal.4th 1198, 1204 (2004); *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 648 (2003) (rule applies with particular force when a policy’s coverage provisions would lead insured to reasonably expect coverage for matter purportedly excluded).
- ◆ The insurer bears the burden of proving applicability of exclusions and limitations. *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183, 1188 (1998); *Royal Globe v. Whitaker*, 181 Cal.App.3d 532, 537 (1986); *Prichard v. Liberty Mutual*, 84 Cal.App.4th 890, 910 (2000). Accordingly, it should be the insurer’s burden to demonstrate which claims fall within the aggregate limits of “completed operations,” rather than the insured’s burden.
- ◆ The insurer bears the burden of proving exhaustion. *Hartford v. Superior Court (Syntex)*, 23 Cal.App.4th 1774, 1781 (1994). (Primary insurer claiming exhaustion must defend until it obtains a declaratory judgment or summary judgment that it has exhausted its policy limits.)

The application of these principles to the issue of non-aggregated “operations” coverage would, at a minimum, result in the review of extrinsic evidence, including drafting history and insurance industry custom and practice, and would likely result in a determination of ambiguity, which, if not resolved through extrinsic evidence, would be construed in favor of the insured and against the drafter of the policy, the insurer.

D. Wallace & Gale Is Inconsistent With The “All Sums” Rule And The “Concurrent Causation” Doctrine

1. The “All Sums” Rule

California is an “all sums” state. *Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 1080 (2002) (“[a]pro rata allocation among insurers ‘does not reduce their respective obligations to their insured.’ The insurers’ contractual obligation to the policyholder is to cover the full extent of the policyholder’s liability (up to the policy limits).” The requirement in the policies that there be injury “during the policy period” only specifies what needs to happen for coverage to exist under the policy. *Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 105 (1996). Once there is injury “during the policy period,” the insurer in California is required to pay “all sums,” *i.e.*, “the full extent of the insured’s liability (up to the policy limits), not just for the part of the damage that occurred during the policy period.” *Id.* In contrast, Maryland has specifically rejected “all sums” in favor of a “pro rata” approach that compartmentalizes an insurer’s liability to only that portion of injury that occurred during its specific policy period. *Mayor & City Council of Baltimore v. Utica Mutual Insurance Co.*, 145 Md.App. 256, 802 A.2d 1070 (2002).

As described and approved by the California Supreme Court, the “all sums” approach provides that:

“[T]he event which triggers an insurance policy’s coverage does not define the extent of coverage. Although a policy is triggered only if [bodily injury or] property damage takes place ‘during the policy period,’ once a policy is triggered, the policy obligates the insurer to pay ‘all sums’ which the insured shall become liable to pay as damages for bodily injury or property damage. The insurer is responsible for the full extent of the insured’s liability . . . , not just for the part of the [injury or] damage that occurred during the policy period (citation omitted) in light of the foregoing, commentators have soundly stated: ‘Courts reject the argument that [an] insurer should only be responsible for [injury or] damage that took place during its policy period’”

Aerojet, 17 Cal.4th at 57, fn. 10, citing and quoting *Armstrong*, 45 Cal.App.4th 1 and Croskey, et al., CAL. PRAC. GUIDE: INSURANCE LITIGATION 2, ¶ 8:73.10.

Claims that are based on exposure to asbestos released **during** ongoing insulation operations involve injury that commences **before** the operation is complete, and **before** physical possession of the insulation has been relinquished to others. If, for example, a claimant was exposed to asbestos during an insured’s insulation operations in 1962, that claim does not become a “completed” operations claim merely because twenty years elapsed between the claimant’s injurious exposure to asbestos and the insured’s purchase of liability insurance. The elapse of time between a particular claimant’s exposure to asbestos and the inception of the policy does not mean **all** of the claimant’s bodily injury occurred after the insured’s insulation operations were completed. Some of the bodily injury occurred while the insured’s operations were ongoing; some of the bodily injury occurred later.

