

## **Major Victory Impacting Asbestos Defense and Coverage Obligation Defeating \$45 Million Reimbursement Claim**

On June 3, 2011, in the matter of *Continental Casualty Co. et al v. Employers Insurance of Wausau, et als* \_\_\_App.3d \_\_\_, 923 NYS 2d 538 (1st Dept. 2011) the New York Appellate Division, First Department ruled that HKMP client, One Beacon America Insurance Company, was not liable for reimbursement of incurred defense expense totaling approximately \$45 million sought by two other insurers. The Appellate Division implicitly rejected the notion that HKMP's client had a duty to defend Robert A. Keasbey Company equal to that of Keasbey's other primary insurers, and reversed the ruling that those insurers were entitled to be reimbursed by OneBeacon for one-quarter of the cost of defending all actions instituted against Keasbey. This decision follows the prior success in phase I of the the Keasbey litigation that established that multiple asbestos claims arising from a single work site constituted a single occurrence under New York law. This ruling, in combination with the Court's finding that asbestos claims from this and other work sites did not satisfy the necessary criteria to constitute operations claims, appropriately limited the insurer's obligation to the risk assumed when the policy was written.

George R. Hardin and John R. Scott, were HKMP's trial and appellate team that successfully argued in phase I of the trial that any obligation to indemnify or defend Keasbey was limited to those claims arising out of alleged exposure to asbestos at the Indian Point Nuclear Power Plant, units 2 and 3. HKMP successfully proved that any and all exposure to asbestos would have occurred over an eight-week period and convinced the Court that the temporal and spatial requirements under New York law warranted a finding that all claims constituted a single occurrence, as distinguished from the New York decision in *General Electric*. However, the trial court had rejected the late notice defense in response to claims by other insurers for reimbursement of millions of dollars in defense expense incurred in defending the insulation contractor, Keasbey. The inter-insurer dispute went to a second trial phase and second appeal, when the favorable ruling was achieved.

One Beacon authorized HKMP to appeal these determinations, while other primary insurers cross-appealed the determination limiting their recovery to 25% and sought reimbursement of 100% of the defense expense, which approximated \$45,000,000. The Appellate Division ruled that where an insured gives notice to one of two insurers, the insurer that receives notice may obtain reimbursement from the other only if it provides timely and adequate notice to other insurer. The court held that HKMP's client had not received timely and adequate notice and was not obligated to pay any reimbursement claim. The appellate court re-affirmed that notice of a single claim does not constitute notice of other claims, and notice by one insured does not satisfy the notice requirement for other insureds, since each party seeking coverage under a liability policy is obligated to provide timely and adequate notice of the claim for which they seek coverage.

This result culminates nearly seven years of litigation, two trials and multiple appeals. The successful result demonstrates HKMP's resolve to protect client interests and achieve client objectives on matters involving complex issues that require competent and proactive trial and appellate counsel.

Inquiries on the issues involved in this matter may be directed to George Hardin.