

Alert

Connecticut High Court Affirms Continuous Trigger, Unavailability Exception to Pro-Rata Allocation for Asbestos Bodily Injury Coverage

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On October 4, 2019, the Connecticut Supreme Court affirmed the Appellate Courts' decision in *R.T. Vanderbilt Company, Inc. v. Hartford Accident and Indemnity Company*, 171 Conn. App. 61 (2017), adopting the "continuous trigger" and the "unavailability exception" to pro-rata allocation for asbestos bodily injury claims. The Court also affirmed the Appellate Court's holdings that the pollution exclusions in the subject policies applied only to "traditional environmental pollution," and that the application of occupational disease exclusions in certain policies barred claims for occupational exposure to asbestos by both employees and non-employees of the policyholder.

The Court had agreed to review a handful of the multitude of issues that had been decided in the wide-ranging and detailed opinion by the Connecticut Court of Appeals affecting talc producer R.T. Vanderbilt's ("Vanderbilt") claims for insurance coverage for long-tail, asbestos bodily injury claims.

The insurers joining in the appeal argued that the Appellate Court erred in upholding the trial court's rulings on three issues: (1) the adoption of the "continuous trigger" theory for asbestos-related disease claims as a matter of law; (2) the preclusion of expert testimony on current medical science regarding the actual timing of bodily injury from asbestos related diseases; and (3) the adoption of the "unavailability of insurance" exception to time on the risk allocation.

The Supreme Court held that the Appellate Court's "thorough and well-reasoned opinion more than sufficiently addresses" those issues, and adopted the relevant portions of the Appellate Court's decision "as the proper statement of the issues and the applicable law concerning those issues" without further analysis.

Thus, the decision confirms that Connecticut has adopted both the continuous trigger and the "unavailability of insurance exception" to pro-rata allocation, in which there is no proration to the insured for periods in which insurance for the loss is unavailable. Significantly, the Appellate Court recognized that an "equitable exception" to the unavailability rule could arise if the policyholder's

continued placement of harmful products into the stream of commerce after coverage is unavailable “adversely impacts” earlier insurers on the risk. However, because Vanderbilt had a long-standing and good-faith belief that its talc did not contain asbestos and that the underlying claims were groundless, the Appellate Court declined to apply the exception in this case. Both the unavailability rule and its equitable exception are now the law in Connecticut.

The Court spent more time on the question presented by the policyholder: whether the Appellate Court incorrectly held that two exclusions barring coverage for “occupational disease” apply to claims by non-employees of Vanderbilt who develop an occupational disease while using Vanderbilt talc. Neither policy defined “occupational disease.” The Court rejected Vanderbilt’s argument that “occupational disease” was a term of art limited to the worker’s compensation context, and held that the Appellate Court was correct in applying the exclusion to non-employee claims.

Coughlin Midlige & 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) 631-6008, lamenti@cmg.law or Christopher S. Franges, (973) 631-6017, cfranges@cmg.law.