

**NEWS ALERT****INSURANCE RECOVERY GROUP****Murtha Cullina Helps Policyholder Prevail  
Before Connecticut Appellate Court  
In Asbestos Coverage Dispute**

By Marilyn B. Fagelson and Rachel Snow Kindseth | March 20, 2017

*In a significant Connecticut Appellate Court victory for policyholders, Murtha Cullina LLP helped Vanderbilt Minerals, LLC prevail in its coverage case against more than 20 of its insurance carriers, who had issued policies from the 1950s to the 1980s. The case presented several complex coverage issues and, at 250 pages, is believed to be the longest opinion ever issued by the Connecticut Appellate Court. In this case, Vanderbilt sought coverage for claims that alleged asbestos-related disease from exposure to industrial talc sold by Vanderbilt. The central issues on appeal concerned how to allocate the cost of the defense and indemnity for these asbestos claims among the parties and whether to apply policy exclusions.*

**ALLOCATION**

In a 250 page opinion addressing more than a dozen appellate issues, the Appellate Court devoted nearly half of its decision to allocation issues, in which it affirmatively adopted “continuous trigger” and the “unavailability rule” in applying pro-rata allocation to coverage obligations for asbestos claims.

- Under “continuous trigger,” all policies from the date of first exposure to asbestos to the time of manifestation of the disease may be called upon to respond to the claim.
- Under pro rata allocation, the cost of defense and indemnity is spread over the triggered policy periods and the policyholder shares in those costs if there are periods when the policyholder was intentionally uninsured or when coverage has been lost or compromised.
- Under the “unavailability rule,” no allocation is made to periods of time when coverage was not available for the type of risk at issue – here asbestos injuries, which were broadly excluded by the insurance market after 1985.

The Appellate Court provided a very thorough and thoughtful analysis as to why continuous trigger and the unavailability rule are proper components of the pro-rata allocation framework. The Appellate Court explained that the indivisible and cumulative nature of progressive injuries caused

---

The Appellate Court explained that the indivisible and cumulative nature of progressive injuries caused by asbestos is fundamentally different from traditional accidents.

---

**Marilyn B. Fagelson, Chair**  
203.772.7725  
mfagelson@murthalaw.com

by asbestos is fundamentally different from traditional accidents. Recognizing that comprehensive general liability policies do not clearly address how long-tail claims should be allocated, Connecticut and other courts have adopted pro rata, continuous trigger allocation, which the Appellate Court described as “an artificial judicial construct designed to allocate costs between various insurance policies. . . .” The many policy reasons for adopting pro rata, time on the risk allocation, continuous trigger and an unavailability rule were identified by the Appellate Court as including: distributing of the burdens equitably among all parties involved, maximizing resources available to respond to the multitude of claims (which means maximizing the use of available insurance because insurers have a better ability to manage this sort of risk), and satisfying the reasonable expectations of the insured.

The insurers’ argument that policy language providing for coverage of injuries “during the policy period” conflicted with the application of the unavailability rule was rejected by the Appellate Court. Noting that each insurer agreed to write an occurrence-based policy that affords “almost unlimited prospective coverage” for future costs arising from injuries that take place during the policy period, the Appellate Court dismissed any claimed conflict with the policy language or unfairness in applying the unavailability rule.

The Appellate Court also rejected the insurers’ argument that an equitable exception to the unavailability rule should apply where the policyholder continues to sell a harmful product after insurance for those harms becomes unavailable. While not foreclosing the possibility of an equitable exception under other circumstances, the Appellate Court held that the trial court’s findings established that no such exception applied here. Specifically, the trial court had found that Vanderbilt had a longstanding and good faith belief, validated by federal regulators, that its talc did not contain asbestos and that the underlying actions were groundless. On this record, the Appellate Court reasoned that the application of the unavailability rule would neither encourage risky behavior nor afford Vanderbilt an undeserved windfall.

