

## **Connecticut Appellate Court Issues Wide-Ranging And Mixed Decision Regarding Asbestos Insurance Coverage**

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March 2, 2017

In a wide-ranging and detailed opinion spanning more than 200 pages, the Connecticut Appellate Court addressed a multitude of issues affecting talc producer R.T. Vanderbilt's ("RTV") claims for insurance coverage for long-tail, asbestos bodily injury claims.

The issues addressed by the Court include trigger, allocation, availability of insurance, exhaustion, the default date of first exposure ("default DOFE"), and defense in excess policies. See R.T. Vanderbilt Company, Inc., v. Hartford Accident and Indemnity Company, AC 36749 (Conn. App. Ct. March 7, 2017). A number of these are issues of first impression for the Connecticut courts.

After noting that trigger was an issue of first impression, the Court joined the majority of states by adopting a continuous trigger. In so doing, it rejected arguments made by the excess insurers that medical evidence should be considered to determine whether a continuous trigger is consistent with the current medical understanding of the etiology of asbestos injury, or that RTV had to prove by medical evidence and on a claimant-by-claimant basis that bodily injury-in-fact occurred during each policy period.

On another issue of first impression, the Court adopted the "unavailability of insurance rule," in which there is no proration to the insured for periods in which insurance for the loss is unavailable.

Significantly, the Court recognized that an "equitable exception" to the unavailability rule could arise if the insured's continued placement of harmful products into the stream of commerce after coverage is unavailable "adversely impacts" earlier insurers on the risk. However, because RTV had a long-standing and good-faith belief that its talc did not contain asbestos and that the underlying claims were groundless, the Court declined to apply the exception in this case.

The Appellate Court upheld the propriety of an allocation agreement between two of RTV's primary insurers, Continental Casualty Company ("Continental") and Hartford Accident and Indemnity Company ("Hartford"), and the exhaustion of certain of their primary policies based on that allocation agreement. In rejecting the excess insurers' arguments as to the propriety of the allocation and exhaustion, the Court held that the evidence supported the reasonableness of the allocation, and further held that the agreement was not entered to prematurely exhaust the excess policies.

For pending and future claims, the Court rejected a fixed early default DOFE of 1948, and suggested that a moving default DOFE, as proposed by Continental, that tracks known exposures was "sensible." The Court remanded this issue for further proceedings to craft a progressive default DOFE.

Finally, the Court held that Continental's umbrella/excess policies had no defense obligation upon exhaustion of underlying insurance. In so doing, it rejected RTV's argument that exhaustion is tantamount to there being no coverage afforded by the underlying policies.

Coughlin Midlidge & Garland LLP represented Continental at trial and on appeal in this matter.

If you have any questions about the decision, please feel free to contact Lorraine M Armenti, (973)

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