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Alert

Connecticut Supreme Court to Review "Unavailability Exception" and Other Significant Asbestos-Related Coverage Issues

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On October 18, 2017, the Connecticut Supreme Court granted petitions to review the "unavailability exception" and other significant asbestos coverage issues. The review in *R.T. Vanderbilt Company, Inc., v. Hartford Accident and Indemnity Company*, 171 Conn. App. 61 (Conn. App. 2017), comes after two phases of trial and a 200-plus page decision by the Connecticut Appellate Court. The Court will also review issues related to trigger, pollution exclusions, and occupational disease exclusions. Notably, the Court declined to review the Appellate Court's decisions related to default dates of first exposure and defense obligations under certain umbrella/excess policies.

The Court will review whether the Appellate Court properly affirmed the trial court's adoption of an "unavailability of insurance exception" to the *pro rata* by time on the risk allocation methodology. The Court will also review whether there should be an equitable exception to the "unavailability exception" when an insured continued to utilize, market and/or sell asbestos-containing products after it was no longer able to obtain insurance for asbestos-related liabilities.

With regard to trigger, the Connecticut Supreme Court will review the Appellate Court's affirmation of the application of a continuous trigger of coverage as a matter of law, and whether the trial court correctly precluded expert testimony on current medical science regarding the actual timing of bodily injury from asbestos-related disease.

In addition, the Court will review whether "sudden and accidental" and "absolute" pollution exclusions apply only to "traditional" environmental pollution, as determined by the trial and Appellate Courts, or whether those exclusions bar coverage for asbestos bodily injury claims. Finally, the Court will address whether the trial court correctly determined that occupational disease exclusions apply only to the occupational exposure of the insured's employees, or whether the Appellate Court correctly determined that occupational disease exclusions apply to all occupational exposures irrespective of whether the person was employed by the insured.

The Connecticut Supreme Court declined to review the Appellate Court's remand to develop a more complete record related to a "walking forward" default date of first exposure that tracks known exposures, as was proposed by Continental Casualty Company, Columbia Casualty Company, and Continental Insurance Company (collectively, "Continental"). The Court also declined to review the Appellate Court's affirmance that Continental's umbrella/excess policies had no defense obligation upon exhaustion of underlying insurance.

The Connecticut Supreme Court's decision on this appeal will be closely watched as New York's First Appellate Department recently declined to adopt an "unavailability exception" in *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 143 A.D.3d 86 (1st Dep't 2016), and the New Jersey Supreme Court recently heard argument related to the application of an equitable exception to the "unavailability exception" in *Continental Insurance Company v. Honeywell International, Inc.*, Supreme Court Docket #A-21-16.

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