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Vanderbilt Needn't Fill Asbestos Coverage Gaps: Conn. Court

By **Jeff Sistrunk**

Law360, Los Angeles (March 6, 2017, 4:43 PM EST) -- A Connecticut appeals court set state precedent Monday by finding that Vanderbilt Minerals LLC doesn't have to share in costs tied to asbestos personal injury claims for years it was unable to buy insurance, while also establishing a national benchmark by ruling that an occupational disease exclusion isn't limited to claims by the company's own workers.

In a sprawling 161-page decision, a panel of the Connecticut Appellate Court largely affirmed a trial court's rulings on a host of legal and evidentiary issues in Vanderbilt's dispute with 30 of its insurers over coverage of asbestos personal injury claims tied to the company's sale of open-pit mined industrial talc. Among other things, the panel ruled as a matter of first impression in Connecticut that state law allows for a so-called "unavailability of insurance" rule, which states that a policyholder is not liable for a prorated share of defense and indemnity costs for periods during which insurance for a certain risk is unavailable in the marketplace.

Applying the rule, the appellate panel determined that Vanderbilt isn't liable to cover a share of its asbestos-related liability costs between 1986, when insurers largely stopped offering coverage for asbestos risks, and 2008, when the company ceased industrial talc production. The panel also declined to implement an "equitable exception" to the rule on account of Vanderbilt's decision to continue selling talc for 22 years after asbestos coverage became generally unavailable.

"If a policyholder has been diligent in its efforts to maintain a continuous stream of coverage, then it may reasonably expect that it will be able to avail itself fully of such coverage in the event that unforeseen and ongoing injuries arise," the panel wrote.

The appellate panel also set state precedent by declining to apply pollution exclusions to the asbestos injury claims against Vanderbilt, and made national precedent by holding that occupational disease exclusions don't apply solely to Vanderbilt's own employees.

The coverage dispute dates to 2007, when Vanderbilt sued several of its primary insurance carriers to determine the scope of their obligations to cover the underlying asbestos injury claims under policies issued over a 60-year period. A slew of the company's umbrella and excess insurers were later drawn into the litigation.

Vanderbilt and its insurers in 2014 appealed numerous findings by Connecticut Superior Court Judge Dan Shaban after the **conclusion of the second phase** in a four-part trial. The first two phases dealt with how Vanderbilt's defense and indemnity costs were to be allocated, along with questions about the exhaustion of certain policies and the meaning of various policy provisions.

To set the stage for its analysis of the issues, the Connecticut appellate panel found that state precedent establishes that insurance obligations for asbestos claims must be allocated pursuant to a pro rata "time-on-the-risk" method, under which each triggered policy is assigned a proportional amount of the liability. Under a pro rata scheme, the policyholder is held liable for a prorated share of costs for any periods during which it is deliberately uninsured or underinsured.

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.

A large chunk of the panel's decision focused on the parties' arguments regarding the unavailability rule. On one side, Vanderbilt asserted that the trial court properly held that it shouldn't be assigned a prorated share of liability for the post-1985 years after asbestos-related coverage became generally unavailable. On the other, one of the company's carriers, Mt. McKinley Insurance Co., argued that the lower court improperly recognized such a rule without an equitable exception for companies that continued to sell asbestos-containing products after 1985.

The appellate panel said the trial court properly held that the unavailability rule is consistent with the pro rata allocation principles set forth in Connecticut Supreme Court precedent, despite the potential risk of abuses by policyholders. A pro rata allocation system based on a continuous trigger and including an unavailability rule "distributes the burdens equitably" among involved parties "and maximizes the resources available to respond to claims while minimizing administrative hassles and transaction costs," the panel said.

As part of its findings on the rule, the panel reversed the trial court's ruling putting Vanderbilt on the hook for a share of defense costs between March 1993 and April 2007. The fact that Vanderbilt was able to obtain limited primary-level defense coverage for asbestos risks during that span doesn't justify assigning the company some of the liability for those years, the panel said.