Other case law also does not support the application of the aggregate limits to operations claims. For example, in *Mason v. Home Ins. Co. of Illinois*, 532 N.E.2d 526, 531 (Ill. App. Ct. 1988), the court held that botulism claims resulting from tainted restaurant food were not within the products/completed operations hazard, even though the resulting injuries did not “manifest” until after customers left the insured’s premises. The court analogized the botulism claims at issue to asbestos bodily injury claims in holding that the aggregate limit in the insurer’s policy did not apply:

“We note that our supreme court recently determined, after examining extensive medical evidence regarding the effect of asbestos exposure, that bodily injury occurs when asbestos fibers are inhaled and retained in the lung. (*Zurich Ins. Co. v. Raymark Industries, Inc.* (citation)). This case supports our determination that although overt symptoms of physical injury did not appear immediately, the bodily injury occurred when the toxic substance, the tainted food, was ingested. Accordingly, we find that the trial court erroneously determined that the plaintiffs’ claims fell under the products hazard coverage and that the \$1 million aggregate limit of the International policy provision applied.”

Id.

In California, asbestos bodily injury also is deemed to have occurred when asbestos fibers are inhaled and retained in the lung. *Armstrong*, 45 Cal. App. 4th at 37-39. Claims based on the inhalation and retention of asbestos fibers *during* the insured’s operations thus are not subject to the aggregate limits, regardless of the passage of time between injurious exposure and the inception of the policies. *See also, Century Indemnity Co. v. Golden Hills Builders*, 561 S.E.2d 355, 359-60 (S.C. 2002) (court held that if moisture damage to a building commenced before construction operations ended, the completed operations hazard would not apply despite the fact that most of the damage took place after construction was completed); *Ott v. Crews*, 830 F.2d 773, 776-77 (7th Cir. 1987) (an exclusion for products hazard claims would not apply to claims seeking damages arising out of the sale of sick hogs if the hogs first became sick while they were in the possession of the policyholder).

2. California “Concurrent Causation” Principles and Precedent

The long-settled rule in California is that a loss that is attributable to more than one risk is fully covered as long as any of the contributing losses is covered. *State Farm Mut. Auto. Ins. Co. v. Partridge*, 10 Cal. 3d 94 (1973). In *Partridge*, the issue was whether there was insurance coverage under a homeowner’s policy for a loss that was caused both by negligent driving and negligent modification of a gun that was accidentally fired from a car causing bodily injury. The homeowner’s policy did not cover losses arising from negligent operation of a vehicle, but covered losses arising from the negligent modification of the gun. The California Supreme Court held that where two risks constitute the concurrent proximate cause of the loss, full coverage is afforded under the policy as long as at least one of the risks is covered. *Partridge*, 10 Cal. 3d at 103. (Maryland, the state whose law was applied in *Wallace & Gale*, is one of the few states that has rejected the concurrent causation rule adopted by the

California Supreme Court in *Partridge. Northern Assur. Co. of America v. EDP Floors, Inc.*, 533 A.2d 682 (Md. App. Ct. 1987).)

The principles of “concurrent causation” coverage as set forth in *Partridge* were recently and unequivocally reaffirmed by a California Court of Appeal in *State of California v. Underwriters at Lloyd’s London*, ___ Cal. App. 4th ___, 2006 WL 3823525 (Cal. App. 4th Dist.). The *State of California* decision involved insurance coverage for environmental property damage that occurred over many years as a result of various events – some covered by the insurance policies while others were not. The insurers argued that because the policyholder acknowledged that it could not identify the specific damage resulting from covered events, as opposed to uncovered events, there was no coverage at all, relying on *Golden Eagle Refinery Co. v. Associated International Ins. Co.*, 85 Cal. App. 4th 1300 (2001) and *Lockheed Corp. v. Continental Ins. Co.*, 134 Cal. App. 4th 187 (2005).

