

## Insurance Law Update

### Pro-Policyholder Talc-Related Asbestos Exposure Case Endorses Favorable Allocation Rule and Rejects Pollution Exclusion

By: *Alexander J. Bandza*

#### PRACTICAL POLICYHOLDER ADVICE

This well-reasoned opinion from the Connecticut Appellate Court provides ample support for policyholders seeking coverage for asbestos-related long-tail liability claims under CGL policies to overcome certain coverage defenses common to these types of claims, including the allocation of risk for uninsured policy periods and the application of the pollution exclusion. The opinion further serves as a comprehensive and educational overview of the existing cases, judicial rationales, and coverage positions taken by both policyholders and insurers in connection with the issues discussed in this article, and other issues, common to long-tail liability claims.

In a recent opinion from the Connecticut Appellate Court, *R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co.*, the court considered the question of coverage for long-tail liability asbestos claims under various Commercial General Liability (CGL) and excess or umbrella policies and issued a ruling on two significant issues—first, endorsing the “unavailability of insurance” exception to the pro rata allocation method to allocate uninsured policy periods to the insurer, and second, rejecting the application of the pollution exclusion to talc-related asbestos exposure. 2017 Conn. App. LEXIS 59 (Conn. Ct. App. Mar. 7, 2017). At issue in *Vanderbilt* were thousands of underlying lawsuits alleging injuries from exposure to industrial talc mined and sold by the plaintiff, R.T. Vanderbilt Company, Inc. (Vanderbilt) that purportedly contained asbestos. In 1948, Vanderbilt began to produce industrial talc through a subsidiary, and it continued to mine and sell talc until 2008, when it ceased production and sold off the last of its inventory. Between 1948 and 2008, about thirty (30) different insurance companies issued CGL insurance policies to Vanderbilt.

In 2008, Vanderbilt brought an insurance coverage action against its primary insurers for the policy periods spanning 1948 through 2008, arguing that those insurers had breached the contractual obligation to provide coverage for defense and indemnity costs incurred in connection with the underlying actions. These primary insurers in turn filed third-party complaints against excess and umbrella insurers. The court issued its findings that were the subject of this appeal after the first two phases of a four-phase trial schedule. In Phase I, the court addressed the question of how defense costs for the underlying actions were to be allocated as between Vanderbilt and its insurers. In Phase II, the court considered the same questions with respect to indemnity costs, as well as issued rulings with respect to the meaning of various policy provisions, the exhaustion of Vanderbilt’s primary policies, and the applicability of two exclusions contained in certain of Vanderbilt’s excess and umbrella policies—specifically a pollution exclusion and an occupational exposure exclusion.

Among the numerous policy periods, the parties’ dispute centered on the policy periods between March 3, 1993 and April 24, 2007, for which the parties contested whether coverage for the types of talc-related asbestos losses incurred by Vanderbilt was commercially available, and if so, whether Vanderbilt had, in fact, purchased such coverage. The trial court concluded that such coverage was commercially available during that fourteen-year period, but found that Vanderbilt did not purchase such coverage. As a result, the trial court held that Vanderbilt was knowingly underinsured during that period of time for purposes of its allocation analysis. As to the pollution and occupational exposure exclusions, the court held that the pollution exclusion was ambiguous

and therefore did not apply to preclude coverage for Vanderbilt's talc-related asbestos losses, but the occupational exposure was unambiguous and thus barred coverage for claims brought by Vanderbilt's own employees. Following the completion of the Phase II trial, Vanderbilt and several defendants filed appeals and cross appeals, challenging approximately twenty of the court's conclusions and findings.

One significant issue, among many issues, on appeal was which of the four prevailing trigger of coverage theories (*i.e.*, initial exposure, injury-in-fact, manifestation, or continuous trigger) should be applied under Connecticut law. After an expansive survey of the law of other states and the stated rationales for application of each of the theories, the appellate court affirmed the trial court's selection and application of the continuous trigger theory, under which all policies on the risk from the time of first exposure through the date of manifestation and actual injury are triggered.

