

**NEWS ALERT****INSURANCE RECOVERY GROUP****The Connecticut Supreme Court Affirms Policyholder Victory On Allocation Issues In Coverage For Asbestos-Related Injuries**

By Marilyn B. Fagelson and Rachel Snow Kindseth | October 9, 2019

In a significant Connecticut Supreme Court win for policyholders officially released this week, Murtha Cullina helped Vanderbilt Minerals, LLC prevail once again in its coverage case against more than 20 of its insurance carriers, who had issued policies from the 1950s to the 1980s. In this case, Vanderbilt sought coverage for claims that alleged asbestos-related disease from exposure to industrial talc sold by Vanderbilt. The Supreme Court had granted the insurers certification to appeal three rulings: two of the challenged rulings had the effect of limiting Vanderbilt's responsibility for the costs of defense and indemnity for the asbestos claims and a third ruling rejected the insurers' argument that the pollution exclusion would bar all coverage for those claims. In rebuffing the insurers' arguments on appeal, the Supreme Court simply adopted nearly half of the 250 page 2017 decision of the Connecticut Appellate Court, describing those rulings as "thorough," "well reasoned" and a "proper statement of the . . . applicable law."

**ALLOCATION**

Specifically, the Supreme Court adopted the Appellate Court's opinion holding that "continuous trigger" and the "unavailability rule" are properly part of the pro-rata allocation methodology to be applied 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.

In concluding that 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 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 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.

In adopting continuous trigger, the Appellate Court concluded that the trial court properly precluded expert testimony on current medical science concerning the actual timing of bodily injury from exposure to asbestos. Holding “bodily injury” to be a legal – not medical – term, it found the proposed testimony of the medical expert to be unnecessary. Moreover, given that the expert would testify that asbestos causes inflammation upon exposure, this testimony would have been consistent with continuous trigger.

The decision also rejected the insurers’ argument that policy language providing for coverage of injuries “during the policy period” conflicted with the application of the unavailability rule. 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.

#### **POLLUTION EXCLUSION**

The Supreme Court also adopted the Appellate Court’s opinion holding that pollution exclusions bar coverage only for claims asserting traditional environmental pollution. Pollution exclusions do not bar claims arising from exposure to a toxic substance, such as asbestos, in the course of its intended use. The Appellate 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.

#### **OCCUPATIONAL DISEASE**

The only issue substantively addressed by the Connecticut Supreme Court concerned the construction of “occupational disease” exclusions in certain policies. Not all of Vanderbilt’s policies have occupational disease exclusions but, for those that do, some specifically exclude coverage for occupational disease of Vanderbilt’s employees while others exclude occupational disease without reference to Vanderbilt’s employees. Vanderbilt argued that “occupational disease” was a term of art that necessarily referred to occupational disease statutes adopted in most states to compensate employees for diseases linked to their employment. The Supreme Court rejected that argument, holding that the plain meaning of the phrase bars coverage for claims alleging workplace exposure by persons other than Vanderbilt’s own employees. This decision – which affirmed the Appellate Court’s reversal of the trial court’s holding that the broadly worded exclusion did not bar coverage of employment related asbestos injuries – is the first time that a state’s highest court has construed the occupational disease exclusion.

All told, the Supreme Court provided a very favorable result for Vanderbilt on the majority of issues. Murtha Cullina attorneys Proloy K. Das, Marilyn B. Fagelson and Rachel Snow Kindseth joined with Hoke LLC attorneys Jacob Mihm and Stephen Hoke of Chicago, Illinois represented Vanderbilt at the Supreme Court.

The case is *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 333 Conn. 343 (Oct. 8, 2019), affirming 171 Conn. App. 61 (March 7, 2017). The opinion is available [here](https://www.murthalaw.com/files/documentinquiry.pdf), affirming <https://www.murthalaw.com/files/documentinquiry.pdf>.

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

**Terence J. Brunau**  
203.772.7785  
tbrunau@murthalaw.com

**George A. Dagon, Jr.**  
860.240.6039  
gdagon@murthalaw.com

**Michael J. Donnelly**  
860.240.6058  
mdonnelly@murthalaw.com

**David P. Friedman**  
203.653.5438  
dfriedman@murthalaw.com

**Rachel Snow Kindseth**  
203.772.7774  
rkindseth@murthalaw.com

**Benjamin H. Nissim**  
203.653.5419  
bnissim@murthalaw.com

**James F. Radke**  
617.457.4130  
jradke@murthalaw.com

**Emily M. Souza**  
203.772.7711  
esouza@murthalaw.com

**Andrew G. Wailgum**  
617.457.4006  
awailgum@murthalaw.com

**Kristen L. Zaehring**  
203.653.5406  
kzaehring@murthalaw.com



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