

Insurer Can't Prorate Asarco Asbestos Coverage, Judge Says

By Jeff Sistrunk

Law360 (August 29, 2018, 7:38 PM EDT) -- A trust tasked with securing payouts on asbestos injury claims against Asarco LLC can pursue the full limits of excess policies that defunct Midland Insurance Co. issued to the mining company in a single year, a New York judge has ruled, refusing to restrict the insurer's coverage to a proportional share of the trust's total recovery.

In a decision made public Tuesday, Judge Barbara Jaffe confirmed a referee's November 2016 finding that Midland's coverage dispute with the Asarco Asbestos Personal Injury Settlement Trust must be governed by the "all sums" method of allocation, which permits an insured to call upon any insurance policy in effect during the period that injuries occurred to cover its total loss. The trust is looking to access up to \$55 million under four excess policies that Asarco bought from Midland in the mid-1970s.

The judge rejected arguments by Midland's liquidator, New York Department of Financial Services Superintendent Maria Vullo, that the competing "pro rata" allocation method should apply. Under the pro rata approach, each of a company's insurance carriers is assigned only a portion of the total loss depending on how long its policies were in place.

Judge Jaffe said her ruling is consistent with the New York Court of Appeals' landmark 2016 ruling in a case known as *Viking Pump*, which established that all sums allocation is applicable to insurance policies containing "non-cumulation" or "prior insurance" clauses. Generally speaking, such clauses state that only a single policy limit is available for a loss covered under multiple policy periods.

Here, Midland's excess policies incorporated the terms of Asarco's lower-level policies with American Home Assurance Co., including prior insurance provisions, Judge Jaffe noted.

"As the Midland policies contain the prior insurance provisions incorporated from the AHAC policies, an all sums allocation is proper in this case," the judge wrote.

The ruling was the latest development in what Judge Jaffe characterized as "highly disputed and exceedingly protracted insurance coverage litigation" dating back more than 30 years.

Starting in the early 1980s, Asarco has faced scores of asbestos personal injury claims stemming from the operations of its Canadian subsidiary, Lac D'Amiante du Quebec Ltee. The asbestos cases spawned courtroom battles between Asarco and its insurers. Eventually, Asarco settled with AHAC and another insurer, Highland Insurance Co., leaving Midland — which went into liquidation in 1986 — as the "sole

holdout,” according to Judge Jaffe’s decision.

In 2005, amid mounting asbestos and environmental liabilities, Asarco and some of its subsidiaries filed for Chapter 11 bankruptcy. Four years later, the bankruptcy court confirmed Asarco’s reorganization plan, which resulted in the creation of the trust to process asbestos claims and make payments to the claimants, according to court filings. During the bankruptcy proceedings, the court allowed about \$1 billion in current and future asbestos claims against Asarco, court papers state.

As the trust pursued coverage for asbestos claims under Midland's excess policies, it locked horns with the DFS superintendent's office. The office recommended “entirely disallowing” the coverage bid in January 2014 on the grounds that, under a pro rata allocation scheme, Midland’s excess layers were not reached.

The dispute went before a referee, who issued a March 2016 report upholding the superintendent’s application of the pro rata method.

In May 2016, though, the New York Court of Appeals decided Viking Pump, recognizing that all sums allocation is proper in certain circumstances. That decision prompted the trust to ask the referee to reconsider his determination.

The referee obliged, and in November 2016, he reversed course and issued a report finding that Midland’s policies are subject to all sums allocation. In addition, the referee said “vertical exhaustion” applies, meaning that the trust can access a Midland excess policy in a given year after showing that the limits of lower-level policies in that same year have been depleted. Under the opposing “horizontal exhaustion” approach, the trust would have had to prove that all of Asarco’s lower-level policies across all triggered years were tapped out before being able to access any of Midland’s policies.

The DFS superintendent subsequently filed a motion asking Judge Jaffe to reject the referee’s report and instead find that pro rata allocation applies, citing a slew of purported differences between the language of Midland’s policies and those at issue in the Viking Pump case.

For instance, Vullo argued that Midland’s policies do not incorporate the prior insurance provisions of the underlying AHAC policies, which would render Viking Pump inapplicable. But Judge Jaffe said the superintendent failed to identify any “explicit provision” in Midland’s policies supporting that notion.

Vullo also contended that Midland’s policies don’t contain key language that led to the New York high court adopting all sums allocation in Viking Pump, namely the requirement that the insurer pay “all sums in excess of the retained limit” that the policyholder becomes “legally obligated” to pay. Instead, Midland’s policies provide that it will indemnify Asarco only against “ultimate net loss” exceeding underlying insurance, according to court papers.

However, the referee found in his November 2016 report that the meaning of “all sums” and “ultimate net loss” is “essentially the same,” and Judge Jaffe agreed.

Having confirmed the application of all sums allocation, the state judge returned the case to the referee for further proceedings.

Counsel for the trust and the superintendent did not immediately respond to requests for comment.

The trust is represented by Rhonda D. Orin and Michele A. Gallagher of Anderson Kill PC, and Sander L. Esserman of Stutzman Bromberg Esserman & Plifka.

The superintendent is represented by Aidan McCormack and Brian Seibert of DLA Piper.

The case is In the Matter of Liquidation of Midland Insurance Co., case number 041294/1986, in the New York Supreme Court for New York County.

--Editing by Aaron Pelc.

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