

Asbestos/Insurance Coverage: New York Court Addresses Defense/Indemnity Obligations Related to Alleged Criminal Clean Air Act Violation



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The New York Supreme Court (Appellate Division) addressed in a February 2nd decision whether three insurance companies had any obligation to defend or indemnify a company who was subject to criminal proceedings related to an alleged violation of the Clean Air Act. See *Certified Environmental Services, Inc. v. Endurance America Insurance Company, et al.*, 2018 WL 668955.

The alleged violations involved the release into the ambient air of asbestos (a hazardous air pollutant).

Plaintiff Certified Environmental Services, Inc. ("Plaintiff") was indicted by a grand jury and subsequently convicted of aiding and abetting violations of the Clean Air Act. The conviction was vacated on appeal and retried.

Plaintiff thereafter pleaded guilty to a criminal charge which is described as:

. . . negligently releasing into the ambient air a hazardous air pollutant, i.e., asbestos, thereby negligently placing other persons in imminent danger of death or serious bodily injury in violation of 42 USC § 7413(c)(4).

Plaintiff sought a defense and coverage under the following insurance policies:

- American Safety Casualty Insurance Company ("American Safety")
- Indian Harbor Insurance Company ("Indian Harbor")

The policies issued by American Safety included "Environmental Consultant's Professional Liability" ("Environmental Consultant's") coverage.

Indian Harbor issued policies described as:

- Professional Liability ("Professional Liability")
- Contractors' Pollution Legal Liability ("Pollution Liability")

The insurance companies disclaimed any duty to defend or indemnify Plaintiff in the criminal action. Plaintiff subsequently commenced a declaratory judgment and breach of contract action seeking to recover its defense costs.

The insurance companies moved in the lower court for a declaration that they had no obligation to defend or indemnify, which was granted.

The New York appellate court upholds this decision.

As to the American Safety (Environmental Consultant's) policy, the Court concludes it is unambiguous and does not require a defense with respect to the criminal action. It notes that the policy requires American Safety to defend Plaintiff against any claim or suit seeking . . . covered damages. A claim is stated to be defined as any written demand, notice, request for defense, request for indemnity, or other legal or equitable proceeding against Plaintiff by a person or entity for, inter alia, "covered damages" arising out of Plaintiff's "negligent acts, errors, or omissions." "Covered damages" are noted to include all claim related costs which are defined as "all costs and expenses associated with the handling, defense, settlement or appeal of any claim or suit."

Plaintiff argued that the "claim" was its demand requesting a defense and indemnity from American Safety for Plaintiff's negligent acts and that the "covered damages" were its attorneys' fees and other costs incurred in the criminal action.

The Court rejects this argument stating it:

. . . is not a "claim" within the meaning of the policy inasmuch as it was not made "*against* [plaintiff]," but rather, in this case, was made *by* plaintiff.

As to the Indian Harbor policies, it concludes that they were also unambiguous. The Court states that the Professional Liability coverage requires the insurance company to defend Plaintiff "against any suit," which is defined as a civil proceeding. It notes that Plaintiff's proceeding was criminal and, therefore, not a suit. As a result, there was no duty to defend under this policy.

As to Pollution Liability coverage, the Court notes Plaintiff's argument that the allegations of the indictment (if true), could have resulted in civil claims. It therefore argues that Indian Harbor had a duty to defend Plaintiff in the criminal action. The Court rejects this argument, stating:

. . . however, that the contract unambiguously provides that Indian Harbor has a duty to defend plaintiff against suits only. Inasmuch as there was no suit against plaintiff here, Indian Harbor had no duty to provide a defense.

[A copy of the decision can be downloaded here.](#)