"Absent any specific findings by the trial court that Vanderbilt could have obtained broader coverage between 1993 and 2007 but chose not to, it should not have treated Vanderbilt as underinsured and assigned it a pro rata share of defense costs for those years," the panel wrote.

The panel refused Mt. McKinley's invitation to create an equitable exception to the unavailability rule in the case at hand, pointing out Vanderbilt's "good faith" belief after 1985 that its industrial talc did not contain asbestos.

"On the record before us, we have no basis to conclude that those representations were false or that Vanderbilt's continued sale of talc after 1985 did or will in fact increase the financial burdens on any of its pre-1986 insurers," the panel wrote. "Accordingly, we do not believe that applying the unavailability rule in the present case would afford Vanderbilt an undeserved windfall."

Also on appeal, Mt. McKinley contended that the trial court erred in ruling that pollution exclusions in many of Vanderbilt's policies didn't bar coverage for the underlying claims. But the panel was unconvinced, agreeing with Vanderbilt that the exclusions only apply to "traditional" environmental pollution, "such as when the dumping of waste materials containing asbestos causes asbestos fibers to migrate onto neighboring properties or into the natural environment."

However, at the urging of another insurer, National Casualty Co., the panel found as a national matter of first impression that the trial court improperly interpreted the occupational disease exclusions in some of Vanderbilt's policies to preclude coverage only for claims brought by the company's own workers, and not claims by workers at other companies in Vanderbilt's supply chain.

The appellate panel held that the trial court interpreted the occupational disease exclusions too narrowly by limiting them to Vanderbilt's own workers, holding instead that they clearly also bar coverage for claims brought by individuals "who contracted an occupational disease in the course of their work for other employers."

Elizabeth J. Stewart of Murtha Cullina LLP, who represents Vanderbilt, praised some of the appellate panel's key holdings.

"We obviously are pleased for the most part, particularly with respect to the appellate court's rulings on allocation and the pollution exclusions," Stewart told Law360. "We have not yet fully analyzed the opinion or considered our next steps."

Lawrence D. Mason of Segal McCambridge Singer & Mahoney Ltd., who represents National Casualty, told Law360 the panel's ruling on the occupational disease exclusion could have a broad impact in a

variety of cases.

"The [occupational disease exclusion] ruling is now the only decision in the U.S. on this issue and will impact a variety of situations, especially toxic tort claims," he said.

An attorney for Mt. McKinley did not immediately respond to a request for comment.

Judges Douglas S. Lavine, Robert E. Beach Jr. and Stuart Bear sat on the appellate panel.

Vanderbilt is represented by Elizabeth J. Stewart, Rachel Snow Kindseth and Marilyn B. Fagelson of Murtha Cullina LLP and by Jacob Mihm, Stephen Hoke and David H. Anderson of Hoke LLC.

Mt. McKinley is represented by Michael J. Smith and Bryan W. Petrilla of Stewart Bernstiel Rebar Smith and by John F. Conway of Loughlin FitzGerald. National Casualty is represented by Lawrence D. Mason, Dwight A. Kern and John A. Lee of Segal McCambridge Singer & Mahoney Ltd. The other insurer defendants are represented by Karbal Cohen Economou Silk & Dunne LLC, Tinley Renehan & Dost LLP, Coughlin Duffy LLP, DanaherLagnese PC, Clausen Miller PC, MacDermid Reynolds & Glissman PC, Cooney Scully & Dowling, Rivkin Radler LLP, Mendes & Mount LLP, Slutsky McMorris & Meehan LLP, Segal McCambridge Singer & Mahoney Ltd., Clyde & Co. US LLP, Conway Stoughton LLC, Siegel & Park, Halloran & Sage LLP, Day Pitney LLP, Pullman & Comley LLC and BatesCarey LLP.

The case is R.T. Vanderbilt Co. Inc. v. Hartford Accident and Indemnity Co. et al., case numbers 36749, 37140, 37141, 37142, 37143, 37144, 37145, 37146, 37147, 37148, 37149, 37150 and 37151, in the Connecticut Appellate Court.

--Editing by Kelly Duncan.
