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COMMENTARY

# Connecticut Appellate Court Issues Mixed Ruling on Coverage for Asbestos Liabilities

On March 7, 2017, the Connecticut Appellate Court issued a ruling[1] with potentially significant ramifications for manufacturers with asbestos liabilities. In a mixed decision for policyholders, the court issued policyholder-friendly rulings on the issues of trigger of liability, allocation of liabilities to policy terms when coverage is unavailable, and the application of the pollution exclusion. At the same time, it ruled against policyholders on the application of the occupational disease exclusion, holding that exclusion applies even where the injured party is not an employee or former employee of the insured.

The occupational disease holding is unprecedented. While, at present, its impact will be limited to Connecticut, policyholders can expect to see insurers make similar arguments nationwide in an effort to extend this ruling.

## The *R.T. Vanderbilt* Decision

The suit arose from thousands of claims against R.T. Vanderbilt Company claiming bodily injury caused by exposure to industrial talc that Vanderbilt had mined and sold between 1948 and 2008, alleged to have contained asbestos. Vanderbilt filed suit against its insurers seeking a declaration of its insurers' obligations to provide defense and indemnity coverage for the underlying liabilities and for breach of contract damages.

In a bifurcated proceeding, the trial court held: (i) a continuous trigger applied; (i) Vanderbilt was not responsible for indemnity costs after 1985 when coverage was unavailable (but would be responsible for defense costs for 14 years of that same period); (iii) the pollution exclusion does not bar coverage for claims of asbestos exposure; and (iv) the occupational disease exclusions in certain umbrella and excess policies apply only to claims arising from injuries to an insured's employees. Vanderbilt and the insurers filed interlocutory cross-appeals. On appeal, the appellate court reversed in part and affirmed in part.

First, the court joined the majority of jurisdictions in holding that the "efficient administration of justice" requires that the continuous trigger theory—whereby every insurance policy in effect from the date of first exposure through manifestation of asbestos-related disease is on the risk for defense and indemnity costs—apply as a matter of law to asbestos-related claims.[2] The court explained that the continuous trigger theory is generally compatible with current medical knowledge, appropriately accounts for the lack of

knowledge regarding the progression of asbestos-related disease, and is the most fair and efficient means of distributing costs over the course of a long latency disease claim and maximizing funds available to compensate victims.

Second, the court handed policyholders a significant victory in its interpretation of Connecticut's pro rata allocation rule. The court reaffirmed that Connecticut law requires liabilities for long-tail insurance claims to be prorated based on the insurers' respective time on the risk, with liabilities allocated to the policyholder only for those periods when the policyholder elects to be uninsured. As a matter of first impression in Connecticut, the court held that liabilities should not be allocated to the policyholder for those periods in which coverage was not available—an important qualification to the pro rata rule, given that insurers generally stopped writing asbestos liability coverage after 1985. The court further held that the "allocation block" would not include those periods after 1985 when coverage was unavailable. In so ruling, the court sided with "the vast majority of our sister states [that] do not hold an insured accountable for a pro rata share of long-tail losses that occur during periods when insurance is not available."[3] It reasoned that the justifications for allocating liabilities to the policyholder during periods of self-insurance (avoiding policyholder windfalls, incentivizing the purchase of insurance, and equitable reasons associated with policyholders voluntarily assuming the risk) do not apply where insurance is commercially unavailable.

Third, on an issue of first impression in Connecticut, the appellate court held that the standard qualified pollution exclusion does not "apply to situations in which a commercial or industrial product is discovered to pose health threats to individuals who manufacture, apply, or are otherwise exposed to it in the ordinary course of business."[4] The court reasoned that the drafting history of the exclusion and the similarities between the terms of the exclusion and the terms of contemporaneously enacted environmental statutes support the conclusion that the exclusion is intended to exclude coverage only for traditional environmental pollution.[5]

Finally, on an issue it described as "a question of first impression not only in Connecticut but also nationally," the court held that the "occupational disease exclusion" barred coverage not only for liabilities arising from occupational disease contracted by the insured's employees but also for liabilities arising from occupational disease contracted by *third-party employees*. The court recognized that "occupational disease" is frequently associated with workers' compensation statutes, but the court refused to limit the exclusion's application to that context. It further noted that the policies specifically limited the application of certain exclusions to claims brought "by employees," and reasoned that if the drafters had wanted to similarly limit the occupational disease exclusion, they would have done so.

## Policyholders Must Be Ready to Respond to Insurers on the Occupational Disease Exclusion

While the *R.T. Vanderbilt* decision is a win for policyholders on allocation and the interpretation of the pollution exclusion, its interpretation of the occupational disease exclusion has the potential to severely curtail the availability of insurance to provide coverage for asbestos liabilities. Insureds whose policies contain occupational disease exclusions can expect their insurers to attempt similar arguments in other jurisdictions. Accordingly, unless this holding is reversed by the Supreme Court of Connecticut, policyholders should be prepared to respond aggressively to insurers on the application of the occupational disease exclusion by arguing:

- The decision is an intermediate appellate court decision with no precedential authority outside of Connecticut;
- The decision fails to cite any authority in support of its interpretation of the occupational disease exclusion—it is literally unprecedented;
- The decision is entirely inconsistent with the most natural reading of the exclusion and the expectations of policyholders, who would reasonably understand the occupational disease exclusion as applying to claims for occupational disease compensable under workers' compensation statutes;
- Divorcing the phrase "occupational disease" from workers' compensation statutes renders the term ambiguous; and
- The decision is inconsistent with the purpose of the exclusion—namely, to ensure that the policy covers liabilities to the general public while preserving each state's respective workers' compensation scheme as the exclusive remedy for responding to injuries to an employee.[6]

The Connecticut Appellate Court's decision gives policyholders much to celebrate. Those insureds whose policies include occupational disease exclusions should, however, be prepared to parry insurers' likely reliance on the court's erroneous interpretation of that exclusion.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

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## Endnotes

1 *R.T. Vanderbilt Company v. Hartford Accident and Indemnity Company*, 2017 Conn. App. Lexis 59 (Conn. App. Ct. March 7, 2017).

2 *Id*. at *67.

3 *Id*. at *98.

4 *Id*. at *262.

5 *Id.* at *252-53 (quoting *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 328 (D.C. 2003) ("[T]he similarity between the language of the pollution exclusion and the terminology of environmental statutes, regulations, and judicial decisions is sufficiently striking to render a coincidence improbable.")); *see also id.* at *261-62.

6 *See generally* 9A Couch on Ins. § 129:11 (3d ed. 2016) ("A commercial general liability policy is designed and intended to provide coverage to the insured for tort liability for physical injury to the person or property of others. An employer accordingly obtains a commercial general liability policy for purposes of providing coverage for the employer's liability to the general public.… A commercial general liability policy is not designed to provide coverage for an employer's liability for injuries to its employees. Instead, the compliance of an employer with a respective jurisdiction's workers' compensation statute constitutes the full extent of an employer's liability for any injuries sustained by its employees, arising out of and in the course of their employment. The standard commercial general liability policy therefore expressly excludes coverage for any obligation of the insured under a workers' compensation law or any similar law.").