New York highest state court sent mixed signals last month to policyholders who seek insurance coverage for asbestos claims. In *Continental Casualty Co. v. Rapid-American Corporation*, the Court of Appeals unanimously affirmed an appellate court ruling that the standard “pollution exclusion” found in comprehensive general liability insurance policies did not bar an insurance company’s obligation to defend the policyholder for asbestos-related claims. The high court’s much-anticipated decision, however, did not adopt the broad rationale of the intermediate appellate court, leaving open the possibility that the pollution exclusion eventually might bar coverage for the policyholder’s ultimate liability to asbestos claimants. The court also considered, but did not decide, the core issue of what events during the insurance policy period “trigger” the ultimate coverage obligations of the insurance company. Instead, the court guaranteed further litigation on the trigger-of-coverage issue.

**A Missed Opportunity**

The Court of Appeals missed the opportunity to endorse several of the pro-policyholder rulings by the state intermediate appellate court, the First Department. Although Judge Judith Kaye (who recently was appointed Chief Judge by Governor Mario Cuomo) held that the pollution exclusion did not apply to exclude the insurance company’s duty to defend the policyholder against the asbestos claims at issue, she narrowed the grounds of the First Department ruling. The court focused on the portion of the exclusion that applies, in part, to discharges or releases of pollutants “into or upon... the atmosphere.” The court held that the pollution exclusion clause was “ambiguous with regard to whether the asbestos fibers at issue—fibers inhaled by persons working closely with or suffering long-term exposure to asbestos products—were discharged into the ‘atmosphere’ as contemplated by the exclusion.” The court refused to adopt the First Department’s holding that the pollution exclusion simply was inapplicable to product liability claims.

**Allocation of Defense Costs**

The court also limited the First Department’s holding in other respects. Because asbestos claims typically involve long injury processes, and thus “trigger” multiple policies, the issue arises as to whether each policy triggered is separately liable to respond in full to a claim. Although the Court of Appeals ruled that the insurance company initially was obligated to defend the policyholder fully in the asbestos actions without any allocation to other insurance companies or to the policyholder for years in which it did not have insurance, the Court “deferred” the issue of whether the policyholder might have to contribute to defense costs later if the insurance company ultimately demonstrated that an individual asbestos case implicated an uninsured policy year.

**Unanswered Questions**

The full implications of the Court of Appeals’ decision remain to be seen. If the Court had held that the pollution exclusion does apply to asbestos claims, many policyholders whose insurance policies are construed under New York law would have had no coverage for their asbestos liabilities. Nonetheless, although the Court of Appeals joined numerous other courts that have refused to apply the pollution exclusion to asbestos claims, its
holding is less clear than other court rulings. Complicating matters, the court’s refusal to determine the issue of whether asbestos payments may be allocated among insurance companies, or to a policyholder for uninsured periods, will lead to further disputes.

**Continuous Trigger vs. “Injury in Fact”**

Perhaps most importantly, the issue of the trigger of coverage remains to be decided by the New York courts. Policyholders typically argue that each policy from initial asbestos exposure to manifestation of injury is triggered to provide coverage for a claim. Insurance companies typically argue either that the policies in existence when the asbestos claimant was exposed to the asbestos, or when the disease manifested itself, are triggered. Although the Court of Appeals did not expressly decide the issue, its determination that the relevant policy language is ambiguous removes the rationale for the injury-in-fact trigger, which is based upon a determination that the policy language is clear. Policyholders can be expected to argue that the policy language applicable to latent injury claims such as asbestos claims is ambiguous, and that the provisions should be construed in their favor as a matter of law. It remains to be seen whether New York courts will follow this.