

Connecticut Appellate Court Addresses Allocation Issues In Asbestos-Injury Context

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A Connecticut appellate court addressed the proper allocation of defense and indemnity for long-term asbestos-related injury claims, resolving several matters of first impression under Connecticut law. *R.T. Vanderbilt Co., Inc. v. Hartford Accident and Indem. Co.*, 2017 WL 810704 (Conn. App. Ct. Mar. 7, 2017).

The coverage dispute arose from thousands of underlying asbestos-related personal injury lawsuits against Vanderbilt. In this interlocutory appeal, Vanderbilt and approximately thirty insurance companies sought declarations regarding their respective obligations as to the underlying claims. Among other things, the parties challenged the trial court's allocation and policy exclusion rulings. Reversing in part and affirming in part, the appellate court ruled as follows:

Trigger: The court rejected Vanderbilt's contention that Connecticut law has definitively endorsed a continuous trigger for long-tail asbestos injury claims. Rather, the court held that trigger remains an "open question" in Connecticut. The court also rejected Vanderbilt's assertion that trigger presents a question of fact that requires expert testimony. Instead, the court concluded that trigger must be determined by the court as a matter of law and that the trial court properly excluded expert testimony in this context. Turning to the substantive issue at hand, the court ruled that a continuous trigger governs asbestos-related claims, under which "every policy in effect, beginning at the time of initial exposure and extending through the latency period and up to the manifestation of asbestos related disease, is on the risk for defense and liability costs."

Unavailability of Insurance: The court addressed whether Vanderbilt should be responsible for costs prorated to periods in which it was uninsured not by choice, but because insurance coverage was unavailable. The insurers argued that Connecticut law does not recognize an unavailability rule, and that even if it does, an equitable exception existed because Vanderbilt "continue[d] to place allegedly harmful products into the stream of commerce during a time when no coverage [was] available for losses attributed to those products." The court rejected both contentions. First, the court endorsed an unavailability rule under Connecticut law, but held that the trial court misapplied the rule. In particular, the appellate court found error in the trial court's reasoning that occurrence-based insurance was available from 1993 through 2007 based on the availability of claims-made coverage. The appellate court also noted a lack of factual support for the finding that Vanderbilt could have obtained coverage during this time frame, but chose not to. Second, the court declined to rule on whether Connecticut would adopt

an equitable exception to this rule, instead finding that even if such an exception existed, the factual record did not support its application because Vanderbilt had a good faith belief that its talc did not contain asbestos during the relevant period of no insurance.

Excess and Umbrella Coverage: The court ruled that an allocation agreement among primary insurers was enforceable against umbrella and excess insurers that were not parties to the allocation agreement. The court noted that while potentially collusive or bad faith agreements may be challenged by excess insurers, the factual record did not suggest any such impropriety. The court also ruled that Continental’s umbrella policies were unambiguous and that language obligating Continental to defend “an occurrence not covered in whole or in part by underlying insurance” does not create a defense obligation when primary coverage was available and has been exhausted.

Pollution Exclusion: The court held that a standard pollution exclusion is ambiguous as to whether it applies only to traditional environmental contamination or “more broadly to circumstances such as the release of asbestos dust and similar toxic industrial products within a building when used as intended.” However, the court noted that to the extent that the factual record establishes traditional environmental contamination (*e.g.*, the outdoor dumping of silica waste onto neighboring properties), the exclusion may apply.

Occupational Disease Exclusions: Addressing a matter of first impression in Connecticut and nationally, the court ruled that occupational disease exclusions are not limited to claims brought by a policyholder’s own employees. Rather, the exclusion also bars claims brought by complainants who developed occupational disease while using the policyholder’s products in the course of working for another employer. The court reasoned that although the term “occupational disease” may be used in workers’ compensation law, “it does not follow that the term applies only to workers’ compensation claims brought against one’s own employer.”

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