CONNECTICUT SUPREME COURT AFFIRMS CONTINUOUS TRIGGER AND UNAVAILABILITY EXCEPTION, MAKES FIRST-IN-THE-NATION LAW REGARDING OCCUPATIONAL DISEASE EXCLUSION

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INTRODUCTION

Earlier this month, the Connecticut Supreme Court (the "Supreme Court") finally issued its long-anticipated ruling regarding the Connecticut Appellate Court's (the "Appellate Court") landmark 2017 decision in *R.T. Vanderbilt v. Hartford Accident and Indemnity Co.* (the "2017 Appellate Court Decision"). [1] The Supreme Court adopted in its entirety the Appellate Court's policyholder-favorable decisions regarding the application of the continuous trigger theory to long-tail asbestos-related bodily injury claims, the application of the unavailability-of-insurance rule to allocation of liability for such claims, and the inapplicability of the qualified pollution exclusion to asbestos-related bodily injury claims.

The Supreme Court's opinion also contained a potentially problematic ruling for policyholders. Ruling on an issue of national first impression, the Supreme Court held that an occupational disease exclusion in certain of the policyholder's policies applied not only to claims brought by the policyholder's own employees but also to all underlying claimants alleging that they suffer from an occupational disease, even if they were employed by others.

THE SUPREME COURT'S *VANDERBILT* DECISION

The Connecticut Supreme Court considered four issues on appeal from the 2017 Appellate Court Decision. [2] Three of those issues were raised by the defendant insurers: (1) whether the continuous trigger theory was properly applied to long-tail asbestos claims under Connecticut law, (2) whether the unavailability-of-insurance rule should be applied to allocation of liability under Connecticut law for long-tail liability claims, and (3) whether under Connecticut law the pollution exclusion applied only to traditional environmental pollution or more broadly to asbestos bodily injury claims. [3]

The policyholder raised the final issue on appeal: whether the occupational disease exclusion was limited to claims brought by the policyholder's own employees or had broader application. [4]

Trigger, Allocation, and the Qualified Pollution Exclusion

In its 2017 Appellate Court Decision, the Appellate Court placed Connecticut among those jurisdictions that apply the continuous trigger theory to long-tail claims. The Appellate Court's decision reasoned that this theory best reflected the medical particularities of long-tail asbestos claims and was therefore the most fair and efficient way to distribute costs. [5]

The Appellate Court also adopted the "unavailability-of-coverage" rule to augment Connecticut's pro rata allocation theory for long-tail claims. Under this rule, no amounts are allocated to a policyholder for years when the policyholder was unable to purchase insurance for third-party asbestos-related bodily injury claims because such insurance was unavailable in the market. [6] In adopting the "unavailability-of-coverage" rule, the Appellate Court rejected the insurers' attempt to include an "equitable exception" to the rule that would have made the rule inapplicable to periods during which a policyholder sold allegedly asbestos-containing products. It also rejected the insurers' suggestion that the alleged availability of coverage for asbestos liabilities under "claims-made" policies should be factored into the question of whether coverage for asbestos-related bodily injury claims was "available" in the market. [7]

Finally, the Appellate Court held that the so-called "qualified" pollution exclusion (also referred to as the "sudden and accidental" pollution exclusion) only applied to traditional environmental pollution. [8] The Appellate Court reasoned that the meaning of "environmental pollution" was clear at the time the insurers drafted the exclusion and referred to traditional methods of environmental pollution, such as unintentional migration of a pollutant through a water source. [9] The Appellate Court held, therefore, that this exclusion does not apply to asbestos-related bodily injury claims. [10]

On appeal, the Supreme Court agreed with the Appellate Court's reasoning and conclusions with respect to these three issues and adopted in full the Appellate Court's discussion of them without further elaboration. [11]

The Occupational Disease Exclusion

In considering the scope of the occupational disease exclusion, the Supreme Court, after summarizing the discussion of the issue below, began by making an independent inquiry into the plain meaning of the term "occupational disease." [12]

Looking first to the language of the exclusion in the relevant policies, the Supreme Court noted that neither defined the term "occupational disease," thus requiring the court to turn to the plain meaning of the term when the policies were written. [13]

Citing an array of dictionaries and cases, the court found definitions such as "[a] disease caused by the condition or hazards of a particular occupation" [14] and "an illness caused by factors arising from one's occupation." [15] In light of these broad definitions, the Supreme Court rejected the policyholder's argument that the term "occupational disease" belonged to the workers compensation domain and should therefore only apply in a workers compensation context to claims brought by the policyholder's own employees. [16] The Supreme Court acknowledged that "the relationship between occupational disease and workers' compensation is now a matter of black letter law…." [17] However, it found that:

> the definitions on which Vanderbilt relies — including the definition in Black's Law Dictionary — [do not] suggest[] in any way that the phrase "occupational disease" is a construct devoid of meaning outside the law of workers' compensation, notwithstanding its obvious significance within that area of the law. Instead,

> we read those definitions only to highlight the availability of workers' compensation as a common, legal remedy for claims arising from the underlying condition. [18]

The Supreme Court also found it significant that the relevant exclusions themselves, like the general definitions of "occupational disease" that it had considered, did not contain an express limitation to the policyholder's own employees. [19] The Supreme Court contrasted the language of the relevant exclusions with that of certain other exclusions contained in the relevant policies that did expressly limit the exclusion's scope, noting that "when the drafters of the policy desired to limit the application of an exclusion to a certain group of individuals, they did so." [20]