In rejecting the insurer’s argument and in deviating from the decisions in *Golden Eagle* and *Lockheed*, the *State of California* court described the principles of concurrent causation coverage under liability policies as follows:

- “(1) ‘the right to coverage in the third party liability insurance context draws on traditional tort concepts of fault, proximate cause and duty.’;
- (2) in a third party liability policy ‘the insurer agrees to cover the insured for a broader spectrum of risks’ than in first party cases;
- (3) in a third party case, the presence of a covered cause, ‘no matter how minor, would give rise to coverage’; and
- (4) the insured in a third party case need not show that the covered cause was ‘a “sufficient condition” of the loss i.e., capable of producing damage itself.’“

State of California, at WL *24, omitting citations to *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395 (1989). Accordingly, the Court held:

“For these reasons, we conclude *Partridge’s* analysis should govern this case. Under that analysis, the State is not required to allocate its liability based on the cause of the underlying damage, as long as a covered cause is a concurrent contributing cause. Since there is at least evidence raising a reasonable inference that the 1969 discharge contributed to the damage for which the State was held liable, under *Partridge* the State’s liability was covered.”

State of California, at WL *32, footnote omitted.

Applying the concurrent causation analysis, a claim that arises under the *Wallace & Gale* analysis both (i) from an insured’s insulation operations in 1962, and (ii) from the continuing injury of this particular claimant during the years after those operations were completed, the loss would result from two separate risks – operations and completed operations. Therefore, under the *Partridge* and *State of California* analysis, the risk of asbestos bodily injury resulting

from an insured's "operations" remains fully covered under the "operations" coverage provisions, even if the coverage for "completed operations" has been exhausted through prior payments.

E. The A.P.I. Decision

The only decision outside of the federal courts of Maryland to address the issue of non-aggregated coverage for operations claims arising from asbestos bodily injury was rendered in the Minnesota District Court in *A.P.I., Inc. v. Home Ins. Co.*, No. C9-02-8084 (Dist. Ct. Minn.). The *A.P.I.* decision directly addressed, and rejected, the *Wallace & Gale* approach, in the same manner that some of the discussion above would cause a California court to treat the federal court decision. The initial *A.P.I.* rulings came after the bankruptcy court decision in *Wallace & Gale* and while the appeal was pending before the Fourth Circuit. However, even after the Fourth Circuit rendered its decision, the *A.P.I.* court declined to follow *Wallace & Gale* with respect to the transformation of operations claims into completed operations claims in later policy years.

The *A.P.I.* court construed several standard form policies on summary judgment, and declined to adopt *Wallace & Gale*. Instead, the court examined extrinsic evidence and case law to find that the issue of non-aggregated coverage could not be determined as a matter of law and undisputed fact, and therefore under Minnesota procedures, the issue would be presented to a jury. *A.P.I.*, Order, September 26, 2005, at 17. Specifically, the court found:

“API is persuasive in the arguments that *Wallace and Gale* is a flawed analysis and this Court is not relying upon it As stated in this Court's prior opinion

‘Since the policy is triggered by a person having an injury which continues into the policy period than before the exclusion could apply, one must look to when, where, and how the injury occurred to see whether or not there is a general liability claim or a claim which would necessarily fall under the products-completed work exclusion. The when, where, and how of the injury itself is determinative of the cause of the injury, and also is the determining factor of whether or not it falls within the exclusion provision.’”

A.P.I., Order, September 26, 2005, at 16-17. In an earlier decision, the *A.P.I.* court quoted and relied upon the expert testimony of Robert Hughes, who has been qualified to testify in many insurance coverage lawsuits across the United States. The court cited Mr. Hughes' testimony and thus rejected the assertion of the insurers that a claim could “morph” from one type of claim to another based simply on the passage of time:

“An injury caused by the insured's operations does not ‘morph’ into a completed operations claim due to the passage of time. If the ‘operations’ hazard caused the injury, even if the injury triggers a policy many years later, it remains an ‘operations’ related claim.”

A.P.I., Order, May 13, 2004, at 8-9.

The *A.P.I.* court also properly found that the burden of demonstrating the application of a completed operations limitation to any particular claim would rest on the insurer, not the insured. *A.P.I.*, Order, September 26, 2005, at 17-18.

