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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

4 Issues Facing Conn. Justices In Asbestos Coverage Fight

By **Jeff Sistrunk**

Law360 (November 7, 2018, 8:44 PM EST) -- Connecticut's high court is poised to tackle multiple issues of first impression in Vanderbilt Minerals LLC's asbestos injury coverage battle with its insurers, including whether the company must cover litigation costs for years it couldn't buy asbestos insurance and whether an "occupational disease" exclusion is limited to claims brought by Vanderbilt's own workers.

Here, Law360 looks at four key issues facing the Connecticut justices as they weigh multiple appeals in the sprawling coverage case.

Case History

The coverage dispute dates to 2007, when Vanderbilt sued several of its primary insurance carriers to determine the scope of their obligations to cover thousands of claims brought by individuals who were allegedly injured by exposure to asbestos in the mineral company's industrial talc. A group of Vanderbilt's umbrella and excess insurers — including Travelers Casualty & Surety Co., TIG Insurance Co. and Everest Re — were later drawn into the litigation.

Ruling on appeals by both Vanderbilt and the carriers on a host of trial court decisions, a panel of the Connecticut Appellate Court in March 2017 issued a **whopping 161-page opinion** establishing both state and national precedent on a number of critical asbestos coverage questions.

Under Connecticut's prevailing "pro rata" scheme for allocating coverage of asbestos claims, the policyholder is held liable for a prorated share of defense and indemnity costs for any periods during which it is deliberately uninsured or underinsured. However, the panel said state law allows for a so-called "unavailability of insurance exception," which says that a policyholder is not responsible for a share of costs for periods during which insurance for a certain risk was unavailable in the marketplace.

Applying the rule, the panel determined that Vanderbilt isn't liable to cover part of its asbestos liability costs between 1986, when insurers largely stopped offering coverage for asbestos risks, and 2008, when the company ceased talc production.

In another first for a Connecticut appellate court, the panel ruled that asbestos-related injury claims are governed by a "continuous" trigger theory, wherein every policy that is in effect from the date a claimant is first exposed to asbestos through the actual manifestation of an asbestos-related disease is triggered. The panel also set a state benchmark by finding that pollution exclusions in Vanderbilt's policies apply only to "traditional environmental pollution" such as the dumping of toxic waste and not to asbestos claims.

Finally, the panel made national precedent by issuing a first-of-its-kind holding that occupational disease exclusions in some of Vanderbilt's policies bar coverage not only for asbestos injury claims brought by the company's own workers, but also those brought by individuals who purportedly "contracted an occupational disease" attributable Vanderbilt's products in the "course of their work for other employers."

In fall 2017, the Connecticut Supreme Court granted the insurance companies' request to appeal the panel's rulings on the unavailability of insurance, continuous trigger and pollution exclusions, while also allowing Vanderbilt to appeal the decision on the occupational disease exclusions. The mineral company and its insurers filed their opening briefs with the state high court late last month.

Unavailability of Insurance Exception

In a pair of briefs, Travelers, TIG and Everest Re contended that the Appellate Court panel's adoption of an unavailability exception flouts the clear language of Vanderbilt's policies and creates an unfair outcome for the insurers by forcing them to cover injuries that occurred outside their policy periods. The exception effectively would provide Vanderbilt with coverage it didn't pay for, the insurers said.

"Under [Connecticut Supreme Court precedent], this court cannot — and should not — 'torture the insurance policy language' in this manner 'to provide [Vanderbilt] with uninterrupted coverage' for these uninsured periods," Travelers argued in its brief. "That is not what the parties agreed to, and that is not what Vanderbilt paid for."

Even if Connecticut law permits an unavailability exception, the insurers argued, it shouldn't apply here because Vanderbilt made the conscious decision to continue selling allegedly asbestos-containing talc for two decades after it was no longer able to buy coverage for asbestos risks.

"Vanderbilt's calculated decision to persist in manufacturing talc products, with full knowledge of the risks it faced, demonstrates that the equities, efficiency and incentives all merit allocation to Vanderbilt for years in which it chose to mine and sell talc notwithstanding the purported 'unavailability' of insurance," Travelers' attorneys wrote.

Trigger of Coverage

The insurance companies also argued that the appeals panel erred in adopting a blanket continuous trigger for asbestos injury claims, calling the matter a "classic fact question" that is dependent on evidence.

"Appellate courts that have reviewed trial court decisions on trigger, regardless of their conclusions, typically have done so with the benefit of factual findings that are drawn from evidentiary records replete with medical expert testimony and tested by competing medical evidence and cross-examination," Travelers contended.

According to the insurers, the panel improperly excluded the testimony of their expert, who would have opined that asbestos exposure doesn't result in injury or disease until the "final cancer-relevant mutation" occurs.

"The Appellate Court decided it was empowered to decide trigger by ignoring when injury actually occurs and instead characterizing the issue to be a matter of law," Travelers' attorneys wrote.

Pollution Exclusions

In their brief, TIG and Everest Re also challenged the panel's finding that asbestos injury claims don't fall under pollution exclusions in many of Vanderbilt's policies.

According to the two insurers, asbestos fibers constitute an "irritant, contaminant or pollutant" and should therefore implicate the exclusions. The relevant language doesn't support the panel's conclusion that the exclusions apply only to so-called traditional environmental pollution such as the dumping of waste onto land or into bodies of water, they said.

"There are no allegations that the industrial talc would have caused injury absent the release of the asbestos fibers," TIG and Everest Re argued. "Therefore, the alleged injuries are 'arising out of' the irritating, contaminating and polluting nature of the asbestos, and the pollution exclusion applies."

Occupational Disease Exclusions

In its brief, Vanderbilt took aim at the appellate panel's interpretation of the occupational disease

exclusions.

The applicable policy language, statutes and case law in other contexts support the position that the phrase "occupational disease" is a technical term referring only to disputes between an employer and its employees, or between employer-administered compensation plans and employees, Vanderbilt said.

As such, Vanderbilt argued, the occupational disease exclusions should apply only to asbestos injury claims brought by its own employees and not preclude coverage for claims brought by workers at other companies who were exposed to Vanderbilt's allegedly asbestos-containing products while on the job.

"The effect of [the appeals panel's] ruling is to dramatically reduce general liability coverage for manufacturers, particularly in the context of claims of disease resulting from alleged exposure to asbestos and other industrial products," Vanderbilt's attorneys wrote.

Vanderbilt is represented by Proloy K. Das, Marilyn B. Fagelson and Rachel Snow Kindseth of Murtha Cullina LLP and Stephen Hoke and Jacob M. Mihm of Hoke Attorneys At Law LLC.

Travelers is represented by Kathleen D. Monnes, Erick M. Sandler and John W. Cerreta of Day Pitney LLP.

TIG and Everest Re are represented by Jeffrey R. Babbin and Michael Menapace of Wiggin and Dana LLP and Michael J. Smith and Bryan W. Petrilla of Stewart Smith.

The case is RT Vanderbilt Co. Inc. v. Hartford Accident & Indemnity Co. et al., case numbers SC 20000, 20001 and 20003, in the Connecticut Supreme Court.

--Editing by Philip Shea and Alanna Weissman.
