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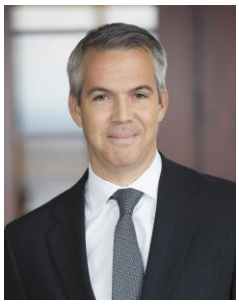
# Morgan Lewis Attys Say Pacing Led To ITT's Coverage Win

By **Shane Dilworth**

*Law360 (September 10, 2021, 12:58 PM EDT)* -- The 17-year legal battle for ITT Corp. to secure excess insurance coverage for asbestos injury suits recently concluded with a win for the valve maker thanks to the work of attorneys from Morgan Lewis & Bockius LLP.



David Cox

The suit was filed in 2003 and proceeded through Los Angeles County Superior Court before Judge Ann I. Jones. Six bench trials were conducted during the course of the litigation, with the third phase of the trial resulting in a 2017 ruling that said ITT could seek $1 billion in coverage from more than two dozen excess insurers. The last two phases were held virtually due to the COVID-19 pandemic.

Paul Zevnik

Law360 had a chance to talk to Paul Zevnik, David Cox and Jay Konkel about the challenges and strategies of handling the case.

### How was the Morgan Lewis team initially hired for the case?

**Zevnik:** I had been doing ITT's insurance recovery work since 1989, so ITT was a longtime client. By 2003, David Cox and I, among others, had recovered more than nine figures from ITT's insurers in a still-pending coverage case involving environmental liabilities, pending before the same judge in Los Angeles.

Jay Konkel

When this case began, in 2003, we were at Zevnik Horton LLP, a nationwide litigation boutique. In 2003, we joined Morgan Lewis in order to have even greater and broader national and international resources. ITT has been an important client for Morgan Lewis, and the Morgan Lewis platform and diverse talent has allowed us to offer a far broader scope of services and expertise.

### How many insurers were involved throughout the litigation?

**Zevnik:** If you count Lloyd's and all the different London Market companies, there were approximately 100 insurers involved.

Most of the insurers in the London market either hire a common lawyer or work together with Lloyd's and the London Market insurance, so in terms of the overall effective number of parties that we were working with, it was more in the neighborhood of 40.

### With so many insurers involved, what were the early planning talks like?

**Zevnik:** One of the lessons of this case is that you have to be patient, you have to plan. And you have to also anticipate that the world will change, and that insurance needs may change. At the time that this case started, ITT faced a smaller number of suits involving only a few products and the liabilities were confined to coverage that we were seeking at the primary insurance level, but the proliferation of asbestos litigation suggested that ITT would need to be able to access its umbrella and excess layers in due time.

As things developed, ITT's liabilities expanded, both in number and in breadth of the products involved, and the need to gain access to the excess insurance became the next challenge. When it came to planning the case, what was so important for ITT was to manage the primary insurance properly, so that it was carefully and prudently exhausted. Otherwise, there would have been a great difficulty with the excess coverage. We also had to develop a long-term strategy for gaining access to the full breadth of ITT's coverage.

**Konkel:** ITT was historically a conglomerate product manufacturer and purchased umbrella and excess coverages from the late 1950s through the 1980s. At the time, product liability law was expanding year after year, and so for insurance programs in that time frame, so you see taller and taller annual towers of insurance from the 1960s until 1985. And then there are exclusions after that.

One of the key things that we focused on from the beginning and returned to for all of the trial phases was always grounding how the court should resolve coverage issues in ITT's favor against the context of what the underlying liabilities were and the nature of the insurance program. That "through line" helped all the favorable rulings we obtained hang together.

We were working with a palette and had to paint the true story of how a policyholder understood its cohesive insurance program would work and how the insurers intended it to work that way when they sold policies in a program. One of the first and most important things we did was to have the litigation in Los Angeles Superior Court, which is one of the finest jurisdictions in the country, if not the world, to litigate these controversies, because that court has both a lot of experience in these issues and immense experience with setting out rules to face those trial issues in a manner that makes sense for the parties and the witnesses.

We also had the advantage of having a couple of witnesses that were actually on the scene and involved historically with ITT in placing the coverage, when it was placed. Not every client has that. We had a wonderful client with great witnesses to help us develop key evidence to support the rulings we sought and that helped tremendously.

**Cox:** I felt that we were able to anticipate the important issues not just in front of us in a given trial phase but down the road as well. We always had the big picture in mind. We were never just trying issues in isolation because we were always trying to develop our case and position ourselves for what came next. We were trying to anticipate what issues would rise in prominence depending on how the court ruled, and we had mapped various exit ramps for how we could proceed.

### How did the trial phases break down?

**Zevnik:** The first phase is what policies apply. That involves what is known as a trigger of coverage.

Phase two is the allocation of loss to triggered policies.

Number three is whether insolvency prevented the insured from getting to higher-level coverage. So, during phase three, we all agreed with the insurers that trigger of coverage, allocation and whether the meaning of the words "paid" or "held liable to pay for" the Home Insurance Co. coverage were critical issues that would dictate what policies would be responsive to these claims.

Phase four flowed naturally from phase three: It was implementing the phase three rules in a concrete situation with concrete claims in order to show how the rules would work.

Phases five and six had to do with two things that are very important to us, number one being if you settle a case and you put money into a qualified settlement fund, do you have to use that money first or can you continue to have the insurance pay? Number two, the insurers always want to put their contribution claims in front of the insurance claims, and the court ruled that you can't do that. So, in phases five and six, we were eliminating defenses that are used consistently by insurance companies.

