New York Court Permits Asbestos Claimants to Proceed Against Insurers with Buyout Agreements

Suggests Circumstances Where Such Agreements May Constitute Fraudulent Conveyances

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A recent New York federal district court decision addresses a number of issues in the context of asbestos coverage involving an insolvent insured, holding that policy buyout agreements between the insured and its insurers did not bar actions by certain tort judgment creditors against some of the settling insurers, and further finding that such agreements can constitute fraudulent conveyances, especially where the proceeds of the settlement are not reserved for payment of insured claims.

In the litigation pending in the Western District of New York (*Mineweaser v. One Beacon Insurance Company, et al.*, No. 14-CV-0585A), certain asbestos plaintiffs sought recovery from excess insurers for judgments obtained against an insolvent asbestos supplier (Hedman Resources, formerly known as Hedman Mines), which ceased operations in 2007 due to insolvency. Hedman had at one time been a subsidiary of Gulf & Western. As of 2009-2011, the excess insurers of Gulf & Western were advised of exhaustion of primary insurance as well as Hedman's insolvency.

In 2012, Hedman entered into settlement agreements with the excess insurers buying out their coverage. The proceeds of the settlements were distributed directly to Hedman's secured creditor.

In 2012 and 2013, the underlying claimants were diagnosed with mesothelioma as a result of earlier exposure to Hedman asbestos.

The underlying cases went to trial without Hedman putting up a defense, and judgments were entered against Hedman. Subsequently, the plaintiffs served the excess insurers with a demand for payment pursuant to New York Insurance Law §3420, and this litigation followed.

The case went before a magistrate on competing motions for summary judgment. In a 66-page report and recommendation issued by the magistrate in May 2018 and adopted by the district court last week, the magistrate found that the underlying insurance had been exhausted, Hedman was an insured under the policies at issue, the claimants sustained injury in fact triggering coverage under the excess policies, and, under *Viking Pump*, "all sums" allocation applies because the excess policies contain prior insurance, non-cumulation of liability and/or continuing coverage provisions.

Next, the court turned to the issue of whether the claimants could maintain an action against the settling insurers under New York Insurance Law Section §3420, which authorizes any person who has obtained a judgment against an insured for damages for injury sustained during the life of an insurance policy which covers insureds and risks located in New

York to commence an action against the insurer to recover the amount of the judgment against the insured in accordance with the terms of the insurance policy.

The insurers moved for summary judgment, arguing that the claimants had no more rights than Hedman, which had released its claims through settlement. The magistrate (and in turn the district court judge) agreed with the plaintiffs that, while that might have been the case at common law, section 3420 provided the "limited statutory right" to sue the tortfeasor's insurer so long as the injury took place during the policy period and involved an insured and risk in New York. "Even though plaintiffs' personal injury claims did not accrue until discovery of injury from asbestos exposure, plaintiffs' had each sustained injury as contemplated by Insurance Law §3420 during the life of the relevant insurance policies and prior to the policy buy-backs."

With respect to whether the buyback agreements were subject to attack as fraudulent conveyances, the court analyzed a number of provisions in New York Debtor Creditor Law:

- Under Section 273 (transfers fraudulent as to existing creditors if made without fair consideration), the court found that only one of the underlying claimants was actually a creditor when Hedman entered into certain of the settlement agreements. In allowing the claim to proceed on behalf of that claimant, the court held that "fair consideration" includes not only the dollar value of the consideration provided, but also whether the parties acted in good faith under the circumstances — noting further that a question of fact existed as to whether the insured and settling insurers acted in good faith in negotiating settlements that were paid directly to the insolvent insured's secured creditors rather than being reserved to pay covered claims.
- Under Section 274 (transfers without fair consideration where the transferor has unreasonably small capital), the court held that fact issues existed as to whether the insured relinquished insurance coverage in return for unreasonably small capital with which to defend itself against claims which would otherwise have been covered by such insurance.
- Under Section 275 (transfers fraudulent as to present and future creditors if made by person incurring debts beyond ability to pay), the court also denied summary judgment to the insurers, finding that questions of fact existed as to the insurers' knowledge that the insured would be unable to pay asbestos claims after paying the settlement proceeds to its secured creditors.
- Under Section 276 (transfers fraudulent as to present and future creditors if made with actual intent), the court denied summary judgment "in light of questions as to the reasonableness of the consideration paid and the timing of the payments to the secured creditor despite knowledge of impending claims against Hedman, as well as evidence as to Hedman's insolvency."

Long-tail claims have challenged the courts for decades. The court in this case attempted to address issues concerning insurance coverage, creditors rights and enforcement of settlement agreements in this unique context. In fact, the district court decision came out three-and-a-half years after the magistrate report and recommendation was issued.

Earlier this year, in *Jenkins v. Liberty Mutual*, the New York Supreme Court held an insurer jointly and severally liable for settlements on behalf of its dissolved insured, finding that the insurer was the real party-in-interest as a result of appearing and negotiating settlements on behalf of the insured in the underlying cases. There, the insurer was not trying to avoid its responsibility but rather appropriately limit it to its pro rata share. Here, the insurers believed they had no further need to appear and be involved in the underlying cases as a result of their buyouts. However, those buyouts apparently did not provide the peace and finality intended. The case shows the challenges of negotiating settlements with insureds who have gone out of business outside the context of a formal bankruptcy proceeding, where provisions can be made for future claims and all claimants can be bound.

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