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THE OCCUPATIONAL DISEASE EXCLUSION: MAKING NEW LAW WITH AN UNDERAPPRECIATED POLICY PROVISION

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The authors of this article discuss a recent Connecticut Appellate Court precedent-setting decision in the R.T. Vanderbilt v. Hartford Accident & Indemnity Co. et al., insurance declaratory judgment action, which addresses the application of the occupational disease exclusion.

The Connecticut Appellate Court recently issued a precedent-setting hundred-page decision in the *R.T. Vanderbilt v. Hartford Accident & Indemnity Co. et al.*, insurance declaratory judgment action. In this important case, the appellate court addressed several issues of first impression in the state of Connecticut involving allocation of defense and indemnity claims. Specifically, the appellate court upheld the application of a "continuous trigger" to long-tailed bodily injury claims, while applying an "unavailability of insurance" rule, which provides that an insured is not liable for a *pro-rata* share of defense and indemnity costs for periods when insurance for the risk at hand is unavailable in the marketplace. In this context, the court declined to apply an "equitable exception" to the unavailability rule, which would limit the application of the rule based on the insured's conduct. The appellate court declined to apply an equitable exception to the unavailability of insurance rule in this particular case based on the specific factual situation surrounding the sale of industrial talc by the R.T. Vanderbilt company post-1986. However, it is important to note that the court's reasoning does not preclude such an application in other situations.

The Occupational Disease Exclusion

While these precedent setting elements of the overall decision are extremely important and will no doubt engender much analysis in their own right, this article focuses on another aspect of the *Vanderbilt* ruling – the application of the occupational disease exclusion ("ODE" for short.) As noted by the appellate court, this part of the decision surprisingly was never addressed before, being a matter of first impression not only in Connecticut, but nationally as well. The fact that no appellate court has ever had cause to address the ODE is doubly surprising, given that it is an "old" exclusion, being found in policies for at least 30-years, and given the multiple thousands of cases filed nationally alleging asbestos and other occupational exposures.

The ODE, as specifically found in the 1985-86 National Casualty Company ("NCC") and Pacific Employers Insurance Company ("PEIC") policies addressed in the case on appeal, is alluringly simple and unambiguous in its use of 13 easy-to-understand words. In its entirety, the exclusion states:

This policy does not apply to any liability arising out of occupational disease.

For a surprisingly simple provision, interpreting what it actually meant turned out to be a rather complex exploration through the Connecticut court system.

The Trial Court's Decision

In initially addressing this issue, the trial court held that the ODE bars coverage only for occupational disease claims brought by Vanderbilt's own employees, and not to claimants who develop occupational disease while using the insured's products in the course of their own employment elsewhere. In reaching this decision, the trial court looked to the provisions of the Connecticut Workers' Compensation Act ("Act"), § 31-275, *et seq*, for a definition of the phrase "occupational disease," as this phrase is not defined in the policies at issue. While it might have been necessary to look outside the policy for a definition of "occupational disease," the principal error the trial court made, according to the appellate court, was continuing to be governed by the provisions of the Act, while ignoring defined terms in the policies and drawing distinctions between "occupational disease" and "personal injury" that the clear provisions of the policies do not support.

The Appellate Court Ruling

Specifically, the appellate court observed that the plain language of the ODE is stated in broad, general terms, and nowhere indicates that coverage is barred only for claims brought by a policyholder's own employees. In this context, the court noted that there was no reason to conclude that the parties intended that policy terms would be construed according to workers' compensation law, rather than according to ordinary usage, pointing out that at the time the policies were written, the term "occupational disease" had a common meaning within insurance and tort law and was not only confined to usage in regards to workers' compensation issues. Continuing, the appellate court stated that in the context of the Act, the trial court's reasoning that the "Employers Liability" clauses in the NCC and PEIC policies barred employee bodily injury claims while the ODE barred claims of employee diseases was incorrect, as neither the Act nor the Employers Liability clauses draw such a distinction. The "Employer Liability" clause in the NCC policy in particular references both "bodily injury" and "disease," which precludes the possibility that the drafters of the ODE intended to distinguish between employee accidental injury and disease.

Finally, the court declared that nothing indicates that either the insurers or Vanderbilt intended to incorporate the Act's definition of "personal injury" into the policies, given that "personal injury" specifically is defined in the policies. While not noted by the appellate court, another reason arguing in favor of the broad application of the ODE is that the underlying workplace exposure claims are the type of claims that could have been brought as workers' compensation claims. High level excess policies, such as the National Casualty Company policy at issue, are not workers' compensation policies, which the trial court's decision would have turned them into.

The Practical Impact of the Decision

What is the practical impact of this decision? Clearly, in the hierarchy of the issues decided by the Connecticut Appellate Court, the ODE is not the top one, taking a backseat to the allocation rulings. However, despite a wide variety of companies being sued in asbestos cases since at least the 1970s, thousands of new cases continue to be filed every year. Of these cases, many still assert a date of first exposure well within the domain of occurrence policies issued before asbestos exclusions were universally incorporated into policies in or about 1986.

Practically, once the insured's own employees are excluded, there are three types of potential exposure pathways in these underlying cases: (i) alleged exposure is claimed solely through workplace exposure; (ii) alleged exposure is claimed through a combination of workplace exposure and exposure outside of the workplace; and (iii) alleged exposure is claimed solely through exposure outside of the workplace. Those cases in which exposure occurred solely through exposure outside of the workplace clearly are not contemplated by the ODE language. Although this is a question of fact, those cases in which mixed exposure is pled, with the alleged exposure overwhelmingly pointing toward workplace exposure and not "weekend warrior" activities, arguably should be considered subject to the ODE.

Consequently, an insurer faced with a claim of occupational exposure, and not just in asbestos cases, if not willing to deny such a claim outright, based on the plain language of the policy and the agreement entered into by the parties to the insurance contract, at least can utilize this tool in a subsequent declaratory judgment action. It should be noted that the Connecticut Appellate Court's ODE decision does not limit its application solely to asbestos-related claims.

It will be interesting to see how the appellate court's decision on the application of the ODE is applied going forward nationwide. Of course, there is the possibility that despite the emphatic reasoning of the appellate court, this decision could be overturned on appeal by the Connecticut Supreme Court. Assuming the ruling survives any impending appeal, a practical limitation on the potential application of the ODE decision, of course, is in how the underlying complaints are pled. This is in the hands of the plaintiff attorney firms, which could complicate a simple application of the ODE by pleading a mixed exposure. While this is possible in the asbestos exposure context, it might not be as simple in other occupational exposure situations. For example, the application of the ODE may be different if the claimed disease was allegedly caused by an electrician's 30-year workplace exposure versus a weekend hobbyist who performed car brake repairs.

Conclusion

The Connecticut Appellate Court's decision brings potential new life to a clearly underused policy provision that should have application not only to asbestos workplace exposure situations, but also to other workplace exposure claim scenarios. The language of the ODE is clear and unambiguous in limiting claims by non-policyholder employees that allege solely occupational disease and insurers in such matters should take a new look at this "old" provision.

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