

## Conn. Allocation Ruling May Swell Insurers' Asbestos Burden

By **Jeff Sistrunk**

*Law360, Los Angeles (March 7, 2017, 8:52 PM EST)* -- A Connecticut appeals court's ruling Monday that Vanderbilt Minerals LLC doesn't have to cover asbestos injury claims for the years during which there was no insurance available for those risks may expand insurers' asbestos liabilities by forcing them to pick up costs for such periods, attorneys say.

As part of a massive 161-page opinion addressing Vanderbilt's asbestos coverage dispute with 30 of its insurers, a panel of the Connecticut Appellate Court ruled as a matter of first impression that state law permits an "unavailability of insurance" rule, which establishes that a policyholder is not liable for a prorated share of defense and indemnity costs for periods when insurance for a certain risk was unavailable in the marketplace.

The panel reasoned that Vanderbilt shouldn't be held liable for a portion of its costs to defend and resolve asbestos injury claims stemming from its sale of open-pit mined industrial talc after 1985, when insurance for risks relating to the toxic mineral became largely unavailable, because the company made efforts to obtain asbestos coverage but found the door closed save for a few limited policies.

"If a policyholder has been diligent in its efforts to maintain a continuous stream of coverage, then it may reasonably expect that it will be able to avail itself fully of such coverage in the event that unforeseen and ongoing injuries arise," the panel said.

However, attorneys who represent insurance carriers said the appellate panel's decision has the effect of unfairly penalizing insurers that made the well-reasoned business decision to stop offering policies for asbestos risks after claims over injuries allegedly caused by exposure to the mineral exploded in the 1980s.

"I thought the appellate court gave short shrift to the idea that insurers were making responsible underwriting decisions by ceasing to offer asbestos-related coverage," said Crowell & Moring LLP partner Laura Foggan, who represented the Complex Insurance Claims Litigation Association as an amicus in support of Vanderbilt's insurers. "What about the insurer that goes on the risk for a year, and then decides it no longer wants to insure the risk? It doesn't make sense for the insurer to continue to be held liable for periods after it stopped issuing the insurance."

But Lowenstein Sandler LLP's insurance recovery group chair, Lynda A. Bennett, said the panel properly refused to hold Vanderbilt liable for the period of unavailability, emphasizing that policyholders shouldn't be punished for their inability to obtain coverage.

“Insurers shouldn’t forget that they marketed these [commercial general liability] policies as being extraordinarily broad,” Bennett said. “When the nature of the risk changes simply because more information becomes available, and not because either party should have known better, the court correctly determined that the insurance company should have to pay for allocation of that risk.”

Vanderbilt and its insurers in 2014 appealed numerous findings by Connecticut Superior Court Judge Dan Shaban after the second phase in a four-part trial. The first two phases dealt with how Vanderbilt’s defense and indemnity costs were to be allocated, along with questions about the exhaustion of certain policies and the meaning of various policy provisions.

As a preliminary matter, the appellate panel found in Monday’s opinion that the Connecticut Supreme Court’s 2003 decision in *Security Insurance Co. of Hartford v. Lumbermens Casualty* definitively established that insurance obligations for asbestos claims must be allocated pursuant to a pro rata “time-on-the-risk” method, under which each triggered policy is assigned a proportional amount of the liability. In a pro rata scheme, the policyholder is held liable for a share of costs for any periods during which it is deliberately uninsured or underinsured.

In another first for a Connecticut appellate court, the panel ruled that asbestos-related injury claims are governed by a “continuous” trigger theory, wherein every policy in effect is triggered from the date a claimant is first exposed all the way through to the actual manifestation of an asbestos-related disease.

A large section of the panel’s decision focused on how to address the unavailability rule. On one side, Vanderbilt asserted that the trial court properly held that it shouldn’t be assigned a prorated share of liability from 1986, after asbestos coverage became generally unavailable, through 2008, when the company stopped producing industrial talc. On the other, one of the company’s carriers, Mt. McKinley Insurance Co., argued that the lower court improperly recognized such a rule without an “equitable” exception for companies that continued to sell asbestos-containing products after 1985.

The appellate panel said the trial court correctly held that the unavailability rule is consistent with the pro rata allocation principles set forth in the *Security* decision, despite the potential risk of abuses by policyholders. A pro rata allocation system based on a continuous trigger and including an unavailability rule “distributes the burdens equitably” among involved parties “and maximizes the resources available to respond to claims while minimizing administrative hassles and transaction costs,” the panel said.

According to attorneys who represent insurers, though, the panel’s recognition of an unavailability rule improperly allocates to insurance companies costs tied to losses arising during the uninsured periods.

Hinshaw & Culbertson LLP partner Scott Seaman said the panel’s rationale for absolving the policyholder of responsibility for uninsured periods is the same reasoning articulated by insureds in seeking an “all sums” allocation, under which the policyholder can hold the insurers in any triggered period liable for an entire loss up to the policy limits. Courts that have adopted a pro rata allocation standard, including the Connecticut Supreme Court, have already rejected such arguments, he said.

“The ‘unavailability’ argument is nothing more than a second bite at the allocation apple that should be foreclosed,” Seaman said. “Even the opinion identifies moral hazards and perverse consequences regarding purchase and nonpurchase of insurance and continued manufacturing of defective products.”

Seaman added that an unavailability rule needlessly adds an extra layer of complexity to proceedings to

determine the proper allocation of costs from asbestos claims.

“Adding unavailability into the allocation equation presents the very problems of increasing the complexity of a coverage action, as well as costs, to the parties and consumption of judicial resources that this court sought to avoid by applying a continuous trigger and avoiding a trial on asbestos and medical issues,” he said.

In accepting Vanderbilt’s contentions in support of the unavailability rule, the appellate panel said a pro rata allocation regime is already more favorable to insurers than the all-sums approach. The panel further determined that many of the concerns justifying proration of a share of defense and indemnity costs to policyholders when they deliberately go uninsured or underinsured don’t apply to situations where a policyholder tries to obtain coverage but simply cannot do so.

Sherilyn Pastor, leader of McCarter & English LLP’s insurance recovery group, said that there is no windfall to policyholders under a pro rata system incorporating an unavailability rule.

“If there is a windfall, it is to insurers; rather than paying all sums for progressive and indivisible injuries undeniably covered by their policies, they instead pay only portions due under what the Connecticut court recognized is an insurer-friendly, pro-rata allocation method,” Pastor said.

Pastor cautioned, however, that the panel’s opinion left open the possibility of an equitable exception to the unavailability rule in cases where the policyholder is found to have continued manufacturing and selling products despite knowing they are harmful. Here, the panel declined to apply an exception based in part on Vanderbilt’s ongoing belief that its industrial talc did not contain asbestos.

“Although the court obviously intended [an exception] in only extraordinary and exceptional circumstances, insurers may nonetheless try to push the envelope to avoid their coverage obligations,” Pastor said.

With the huge financial stakes in play and the pointed arguments on both sides, attorneys say the Connecticut Supreme Court is likely to have the final word on the unavailability rule.

“The length of the decision suggests that the Connecticut intermediate appellate court realizes that the Connecticut Supreme Court ultimately will have an opportunity to consider the issues,” Seaman said.

--Editing by Pamela Wilkinson and Brian Baresch.