Connecticut Case of First Impression Affirms Exhaustion Under Cost Share Agreement and Holds Insured Responsible for Gaps in Coverage and Insolvencies

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Following a 14 day bench trial, on March 28, 2014, a Connecticut trial court issued a decision which significantly impacts the insurance industry under Connecticut law.

In *R.T. Vanderbilt v. Hartford Accident & Indemnity Co.*, the Court affirmed the exhaustion of insurance policies under a cost share agreement that was entered intobetween two insurers prior to the Connecticut Supreme Court's decision in *Security Ins. Co. of Hartford v. Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 826 A. 2d 107 (2003), adopting *pro rata* allocation for long-tail claims. The Court further held that certain of Continental Casualty Company's ("Continental") and Hartford Accident & Indemnity Company's ("Hartford") primary policies were exhausted because the allocation methodology used by Continental and Hartford was objectively reasonable, although not entirely consistent with the methodology later established in *Security*. Coughlin Midlige & Garland LLP represents the interests of Continental in this litigation. The Court also held that a policyholder can be held responsible for gaps in coverage and insolvent periods.

The plaintiff, R.T. Vanderbilt Company, Inc. ("RTV"), n/k/a Vanderbilt Minerals, LLC, commenced a declaratory judgment action against Continental and Hartford seeking a determination of insurance coverage obligations relative to defense and indemnity for asbestos-related bodily injury actions brought against RTV.

For nearly 30 years, Continental and Hartford paid close to 100% of RTV's defense and indemnification for underlying actions alleging bodily injury by reason of exposure to asbestos allegedly contained in RTV's talc. Continental and Hartford entered into a cost share agreement that allocated RTV's defense and indemnity payments between them on a *pro rata* basis over a defined coverage block. Based on Continental's payments and the cost share agreement, Continental claimed that certain of its primary occurrence-based policies were exhausted.

The parties challenging the exhaustion argued that Continental's and Hartford's allocation failed to follow Connecticut law because it did not take into account periods outside of the agreed-to coverage block that they asserted should have been included, such as periods of no insurance and unconfirmed insurance. It was argued that this shortened coverage block resulted in the premature exhaustion of the Continental and Hartford policies. The Court rejected this argument.

The Court found that the allocation methodology utilized by Continental and Hartford was reasonable at the time they entered into the cost share agreement. The Court credited the testimony of Continental's expert and fact witnesses that the allocation methodology was reasonable and applied in good faith. The Court also noted that the agreement pre-dated the Connecticut Supreme Court's adoption of the *pro rata* allocation methodology in *Security Ins. Co. of Hartford v. Lumbermens Mutual Casualty Co.*, 264 Conn. 688, 826 A. 2d 107 (2003). Thus, the parties to the agreement did not have the benefit of Connecticut appellate authority when the allocation agreement was entered, but nevertheless adopted an allocation methodology similar to that adopted by the Connecticut Supreme Court. The Court also highlighted the fact that Continental and Hartford expended millions of dollars of defense and indemnity payments relative to the claims brought against RTV. Citing to the New Jersey Supreme Court case of *Owens-Illinois, Inc. v. United Ins. Co*., 138 N.J. 437 (1994), the Court ruled that "[t]his court will not compel Hartford and CNA to retroactively re-allocate their indemnity payments at this point." The Court concluded that "on an objective basis, the settlement between Hartford and CNA was reasonable at the time it was entered into given that it was generally advisable and was taken in good faith." As the allocation method utilized by Continental was objectively reasonable at the time, the Court held that it would not force the parties to reallocate indemnity payments "already made and done." The Court ruled that the *pro rata* allocation methodology adopted in *Security* is to be applied prospectively.

The Court also held that RTV will be treated as self-insured for periods where there was a gap in coverage, as well as for an insurer's insolvency, whether complete or partial.

In this decision, the court accepted the insurers' good faith and reasonable actions undertaken to protect their insured. Further, this case stands for the proposition that a reasonable allocation methodology developed prior to the establishment of controlling law should not be undone and survives even after such law is established. The case also holds a policyholder responsible for gaps in coverage and insolvent periods. The policyholder's other insurers are not required to make up for periods of insolvency.

If you have any questions regarding this decision, please contact Lorraine M. Armenti (973-631-6008, larmenti@cmg.law), Christopher S. Franges (973-631-6017, cfranges@cmg.law), Kathleen J. Devlin (973-631-6018, kdevlin@cmg.law), or Shayne W. Spencer (973-631-6061, sspencer@cmg.law).