As noted above, the *Travelers* and *Fibreboard* decisions in California, as well as the commentary of Justice Walter Croskey, Barry Ostrager and Paul Glad, hold that a causal connection must exist between the insured's completed work and a resulting injury for a claim to be classified as a "completed operations" claim. *A.P.I.* came to the same conclusion, and cited the same basic principles, in holding that *Wallace & Gale* was a "flawed" decision. Accordingly, the analysis adopted by the *A.P.I.* court in rejecting *Wallace & Gale* is consistent with the principles and precedent in California.

V. *The Issue of "Number of Occurrences"*

Standard form policies almost invariably contain a policy limit for each "occurrence." An "occurrence" is typically defined as "an event, or continuous or repeated exposure to conditions which results in bodily injury or property damage during the policy period." In the context of asbestos bodily injury claims, the issue arises as to whether the definition of an "occurrence" can be used to aggregate claims for purposes of applying the "per occurrence" policy limit and, if so, how does such aggregation work. The extreme positions on the spectrum are:

- ◆ ***Single occurrence.*** All asbestos bodily injury claims arise from a "single occurrence"—often described as the manufacturing, distribution and installation of asbestos material without adequate warnings – such that there would be only a single limit available for all aggregated claims.
- ◆ ***Multiple occurrence.*** Each asbestos claimant constitutes a separate "occurrence," such that the "per occurrence" limits apply repeatedly to every single claim.

Positions taken by insurers and policyholders are not necessarily consistent across the board. For example, a policyholder with significant deductibles or self insured retentions may seek to aggregate asbestos claims under the rubric of a "single occurrence." In contrast, where the policyholder has "first dollar" coverage from primary insurers, insurance can be maximized by having each asbestos claim treated as a separate occurrence. Likewise, excess insurers may advocate multiple occurrence approaches in order to contain losses at the primary level. While primary insurers, with unlimited defense obligations, may advocate a single occurrence approach to exhaust their policy limits and shift the losses to excess insurers. This flexibility in approaches – intended to maximize coverage for the policyholder or, alternatively, minimize coverage for insurers – has resulted in a panoply of inconsistent decisions.

A California Court of Appeal recently addressed this issue head-on in *London Market Insurers v. Superior Court (Real Party Kaiser Cement)*, ___ Cal. App. 4th ___, 2007 WL 49635 (Cal. App. 2d Dist.). In *Kaiser*, the primary level insurer, Truck Insurance Exchange, contended that all of the asbestos bodily injury claims arose from a single occurrence – "Kaiser's manufacture and distribution of asbestos products." *Kaiser*, at WL *1. In contrast, Kaiser's excess insurer,

London Market, contended that each asbestos claim resulted from a separate occurrence. The trial court agreed with Truck, finding that the relevant occurrence was the decision to manufacture and distribute asbestos products and therefore all asbestos claims would be aggregated under a single occurrence limit. *Kaiser* at WL *1. The Court of Appeal reversed.

In framing the issue, the Court of Appeal canvassed various court decisions on the question, underscoring the lack of consistency in this area:

