

## \$220M Cobalt Deal Not A Loss Under Policy, Insurer Says

By **Catherine Marfin**

Law360 (October 24, 2023, 6:32 PM EDT) -- An insurance company for now-bankrupt Cobalt International Energy Inc. told the Texas Supreme Court on Tuesday that a \$220 million settlement the energy company reached with a group of investors after the approval of a bankruptcy plan can't be recovered because it doesn't qualify as a loss under the Cobalt's policy.



Cobalt International Energy cannot recoup a \$220 million settlement with investors because it isn't considered a loss under the company's policy, an attorney for a Cobalt insurer told the Texas Supreme Court.

Thomas C. Wright of Wright Close & Barger LLP, counsel for Illinois National Insurance Co., said the 2019 settlement between Cobalt and a group of investors was decided after a 2017 bankruptcy plan was approved, and after the parties had agreed that the investors would be limited in their recovery to any insurance coverage available.

"The court found that the \$220 million settlement number in the settlement agreement, which nobody is required to pay, is a loss, and it's all a loss," Wright said.

That, combined with a covenant in the settlement that stipulated that the investors would not "collect, execute, or take any steps or actions to record, enforce, or execute" any unpaid settlement amount, means that the investors are at a dead-end to collect, he argued.

"That covenant not to execute ... means that these defendants here did not have any incentive to keep the [settlement] number down because they didn't have to pay it," Wright said. "In fact, before the

settlement agreement, they rejected a demand from GAMCO to pay \$175 million. But during the course of this negotiation about the settlement, the number went up to 220. If they're not willing to pay 175, why are they willing to have the settlement agreement say 220? Because they don't have to pay."

Two investment companies collectively referred to in the appeal as GAMCO — GAMCO Global Gold, Natural Resources & Income Trust and GAMCO Natural Resources, Gold & Income Trust — sued Cobalt and several of its directors and officers in 2014, accusing them of concealing information from investors about the energy company's operations in Angola.

The investment companies alleged that Cobalt knew that the U.S. Securities and Exchange Commission and the U.S. Department of Justice were investigating it in 2011 for allegedly bribing the Angolan government in exchange for access to offshore blocks in the African country.

GAMCO was the lead plaintiff in the federal class action as a stockholder in Cobalt, claiming the investors lost \$1.6 billion. In 2017, several years into the litigation, Cobalt filed Chapter 11 bankruptcy. Two years later, a \$220 million settlement for the class claims **was approved by a federal judge**.

According to Cobalt's 14 insurance companies, led in the high court appeal by Illinois National Insurance Co., GAMCO previously agreed as part of the bankruptcy plan that Cobalt's coverage on the claims in the class action would be limited to available insurance coverage. The agreement didn't stipulate that the insurance companies would pay the eventual settlement, only that GAMCO had the option to pursue coverage for the settlement amount.

GAMCO sought a declaratory judgment that the Cobalt insurance companies had to pay the \$220 million, which the insurance companies moved to dismiss. The companies' motion was denied, and they appealed to a state appellate court in early October 2022, days before the trial was scheduled. The appeal was ultimately denied.

In **briefings to the high court**, Cobalt and GAMCO argued that the insurance companies "abandoned" investors "in all respects," failing to participate in defending the suit or in settlement negotiations.

"This was a situation where the carriers have refused to fund a defense, effectively the same as not providing a defense ... leaving the directors and offices to their own devices," said Andrew J. Entwistle of Entwistle & Cappucci LLP, counsel for GAMCO. "They had multiple notices and opportunities to participate in the negotiation of the settlement and throughout that entire process."

He said that the insurance companies' argument that no damages exist because the \$220 million was tied to available coverage is false because GAMCO lost far more than \$220 million.

"The directors and officers were exposed to \$1.6 billion in damages," Entwistle said. "The settlement amount, yes, it is in fact equal to the \$220 million in coverage that was theoretically available. But that's only 13.75% of the provable damages. It was the most we could negotiate for."

Ben L. Mesches of Haynes and Boone LLP, counsel for Cobalt, expressed a similar sentiment to the court, arguing that the insurance companies' complaints about the settlement are of their own creation.

"They had an opportunity to sit, come to mediation. They were invited. They didn't attend," he said. "They say now it's because of coverage, but all of those coverage arguments have been ruled on in the trial court, and they've been rejected on every single point. ... Their refusal to provide a defense, it seems to me, can be relevant to the analysis of whether there was an adversarial proceeding leading up to the judgment or settlement."

The insurers are represented by firms including Wright Close & Barger LLP, Norton Rose Fulbright, The Allen Law Group, Dykema Gossett PLLC, Clyde & Co. LLP, Thompson Coe Cousins & Irons LLP and Chamberlain Hrdlicka White Williams & Aughtry.

Cobalt is represented by Robert Scott of Blank Rome LLP, Micah Skidmore of Haynes and Boone LLP and Scott Brister of Hunton Andrews Kurth LLP.

GAMCO is represented by Andrew J. Entwistle and Sal H. Lee of Entwistle & Cappucci LLP.

The case is In re: Illinois National Insurance Co. et al., case number 22-0872, in the Supreme Court of Texas.

--Editing by Kristen Becker.

---

All Content © 2003-2023, Portfolio Media, Inc.