

# BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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## **Oy Vey: New York Appellate Division: Asbestos Exclusion Does Not Apply To Asbestos Damage At A Synagogue**

Like its author, this is going to be a short issue of *Binding Authority*. The decision under review is brief and I can't figure it out anyway. [There are a lot of things I can't figure out. Top of the list - does anyone actually buy that massage chair in the window of Brookstone?]

At issue before the New York Appellate Division in *Great American Restoration Services v. Scottsdale Ins. Co.* was coverage for Great American Restoration Services, which had been retained to perform emergency water damage service at a synagogue. It was alleged (by the synagogue's insurer in a subrogation case) that Restoration Services, during the course of its work, caused asbestos to be "dispersed throughout the building and premises." Great America sought coverage from its CGL insurer, Scottsdale, which denied the claim on the basis of the Asbestos Exclusion or Pollution Exclusion.

The Asbestos Exclusion provided that coverage did not apply to inhalation or prolonged physical exposure to asbestos, the use of asbestos in construction, the removal of asbestos from products or structures, or the manufacture, sale, transportation, storage, or disposal of asbestos or products containing asbestos.

[Before getting to the Asbestos Exclusion the court stopped to address a notice issue. What New York coverage case doesn't address a notice issue?]

The court held that the Asbestos Exclusion did not apply (and the following is all that it had to say about it):

"Although the asbestos exclusion clause states that no coverage is provided for property damage arising out of the "removal," "disposal," or "use" of asbestos, the subject clause includes no terms indicating that coverage will not be provided for damages arising out of the unknowing or accidental release or dispersal of asbestos. On this point, the language is susceptible to two reasonable interpretations, and this ambiguity must be construed strongly against Scottsdale (see *Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d at 383)."

I can't figure this decision out. The court acknowledged that the exclusion applied to various activities, such as removal, disposal or use of asbestos. However, the court held that the exclusion did not apply because it did not specify that it applied to damages arising out of the unknowing or accidental release or dispersal of asbestos. Say that again.

Does this mean that an Asbestos Exclusion (or any exclusion) must specify the insured's states of mind for which it applies. The Pollution Exclusion also doesn't specifically state that it applies to damages arising out of the unknowing or accidental release of pollution.

Speaking of the Pollution Exclusion, the court held that it also did not apply because, if it did, it would render the specific asbestos exclusion meaningless.

The decision is too devoid of analysis to address it in any detail (and any analysis raises issues regarding the policy's "occurrence" requirement). It would be too speculative – even more than usual – to try to predict where this decision goes from here. *Great American Restoration Services v. Scottsdale Ins. Co.* could be one of the most significant coverage decisions in the past two decades. Or one of the least. [Got all my bases covered with that prediction.]

A copy of the November 9<sup>th</sup> decision from the New York Appellate Division in *Great American Restoration Services v. Scottsdale Ins. Co.* can be accessed here:

[http://www.nycourts.gov/reporter/3dseries/2010/2010\\_08067.htm](http://www.nycourts.gov/reporter/3dseries/2010/2010_08067.htm)

Please let me know if you have any questions.

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