

ITT Wins Coverage In Asbestos Insurance Trial

By **Melissa Daniels**

Law360, Los Angeles (August 23, 2017, 10:24 PM EDT) -- Global manufacturing company ITT Corp. notched a win in a long-running suit seeking more than \$1 billion in coverage for asbestos liabilities when a California state judge ruled Tuesday that the policies at issue are triggered at the time of asbestos exposure and that ITT can put the policies in any triggered year on the hook for its full liability.

The decision follows a bench trial in Los Angeles between ITT and more than two dozen excess insurers that was focused on determining how ITT's umbrella and excess policies are implicated by asbestos-related losses.

The trial centered on what defines "bodily injury" to trigger coverage, how to allocate losses, and to what extent the loss must be allocated to now-insolvent Home Insurance Company umbrella policies.

Los Angeles Superior Court Judge Ann I. Jones first agreed with ITT's argument that the liability policies at issue are triggered when a claimant is initially exposed to asbestos, while the defendants had argued bodily injury doesn't occur until someone gets cancer or asbestosis.

"Earlier decisions have held that 'bodily injury,' within the meaning of liability insurance policies, takes place with the initial cellular injury that occurs upon exposure to asbestos fibers and progresses continuously as the damage cascades, over time, into disease, frequently ending in death," Judge Jones said. "This continuous injury trigger affords coverage for the continuing and progressive injuries occurring during successive policy periods subsequent to the established date of the initial injury in fact."

Then Judge Jones turned to the issue of allocation, or how responsibility for the losses is divvied up among insurers. She agreed with ITT that the terms and conditions of the policies provide for all sums allocation — under which each of an insured's policies can be held liable for an entire loss. She found the policies are not limited to a pro rata method, which spreads out liability proportionally among all triggered policies, as the defendants argued.

"Once a policy has attached and is selected by the insured, each triggered policy has a separate and independent obligation to cover ITT in full for its liability arising from a given claim, up to the policy's product liability limits," Judge Jones said.

In examining the policy language, Judge Jones referenced the Viking Pump decision from the New York

Court of Appeals in 2016 that found vertical exhaustion — which allows policyholders to reach excess coverage for certain years even if their primary policies haven't been depleted — is consistent with an all sums allocation method.

"Each of the policies at issue primarily hinge its attachment on the exhaustion of the underlying policies that cover the same policy period and that are specifically identified," Judge Jones said. "Accordingly, the excess policies are triggered by vertical exhaustion of the underlying available coverage during the same policy period."

The third issue in the case — whether ITT can access policies that are based on umbrella policies from Home Insurance Co. in the wake of its insolvency — saw Judge Jones examine the liquidation proceeding that Home went through more than 10 years ago. She ultimately determined that Home has been held liable to pay its policy limits for umbrella and excess policies at issue, citing the county judge's order approving ITT's priority allowance.

"The policy language 'held liable to pay' is satisfied by the Merrimack County Superior Court's order approving ITT's Class II priority allowance in the amount of \$80,730,000 which makes Home liable to pay the applicable limits of each of its umbrella and excess umbrella policies at issue," Judge Jones said.

ITT's attorney Paul Zevnik of Morgan Lewis & Bockius LLP told Law360 on Wednesday the decision was well-written and comprehensive in tackling three critical issues for policyholders and insurers — but he said the findings on the allocation and vertical exhaustion are particularly important.

"It really underscores why vertical exhaustion or all sums exhaustion, which is what the policies say, should be the rule," he said. "Horizontal exhaustion is not the way policies were purchased. It puts the policyholder in a position where it has to end up, in many cases, bearing the risk of nonpayment by insurers."

Zevnik also said the issues around Home's insolvency and liability were being litigated for the first time — and that there are more than 3,000 insolvent insurers in the nation.

"The language 'paid or been held liable to pay' is fairly common and has never been adjudicated in this context, which is the context of a liquidation proceeding for an insurer," he said.

Calculations of the defendants' obligations to ITT are reserved for a later trial phase, according to the decision.

This summer's trial, dubbed Phase III, took place more than 14 years after ITT first filed its breach of contract suit claiming that the damages are alleged to have taken place during the defendants' policy periods and seeking a ruling affirming the insurers' obligation to pay the company's legal costs and expenses.

A representative for General Reinsurance Corp. declined to comment. Attorneys for other defendants didn't immediately respond to requests for comment on Wednesday.

ITT is represented by Paul A. Zevnik, Michel Y. Horton, David S. Cox, Gerald P. Konkel, David A. Luttinger Jr., Leah N. Houghton and Colin C. West of Morgan Lewis & Bockius LLP.

Arrowood Indemnity Co. is represented by Laura L. Goodman and Ashley L. Milnes of Sedgwick LLP.

Travelers Casualty and Surety Co. is represented by Sonia S. Waisman and Heather L. McCloskey of McCloskey Waring & Waisman LLP and Ronald D. Kent and Susan W. Walker of Dentons LLP. General Reinsurance Corp. is represented by Alan D. Hamilton of the Law Offices of Alan D. Hamilton and Michael J. Balch of Budd Lerner PC. U.S. Fire Insurance Co., TIG Insurance Co. Associated International Insurance Co., Mt. McKinley Insurance Co. and Everest Reinsurance Co. are represented by Kenneth G. Katel and Lawrence A. Tabb of Musick Peeler & Garrett LLP and Matthew Thomas Walsh of Kennedys CMK. Affiliated FM Insurance Co. is represented by Alan E. Swerdlow of Boornazian Jensen & Garthe and Jason R. Schulze of Hinshaw & Culbertson LLP. Northwestern National Insurance Co. is represented by Kevin McNamara of Traub Lieberman Straus & Shrewsberry LLP. Munich Reinsurance America Inc. is represented by Ira Revich of Charleston Revich & Wollitz LLP. Allstate Insurance Co. is represented by Louise M. McCabe and Tara L. Goodwin of Troutman Sanders LLP. Certain Underwriters at Lloyd's London, Certain London Market Insurance Cos., North River Insurance Co., Lamorak Insurance Co., AIU Insurance Co., American Home Assurance Co., Birmingham Fire Insurance Co., Granite State Insurance Co.; Insurance Co. of the State of Pennsylvania, Landmark Insurance Co., Lexington Insurance Co., National Union Fire Insurance Co. of Pittsburgh PA and The Continental Insurance Co. are represented by Gretchen A. Ramos of Squire Patton Boggs LLP and Patrick T. Walsh, Laura S. McKay and David C. Butman of Hinkhouse Williams Walsh LLP.

The case is Cannon Electric Inc. et al. v. Ace Property & Casualty Insurance Co. et al., case number BC290354, in the Superior Court of the State of California for the County of Los Angeles.

--Additional reporting by Bonnie Eslinger and Jeff Sistrunk. Editing by Jill Coffey.