The appellate court further held that Connecticut applies the pro rata allocation method to long-tail liability claims that implicate multiple insurance policies and policy periods. Under a pro rata allocation, defense costs and indemnity are allocated among insurers on the basis of their time on the risk, but can be pro-rated to the policyholder for periods during which the insured lost or destroyed its policies or was otherwise uninsured or underinsured. At issue in *Vanderbilt*, however, was an additional novel question under Connecticut law regarding whether the policyholder or the insurer should bear the risk for periods during which applicable insurance coverage was commercial unavailable—commonly known in other jurisdictions as the “unavailability of insurance” exception to the pro rata allocation method.

After surveying the law of other states and the stated rationales for the application of the “unavailability of insurance” exception, the appellate court initially noted that it would not be “fundamentally unfair to hold either the insurers or the policyholder responsible for portions of the allocation block during which insurance is unavailable.” The appellate court went on to conclude, however, that it would be more efficient and reasonable for the insurer to bear such a risk. In support of its reasoning, the appellate court noted the following:

1. Holding insurers on the risk collectively responsible for the full injury, up to the policy limits for which the policyholder has contracted, has the desirable effect of maximizing the resources available to respond to the multitude of claims facing Vanderbilt and other similarly situated policyholders.
2. Holding insurers responsible when unforeseen risks arise, and not permitting them simply to drop coverage and cut their losses, creates an incentive for insurers as well as policyholders to continuously identify and investigate previously unknown risks associated with various materials and lines of business.
3. An “unavailability of insurance” exception to the pro rata allocation method best comports with the reasonable expectations of the policyholder because a fundamental component of insurance involves the transfer of risk from policyholder to insurer.
4. Insurers have a better ability to manage this risk because they can continue to accept, pool, and spread the risk and price coverage accordingly.

Affirming the trial court's ruling as to this point, the appellate court held that it was not improper for the trial court to exclude Vanderbilt from the pro rata allocation for policy periods in which asbestos-related insurance was commercially unavailable.

Another significant issue on appeal was the potential application of the excess or umbrella policies' pollution exclusions to the talc-related asbestos exposure. The insurers argued that the pollution exclusions were an additional basis on which to bar coverage, as most of the insurers' policies issued to Vanderbilt after 1970 contained a pollution exclusion. A representative example of one of the pollution exclusions at issue in *Vanderbilt* contains the following language:

It is agreed that the insurance does not apply to personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Recognizing that the potential application of a pollution exclusion to talc-related asbestos exposure was “a close one, over which our sister courts are sharply divided,” the appellate court concluded that the pollution exclusions at issue “bar coverage only when the exposure arises from traditional environmental pollution, such as when the dumping of waste materials containing asbestos causes asbestos fibers to migrate onto neighboring properties or into the natural environment.” Here, however, the court noted that it was ambiguous whether the term “pollution” would extend to exposure arising from “inhalation or ingestion of asbestos dust released in small quantities in an indoor environment during everyday activities such as manufacturing, laundering, or remodeling.” Furthermore, the court agreed with other courts that “a literal interpretation of the list of substances in the standard pollution exclusion language would render the clause so broad as to be meaningless, and would lead to irrational and absurd consequences.” As a result, the appellate court held that the relevant pollution exclusions did not apply to bar coverage for Vanderbilt in relation to the talc-related asbestos exposure in the underlying actions.

The appellate court did note, however, that the excess or umbrella policies further contained an occupational disease exclusion that may apply to preclude coverage, and that such application may be without regard to whether the underlying talc-related asbestos exposure claims were asserted by Vanderbilt’s employees involved in manufacturing the product or instead by Vanderbilt’s employees who may simply have used the products. Ultimately, the appellate court remanded consideration of the application of the occupational disease exclusion to the trial court to make additional findings on this remaining issue.

For policyholders faced with certain coverage defenses common to asbestos-related long-tail liability claims under their CGL policies, including the allocation of risk for uninsured policy periods and the application of the pollution exclusion, *Vanderbilt* provides strong support to overcome such defenses. The opinion further serves as a comprehensive catalogue of the state of the law on these and other issues common to long-tail liability claims.

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