The Supreme Court then rejected the policyholder's argument that the relevant exclusions were ambiguous in the absence of limiting language. [21] It also held that the policyholder's preferred interpretation would require adding nonexistent limiting language in violation of bedrock principles of contract interpretation. [22]

The Supreme Court also disagreed with the policyholder's argument that a reference to "occupational diseases sustained by any employee of the assured" in the body of one of the relevant policies limited the scope of the occupational disease exclusion in that policy, which was found in an endorsement. [23] The Supreme Court held that this reference did not constitute a generally applicable definition of "occupational disease" and so was irrelevant to interpreting the scope of the exclusion found in an endorsement. [24]

Finally, the Supreme Court addressed the policyholder's argument that interpreting the occupational disease exclusion without an own-employees limitation would render the relevant policies' liability coverage meaningless. [25] The Supreme Court found this argument "tempting" but ultimately held that the facts in the record undercut its applicability to the case at bar. [26] In *Vanderbilt*, the parties had stipulated below that the underlying claims were all brought entirely by claimants who were not the policyholder's own employees, and those claims could be classified into three categories: claims arising from workplace exposure, claims arising from both workplace and nonworkplace exposure, and entirely nonworkplace exposure claims. [27] The Supreme Court held that its interpretation of the occupational disease exclusion did not render the relevant policies' liability coverage meaningless in these circumstances, since that interpretation did not affect coverage for claims in the second and third category. [28] Moreover, the Supreme Court noted that even a significant exclusion limiting available coverage does not mean that the insured did not get the coverage for which it bargained or that the "insurance policies are rendered meaningless by virtue of the denial of coverage." [29]

In light of all these reasons, the Supreme Court concluded that the occupational disease exclusion was clear and unambiguous, and it applies to occupational disease claims brought by both a policyholder's own employees and other individuals who contract occupational disease in the course of work for other employers. [30]

Notably, in explaining the import of is decision, the Supreme Court did acknowledge that although a "disease might well have been contracted during [the underlying claimant's] employment, that fact does not, without more, render it occupational in nature." [31] Although the Supreme Court did not describe in detail what was needed to render a disease "occupational in nature," it did suggest that the relevant employment had to be in "an industry that had peculiar incidence of diseases occasioned by exposure to [whatever the underlying claimant was allegedly exposed to]." [32]

CONCLUSION

Policyholders facing third-party long-tail liabilities whose general liability policies may be governed by Connecticut law should take heart that Connecticut has now joined those jurisdictions applying the continuous trigger theory and the unavailability-of-coverage rule. The Supreme Court's *Vanderbilt* opinion also brings Connecticut into the majority of jurisdictions that properly interpret the qualified pollution exclusion as having no application outside the realm of traditional environmental pollution.

However, policyholders also should carefully review their policies for any "occupational disease" exclusionary language, particularly if those policies may be governed by Connecticut law. Policyholders that are uncertain as to whether Connecticut law may apply to the interpretation of their policies may wish to seek advice from coverage counsel regarding the applicable choice of law and the potential implications of *Vanderbilt* to their general liability insurance program. While a general "occupational disease" exclusion of the kind at issue in *Vanderbilt* may not be widely found in general liability policies, *Vanderbilt* may embolden insurers nationally whose policies contain similar provisions to attempt to raise new coverage defenses to escape their coverage obligations for toxic tort claims. Policyholders should carefully evaluate any attempts by their insurers to raise previously unasserted "occupational disease" exclusions.

NOTES

[1] 156 A.3d 539 (Conn. App. Ct. 2017).

[2] R.T. Vanderbilt Co., Inc. v. Hartford Acc. & Indem. Co., 333 Conn. 343 (2019) ("*Vanderbilt*").

[3] *Vanderbilt* at 350.

[4] *Id.* at 351.

[5] 2017 Appellate Court Decision at 571–73. On this point, the Appellate Court also affirmed the exclusion of the insurer's expert opinion regarding recent medical science regarding when an "injury" occurs for asbestos-related disease, finding that the science behind asbestos-related disease is unrefuted and that the term "injury" as referred to in the policy was not a medical term of art. *Id.* at 562, 565–69.

[6] *Id.* at 581. The Appellate Court also noted that this would incentivize insurers to continuously identify and investigate previously unknown risks, recognizing that insurers are better able to manage this sort of risk. *Id.*

[7] *Id.* at 593.

[8] *Id.* at 623.

[9] *Id.*

[10] *Id.* at 626.

[11] *Vanderbilt* at 357.

[12] *Id.* at 360–66.

[13] *Id.* at 366.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 368.

[18] *Id.* at 369.

[19] *Id.*

[20] *Id.* at 369-70.

[21] *Id.* at 372.

[22] *Id.* at 370.

[23] *Id.* at 371.

[24] *Id.* at 372.

[25] *Id.* at 373.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 373-74 (internal punctuation and citations omitted).

[30] *Id.* at 377.

[31] *Id.* at 368, n.19 (citing ROTHSTEIN ET AL., EMPLOYMENT LAW § 7:24 (6th ed. 2019) ("An ailment does not become an occupational disease simply because it is contracted on the employer's premises[.]" [internal quotation marks omitted])).

[32] *Id.*

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