

AIG Must Cover Port Authority Asbestos Claims, Court Affirms

By **Jeff Sistrunk**

Law360 (November 15, 2018, 9:45 PM EST) -- A New York appeals court on Thursday affirmed that an AIG unit must defend the Port Authority of New York and New Jersey and several contractors against asbestos claims brought by construction workers on the original World Trade Center, agreeing with a lower court that coverage is triggered for claims tied to alleged asbestos exposures at the building site.

In a brief opinion, a panel of the state Appellate Division's First Department said a trial court got it right when it ruled last year that AIG unit American Home Assurance Co. is obligated to defend certain underlying asbestos claims against the Port Authority, construction manager Tishman Realty & Construction Co. Inc., aluminum producer Alcoa Inc. and now-defunct Mario & DiBono Plastering Co. Inc. under a liability policy it issued to the transportation agency in 1966.

American Home had taken the position that the policy's coverage is only triggered if a plaintiff's asbestos-related injury was actually diagnosed during the policy period, which spanned from 1966 to 1976. But New York Supreme Court Judge Eileen Bransten ruled — and the appellate panel agreed — that the insurer's interpretation is inconsistent with the policy language, which establishes that coverage is triggered by claims of injuries "arising out of" building operations at the World Trade Center site, regardless of when those harms became apparent.

"[American Home's] interpretation, which would limit coverage to injuries themselves occurring during the policy period, is not supported by that language and also is inconsistent with the broad 'insuring agreement' that requires [American Home] to pay 'all sums' that the insured becomes legally obligated to pay as damages for personal injuries 'in connection with the construction of [the WTC project],'" the panel wrote in Thursday's opinion.

American Home issued the policy to the Port Authority for construction of the Hudson Tubes, through which Port Authority Trans-Hudson trains from New Jersey were carried into the World Trade Center station. The policy also extended coverage to the agency's contractors and subcontractors, including Tishman, Alcoa and DiBono, according to court documents.

Court papers state that Tishman served as the Port Authority's agent and construction manager. Alcoa was contracted to install an aluminum curtain wall on the exterior of the two WTC towers, and DiBono was a subcontractor that allegedly applied fireproofing insulation with asbestos on the exterior columns and beams of the first 39 stories of the first tower of the WTC, according to filings.

For more than 25 years, American Home defended and settled asbestos injury claims against the Port Authority and the various contractors, court papers indicate. But in March 2012, the insurer changed course and filed suit in New York state court, seeking a declaration that it has no obligation to cover claims involving injuries that were diagnosed after the policy period ended.

In a multifaceted opinion issued in November 2017, Judge Bransten rejected American Home's position and said the policy doesn't limit coverage to claims regarding injuries that manifested during the policy period.

Judge Bransten also refused to find that all the underlying claims relating to exposures to DiBono's allegedly asbestos-containing fireproofing insulation constitute a single occurrence subject to a \$10 million coverage limit. The workers who filed those claims were purportedly exposed to the insulation at different times and in different locations around the WTC construction site, meaning there was more than one occurrence, the judge held.

Finally, the judge determined that American Home must continue to cover the defense costs incurred by the Port Authority and the other insureds even after the policy's total liability limit has been exhausted, as the policy doesn't impose a cap on those costs.

In addition to upholding Judge Bransten's ruling on types of asbestos-related claims that are covered under American Home's policy, the appeals panel also affirmed her finding that the underlying claims constitute multiple occurrences.

"[Judge Bransten] correctly concluded that, in the absence of a single event or accident, all claims alleging exposure to asbestos from spray-on fireproofing at the site over a three-year period did not arise from a single occurrence under the policy," the panel found.

However, the panel did hold that American Home's obligation to pay defense costs is capped by the overall liability limit in its policy, reversing the lower court's holding on that point.

"The policy explicitly provides that defense costs are subject to that limit," the panel wrote.

Presiding Justice Rolando T. Acosta and Associate Justices Sallie Manzanet-Daniels, Troy K. Webber and Anil C. Singh sat on the appellate panel.

An attorney for the Port Authority declined comment. Counsel for American Home, Alcoa and Tishman did not immediately respond to requests for comment.

American Home is represented by Michael J. Garvey of Simpson Thacher & Bartlett LLP.

The Port Authority is represented by Robert M. Horkovich, Raymond A. Mascia Jr. and Vivian C. Michael of Anderson Kill PC. Alcoa is represented by Michael J. Lynch, Paul C. Fuener and Peter N. Flocos of K&L Gates LLP. Tishman is represented by Glenn A. Kaminska and Samuel P. Quatromoni of Ahmuty Demers & McManus.

The case is American Home Assurance Co. v. The Port Authority of New York and New Jersey et al., case number 651096/12, in the Supreme Court of New York, Appellate Division, First Department.

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