**Konkel:** The relevance of the rulings here could be applied in all contexts where a policyholder is confronting mass liabilities and seeking to access insurance for an insurance program. In this litigation, when you have that much liability that the insured is pursuing against the excess and umbrella programs, it fleshed out all the defenses that insurers raise to limit access, to prevent an insured from getting beyond the primary level.

If you do get up to the excess layer, the insurers throw out other defenses, such as contribution against settling insurers, which would interfere with the insured's ability to continue to pursue coverage throughout its program. So, the unique circumstances of an underlying liability like this, where you have massive liability is ongoing, that really gave an opportunity for the court to address essentially every major defense that excess carriers advance to prevent a policyholder from getting access to its excess.

### How did the team approach the key issues of allocation and exhaustion?

**Zevnik:** The most important thing that we had for setting key precedent on allocation and exhaustion is an attentive and meticulous judge who read the policies and understood the policies, and superb witnesses who testified about how the program was designed to operate as an integrated program to protect ITT against product liabilities.

Two things are very important: Number one, the policy language is absolutely 100% clear that the ITT position is correct. The judge analyzed all of the policies, which was an enormous task, but very important.

Number two, as the risk manager testified, when an insured is putting together an insurance program, it buys that insurance separately each and every year. So, in essence, the allocation rules allowed ITT to use separately each policy, each year. That's how the insurance was purchased. And the risk manager also talked about why it was an integrated program, meaning you looked at creating that tower, to make sure that if you had a catastrophic or large losses, talking about that it would respond layer after layer after layer, which is what the court ruled ITT can do in accessing its excess coverage. The most important thing is that the judge heard that evidence. The context in which the policies were issued is critical. The fact that the judge allowed the testimony is absolutely essential. Finding the right witnesses and identifying the right evidence to put on, including the witnesses for the other side, was key.

**Konkel:** So, the first thing that most coverage lawyers do with a coverage dispute is look at what case law is out there and what states' laws may be applied and what the highest courts in those states have said about particular issues, such as allocation, exhaustion, etc. And we definitely start there and started there. What we did differently than most policyholder firms and what this court did was carefully consider everything that was presented beyond case law. The one thing that we did through all phases of the litigation was think, "What's out there?"; "What drafting history is out there?"; "What witnesses are out there?"

Fortunately, we were able to get very favorable testimony from defense witness Peter Wilson, who, in the 1970s, was one of the revisers of the original standardized conditions language found in all umbrella policies today, and who underwrote many of ITT's insurance policies, by soliciting candid and honest admissions about how a key provision to rebut how insurers now argue that provision (contrary to the insurers' original and Wilson's intent) greatly limits a policyholder's access to its insurance program.

**Cox:** There was considerable dispute over whether California law or New York law would apply. The insurers placed a lot of emphasis on trying to establish the application of New York law, which they thought would be a silver bullet for them on some key issues, like whether "pro rata" or "all sums" allocation would apply. Our feeling about California and New York law was that they had virtually identical principles of interpretation. We started with the policy language, and application of those shared interpretative principles to the policy language was what was going to drive us to where we thought the case should turn out and where it did turn out.

### Was there an added challenge conducting the final phases of the trial virtually?

**Zevnik:** We had trial phases in person with this judge, and many of the witnesses had appeared in person in prior trial phases. That gave us an immense advantage over most parties facing a remote trial. We did two remote trials, but because we had done two in-person trials with the same lawyers, and many of the same witnesses, it became a much easier thing for us to accomplish virtually. It was a challenge, but it was not nearly as challenging as it would have been had we not had the two extensive in-person trials at a previous time before the same judge. It was very important for the judge to see the witnesses in person and to evaluate their credibility. There were many witnesses in this case and the court's evaluation of demeanor and credibility was critical.

Did we prepare differently? Yes. We prepared our witnesses more extensively for the testimony in the virtual trials than we did for the in-person trials. In a virtual trial, there is increased pressure to present concise questions that the witnesses can answer with crisp and knowledgeable responses because there are attention span issues, and that's just a fact.

### What was the most challenging aspect of the case overall?

**Zevnik:** The critical thing, and the most challenging aspect, is to make sure that when you're adjudicating a long-tail coverage case, take the time to allow the liabilities to develop, so that you can present the richness and fullness of your case.

We also from the outset entered into case management orders that provided for trying the case in discrete phases. Phasing the litigation is also not only good from a case management perspective but also from a practical perspective because it allows you time to be able to settle portions of the case or, in this case, reach settlements with key players in the program.

Ultimately, most cases move towards settlement, and you've got to give yourself time to do that at the most propitious time for all the parties. And so the most important thing, and the most challenging thing when you're looking at a 17-year piece of litigation, is to realize that phasing and pacing is preferable to an immediate trial on all issues. Time allowed us to let the law develop. It allowed us to let the liabilities develop. It allowed us to pace the issues the right way in front of the court, and it allowed us to work with our colleagues and the insurers to settle phases and portions of the case at appropriate times because we had a gap between the phases.

Ultimately, your job as a litigator is to resolve matters, to settle them in a way that's favorable for your clients and others. And it gave us an opportunity also through that process to work with opposing counsel. That helped us in framing and phrasing the next set of issues for trials. The most challenging aspect is being patient, pacing the litigation and being able to keep a long-term strategic focus on results that meet your clients' needs.

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