**AS PUBLISHED IN**

# The New York Jury Verdict Reporter

**XV/33-35**

**INSURANCE CLAIM — INSURER SEEKS DECLARATORY JUDGMENT FOR REFUSAL TO PAY CLAIM FOR PROPERTY DAMAGE - AWARD ON COUNTERCLAIM FOR BREACH OF CONTRACT**

**Atlas Assurance Company of America v. Newark Center Building Company v. Atlas Assurance Company of America No. 119654 / 95-001 2-week trial Decision 1/15/98 New York Supreme**

**Judge:**

**Beatrice Shainswit**

**Decision:**

**$1 0.000.000 (policy) for Deft. for property damage on counterclaim, plus interest for a total of $12,200,000. The court rejected Deft's request for additional sanctions.**

**Pltf. Atty:**

**Joseph Galvano of' Galvano & Xanthakis, Manhattan Charles Wagner and Daniel Carter of Buckley, King & Bluso, Cleveland, Ohio**

**Deft. Atty:**

**Jonathan Wilkofsky and Mark Friedman of Wilkofsky, Friedman, Karel & Cummins, Manhattan**

**Facts:**

**This property damage claim arose after Deft's building, located at 1100 Raymond Blvd. in Newark, New Jersey, became contaminated with asbestos, causing it to become vacant for 4 years. The building had been badly damaged during extreme winter weather in January 1994. Large accumulations of ice and snow caused massive cracking on the roof and allowed hundreds of thousands of gallons of water to leak into the building. This spread asbestos, which had been used in the construction of the building, throughout the third, fourth, and fifth floors and those areas had to be evacuated and sealed.**

**Pltf argued that it was not obligated to pay Deft.'s claim and was seeking a declaratory judgment. It claimed that the water had been seeping into the building over a long period of' time, thereby bringing it within the only exception to coverage: "continued or repeated... leakage of water that occurs over a period of 14 days or more." Decision at p. 5. Pltf.. sought to exclude Deft.'s claim under its all-risk commercial policy. Pltf's expert architect, who visited the building 5 1/2 months after the incident, contended, based solely upon the odor of' the water, that the water that he sampled had to have been present within the roof for at least 2 weeks prior to the accident**

**The court rejected Pltf's contention that Deft, should not have been covered for the damage. It held that there was no testimony or documentary evidence that the roof had been in bad condition before the extreme weather in January 1994. The former building manager testified that in the 5 years before the loss, he had inspected the roof twice a year and found no problems. It also rejected Pltf's contention that Deft was underinsured and noted that Pltf. had failed to mention this issue in any pre-trial proceedings and had paid an earlier claim under the same policy without ever raising that issue. The court did not credit the testimony of Pltf's experts and concluded that the testimony of Pltf's claim manager was biased. In finding for Deft. on its counterclaim for breach of contract, the court found that Pltf.. did not proffer viable evidence in support of its denial of liability or damages and that Pltf's claim as to co-insurance was unfounded. Although it did not award additional sanctions against Pltf, it did award interest from the date that the contract was breached until the day the lawsuit was filed..**
**Demonstrative evidence: certified weather records from 1984 to 1994.; photographs of the damage.**

**Pltf Experts:**

**David Patterson, architect, Princeton Junction, New Jersey; Douglas MacKinney, damage appraiser, Roslyn Heights.**

**Deft. Experts:**

**John Panico, public adjuster, Jericho; Mark Levinn, asbestos abatement/causation, North Bellmore; Daniel Steele, damage appraisal and construction, Morganville, New Jersey.**