“The meaning of ‘occurrence’ as it applies to asbestos injuries is an issue of first impression in this state. Other states have considered the question, but they have reached varying conclusions. Some courts have held that ‘occurrence’ in the asbestos exposure context means the manufacturer's decision to incorporate asbestos into its products, and thus they have concluded that all asbestos injuries for which a defendant is responsible result from a single ‘occurrence.’ (E.g., *Greene, Tweed & Co., Inc. v. Hartford Acc. & Indem. Co.* (E.D.Pa., Apr. 21, 2006, Civ. No. 03 3637) 2006 WL 1050110 at pp. *3 *9; *Liberty Mut. Ins. Co. v. Treesdale, Inc.* (3d Cir.2005) 418 F.3d 330, 334 339; *Westinghouse Elec. Corp. v. American Home Assurance Co.* (N.J.Super.Ct., July 8, 2004, Nos. A 6706 01T5 & A 6720 01T5) 2004 WL 1878764 at pp. *27 *32; *U.S. Gypsum Co. v. Admiral Ins. Co.* (1995) 268 Ill.App.3d 598, 205 Ill.Dec. 619, 643 N.E.2d 1226, 1257 1260; *Owens Illinois, Inc. v. United Ins. Co.* (1993) 264 N.J.Super. 460, 625 A.2d 1, 21 23; *Colt Industries Inc. v. Aetna Cas. & Sur. Co.* (E.D.Pa., Dec. 6, 1989, Civ.A. No. 87 4107) 1989 WL 147615 at pp. *5 *6; *Air Products and Chemicals, Inc. v. Hartford Acc. and Indem. Co.* (E.D.Pa.1989) 707 F.Supp. 762, 772 774; *Owens Illinois, Inc. v. Aetna Cas. & Sur. Co.* (D.C.D.C.1984) 597 F.Supp. 1515, 1524 1528.) Other courts have held that the “occurrence” is the claimant's unique asbestos exposure, and thus that each exposure is a separate occurrence. (E.g., *In re Prudential Lines Inc.* (2d Cir.1998) 158 F.3d 65, 79 83; *Commercial Union Ins. Co. v. Porter Hayden Co.* (1997) 116 Md.App. 605, 698 A.2d 1167; *Stonewall Ins. Co. v. Asbestos Claims Management Corp.* (2d Cir.1995) 73 F.3d 1178, 1212 1214; *Cole v. Celotex Corp.* (La.App.1991) 588 So.2d 376, 390 391.) Still other courts have said that the “occurrence” is the asbestos exposure, but have held that claimants who were exposed to asbestos at approximately the same time and place were injured by the same “occurrence.” (E.g., *Fina, Inc. v. Travelers Indemnity Co.* (N.D.Tex.2002) 184 F.Supp.2d 547, 549 553; *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co.* (2001) 255 Conn. 295, 765 A.2d 891, 896 909.)”

Kaiser, WL at *5. However, the Court went on to note that none of the decisions from other jurisdictions engaged in the “thorough examination of the policy language” required in California, and went on to construe the insurance policies on the basis of the policy language. *Kaiser*, WL at *6.

In addition to the policy language analysis, the Court also reviewed drafting history to support its ultimate holding rejecting Truck’s single occurrence position and London Market’s each

claimant position, in favor of a case-by-case factual determination and remanded the case back to the trial court for an evidentiary showing. In so doing, the Court held:

“[W]e conclude that the plain language of the policies is not susceptible of the conclusion that Kaiser's manufacture and distribution of asbestos products is an "occurrence." Rather, we find that the relevant "occurrence" is injurious exposure to asbestos products. Further, we find that the aggregation provisions preclude treating all asbestos exposure as resulting from a single annual occurrence. Thus, the grant of summary adjudication was improper.”

Kaiser, WL at *16. The Court did not indicate what the “occurrence” was or how many “occurrences” were at issue, but instead found that a factual inquiry would be necessary:

In short, while it is clear that the policies anticipated that claims would be aggregated in some fashion, how the aggregation provisions apply will depend on the nature of the claims. The facts of each claim will determine whether the number of occurrences is limited by either the "one lot" clause or the "same general conditions" clause. On remand, it will be up to Truck to demonstrate to the trial court that these clauses apply to aggregate particular claims.

Kaiser, WL at *17.

In light of the *Kaiser* decision, California courts must examine the underlying facts in order to determine how many “occurrences” are to be determined for purposes of applying policy limits. That examination involves both the policy language and the nature of the insured’s activities giving rise to asbestos liability. In sum, each case must be examined on the particular policy language, the nature of the claims, and the insured’s operational history before the number of “occurrences” can be determined.

VI. Conclusion

With due respect to Mark Twain, the demise of asbestos litigation and resulting coverage disputes predicted by prognosticators in years past has been greatly exaggerated. This multi-billion dollar litigation that began in the 1970s, exploded in the 1980s, ebbed in the 1990s, has remerged in the new millennium as a vibrant and challenging area of litigation. In no small part, the characterization of asbestos claims and the impact on policy limits will be a fertile source of policyholder-insurer disputes for years to come.