## **EXCLUSIONS**

As for exclusions, the Appellate Court held that pollution exclusions bar coverage only for claims asserting traditional environmental pollution. The pollution exclusions do not bar claims arising from exposure to a toxic substance, such as asbestos, in the course of its intended use. In reaching this conclusion, the Court emphasized that the words “pollutants, irritants and contaminants” need to be read in context with the other terms within the exclusion, including the term “atmosphere.” The Court concluded that these are environmental terms of art which become ambiguous as applied to the claims brought against Vanderbilt and therefore did not bar coverage here.

Deciding an issue of first impression for the entire country, the Appellate Court held that a broadly-worded occupational disease exclusion bars coverage for claims alleging workplace exposure by persons other than Vanderbilt’s own employees.

## **NOTEWORTHY**

In addition to being a very favorable result for Vanderbilt on the majority of issues, this case is notable for its unprecedented magnitude. The decision addressed over a dozen issues raised in

the thirteen appeals that were consolidated by the Court. These interlocutory appeals followed two phases of trial and were permitted in order to resolve issues that will guide later phases of trial. For the appeals, the allotted briefing pages for all the parties exceeded 400 pages and the parties' joint appendix was submitted in 8 volumes. The decision came after an unusual day-long oral argument before the three-judge panel of Judges Lavine, Beach and Bear. Murtha Cullina attorneys Elizabeth J. Stewart, Marilyn B. Fagelson, Rachel Snow Kindseth, and Francis J. Brady joined with Hoke LLC attorneys Jacob Mihm and Stephen Hoke of Chicago, Illinois to represent Vanderbilt.

The case is R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co., 171 Conn. App. 61 (March 7, 2017). The opinion is available here: <http://bit.ly/VanderbiltAC36749>

*If you have any questions about the information contained in this bulletin, please contact: Elizabeth J. Stewart at 203.772.7710 or [estewart@murthalaw.com](mailto:estewart@murthalaw.com)*

*Marilyn B. Fagelson at 203.772.7725 or [mfagelson@murthalaw.com](mailto:mfagelson@murthalaw.com)*

*Proloy K. Das at 860.240.6076 or [pdas@murthalaw.com](mailto:pdas@murthalaw.com)*

*Rachel Snow Kindseth at 203.772.7774 or [rkindseth@murthalaw.com](mailto:rkindseth@murthalaw.com)*

**Marilyn B. Fagelson, Chair**  
203.772.7725  
[mfagelson@murthalaw.com](mailto:mfagelson@murthalaw.com)

**Terence J. Brunau**  
203.772.7785  
[tbrunau@murthalaw.com](mailto:tbrunau@murthalaw.com)

**George A. Dagon, Jr.**  
860.240.6039  
[gdagon@murthalaw.com](mailto:gdagon@murthalaw.com)

**Michael J. Donnelly**  
860.240.6058  
[mjonnelly@murthalaw.com](mailto:mjdonnelly@murthalaw.com)

**Melissa A. Federico**  
860.240.6042  
[mfederico@murthalaw.com](mailto:mfederico@murthalaw.com)

**David P. Friedman**  
203.653.5438  
[dfriedman@murthalaw.com](mailto:dfriedman@murthalaw.com)

**Rachel Snow Kindseth**  
203.772.7774  
[rkindseth@murthalaw.com](mailto:rkindseth@murthalaw.com)

**Elizabeth J. Stewart**  
203.772.7710  
[estewart@murthalaw.com](mailto:estewart@murthalaw.com)

**Ryan M. Suerth**  
203.240.6157  
[rsuerth@murthalaw.com](mailto:rsuerth@murthalaw.com)

**Andrew G. Wailgum**  
617.457.4006  
[awailgum@murthalaw.com](mailto:awailgum@murthalaw.com)

**Kristen L. Zaehring**  
203.653.5406  
[kzaehring@murthalaw.com](mailto:kzaehring@murthalaw.com)

*With more than 100 attorneys in six offices throughout Connecticut, Massachusetts and New York, Murtha Cullina LLP offers a full range of legal services to meet the local, regional and national needs of our clients. Our practice encompasses litigation, regulatory and transactional representation of businesses, governmental units, non-profit organizations and individuals.*

**MURTHA  
CULLINA**  
ATTORNEYS AT LAW

BOSTON + HARTFORD + NEW HAVEN + STAMFORD + WHITE PLAINS + WOBURN **MURTHALAW.COM**