

## Vanderbilt Scores In Asbestos Coverage Row Of 30 Insurers

By **Andrew Scurria**

Law360, New York (April 2, 2014, 7:01 PM EDT) -- A Connecticut judge held Friday that neither pollution nor occupational injury exclusions eliminate indemnity coverage for Vanderbilt Minerals LLC's massive asbestos liabilities from the sale of open-pit mined industrial talc, ending the second phase of a two-year trial involving more than 30 insurers.

In a 77-page opinion, Superior Court Judge Dan Shaban ruled in the sprawling coverage case that a bevy of exclusions in policies that extend as far back as the 1950s were ambiguous as to the underlying asbestos injury claims and therefore do not preclude Vanderbilt from accessing coverage.

Ruling on an issue untouched by Connecticut appeals courts, the judge held that standard and absolute pollution exclusions barring coverage for injuries resulting from the discharge, dispersal, release or escape of pollutants could plausibly be interpreted both to encompass claims for asbestos exposure from talc and to refer only to traditional environmental contamination.

Judge Shaban was convinced in part by the asbestos exclusions that began appearing in the policies starting in 1986, when the insurance industry largely stopped offering occurrence-based indemnity coverage for asbestos claims.

The fact that new exclusions were incorporated at that time cuts against the insurers' position that the pollution exclusions were unambiguous, according to the opinion.

"The very adoption of separate asbestos exclusions in policies beginning in 1986 is evidence that insurers did not consider the pollution exclusion language to be clear enough to exclude those claims," the judge said. "To argue the pollution exclusion was unambiguous and therefore excluded asbestos-related claims would render the asbestos exclusion redundant and unnecessary."

While two insurers tried to invoke exclusions that contained slightly different language — applying to "seepage," "pollution" or "contamination" — the judge likewise found those terms ambiguous as to the underlying claims and the exclusions consequently inapplicable.

Several insurers raised occupational disease exclusions as a defense to covering claims over workplace exposure at other companies within Vanderbilt's supply chain. Led by National Casualty Co. and Westport Insurance Co., these carriers said that the exclusion referred to all diseases contracted through employment.

Vanderbilt countered that the exclusion applied only to its own workers, none of whose claims is at issue in the case. Judge Shaban agreed on the grounds that the phrase "occupational injury" is explicitly defined by the Connecticut Workers' Compensation Act and distinct from "personal injury" that may also occur on the job.

"The court finds [the] language of the occupational disease exclusions unambiguous and that they apply only to claims brought by the plaintiffs' own employees, and not nonemployee claims alleging workplace exposure," the judge said.

The judge also rejected the insurers' attempt to put Vanderbilt on the hook for a pro rata share of

indemnity for post-1986 liabilities based on the fact that it continued to sell asbestos-tainted talc after that time.

While the insurers argued that Vanderbilt was self-insured from 1986 to 2008, the judge found that it purchased the only coverage that was available to it in that time, a lone American International Specialty Lines Insurance Co. policy in effect from 2003 and 2004.

Turning to so-called "orphan shares" — periods covered by now-insolvent insurers or lost policies — the judge found Vanderbilt responsible for its liabilities, and no basis for requiring excess insurers to step in and provide coverage.

The judge held that primary policies issued by Continental Casualty Co. and Hartford Accident & Indemnity Co. before 1986 were exhausted, in spite of contentions by excess insurers that an allocation agreement between the two exhausted the policies prematurely.

Vanderbilt also committed no misrepresentation in procuring Pacific Employers Insurance Co. umbrella policies in 1985 by characterizing some underlying liabilities as "dust claims," according to the opinion.

The first phase of the trial determined the insurers' allocation of defense costs. The final phase, scheduled to begin within 45 days of Judge Shaban's ruling, will decide reimbursement claims.

Vanderbilt is represented by Stephen Hoke and Jacob M. Mihm of Hoke LLC; and Francis J. Brady, Marilyn B. Fagelson and Rachel S. Kindseth of Murtha Cullina LLP.

The case is RT Vanderbilt Co. Inc. v. Hartford Accident & Indemnity Co. et al., case number X02-UWYCV-07-5016321, in the Superior Court of the Judicial District of Waterbury, Connecticut.

--Editing by Edrienne Su.