Insurer Liable For $10 Million For Asbestos Gradual Seepage Theory Rejected by Trial Judge

BY CRUISE ANDERSON

REJECTING an insurers contention that major water damage to a former state office building In Newark, N.J., was caused by gradual seepage through its roof, a judge in Manhattan ha. directed the insurer to pay the full amount of the $10 million policy, plus interest, for the extensive asbestos contamination caused by the leaks. The decision will be published Monday.

Ruling in Atlas. Assurance Co. v. Newark Center Building Co., filed last week in Supreme Court New York County IA Part 10. Justice Beatrice Shainswit denied the declaratory judgment sought by the insurer to avoid liability for the water disaster in the five-story, block-wide building at 1100 Raymond Boulevard in Newark. The building, owned by the Newark Center Building Co, a New York corporation, had been leased for nearly 30 years to the State of New Jersey, and after the state moved out in 1991 the building was largely vacant.

After a bench trial, the judge accepted the building owners' argument that the damage was caused by the 1.73 inches of rain that fell on Jan. 28, 1994, on a roof that had been covered with snow and ice from two prior weeks of severe winter weather.

At least four inches of water accumulated on the roof, causing It to crack from stress in numerous places, and the water poured down into the building through all five floors into the basement, according to the owners' witnesses.

The owners' "all risk" policy covered all "fortuitous" losses, but damage caused by continuous or repeated seepage or leakage of water that occurred over a two-week period or more was excluded from coverage by the policy's terms.

The insurer did not support its claim that the damage had started before the heavy rainstorm, the Judge said. In fact, the insurer's own inspectors had reported in 1992 and 1993 that the building was "well maintained" with no evidence of water or structural damage.

The cost of repairing the roof and the interior of the building would have amounted to about $750,000.

However, because the cascading water wet the asbestos fireproofing on steel beams on the third, fourth and fifth floors, loosening the asbestos and turning it into dust when it dried, the estimated cost of cleaning up the toxic dust and re-fireproofing the beams exceeded $11 million.

Justice Shainswit rejected the insurer's argument that the building owner had underinsured the building to save on premiums and that it should have Insured it

for 90 percent of the alleged replacement value of $38 million rather than for $10 million, the

actual. Cash value of the empty building

She noted that the insurer had failed to plead the co-Insurance issue as an affirmative defense to the owners' counterclaim for damages. But even so, the Insurer had paid the owners on an unrelated $20,000 claim in the year before the rainstorm without mentioning the co-insurance issue.

"In doing that, plaintiff in effect told defendant that the amount of insurance was sufficient" the Judge said

The Newark Center Building Co. was represented by Wilkofsky, Friedman, Karel & Cummins. Galvano & Xanthakis and Buckley King & Bluso of Cleveland, Ohio, were counsel for Atlas Assurance Co.