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THE CONNECTICUT SUPREME COURT'S OCCUPATIONAL DISEASE EXCLUSION DECISION: LIBERATING "OCCUPATIONAL DISEASE" FROM WORKERS' COMPENSATION TO GIVE NEW LIFE TO AN UNDERAPPRECIATED POLICY PROVISION

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The Connecticut Supreme Court's Vanderbilt decision on the meaning of the phrase "occupational disease," and the concomitant application of the Occupational Disease Exclusion, makes it clear that the phrase "occupational disease" has a specific meaning that is independent of any attempt to confine it exclusively to a statutory workers' compensation context. The authors of this article discuss the ruling, and advise insurers to take a fresh look at the potential applications of this "old" and previously underappreciated policy provision.

Recently, the Connecticut Supreme Court ("Supreme Court") officially released its highly anticipated decision in the *R. T. Vanderbilt Company, Inc. v. Hartford Accident & Indemnity Co., et al.*, insurance declaratory judgment action.[1] In this important case, the court put its imprimatur on several precedent-setting rulings by the Connecticut Appellate Court ("Appellate Court") addressing trigger, allocation, and the application of the pollution exclusion. Specifically, the Supreme Court affirmed without comment the Appellate Court's ruling that a continuous trigger applied to asbestos-related claims, denying the insurers' bid to present expert testimony regarding current medical science on the actual timing of bodily injury from asbestos-related diseases. The Supreme Court also summarily affirmed that *pro rata* allocation applied to Vanderbilt's claims and that Connecticut would use an "unavailability of insurance" exception to *pro rata* allocation, such that liability would not be allocated to Vanderbilt in years where no insurance was available. The Supreme Court further affirmed the Appellate Court's holding that pollution exclusion clauses are only applicable to "traditional environmental pollution," and not claims related to asbestos exposure in an indoor working environment.[2] The Supreme Court found the Appellate Court's judgment in these matters so "thorough and well reasoned," that it adopted in whole the Appellate Court's Opinion without further elaboration.CCPA compliance may be especially problematic for those insurance companies looking to take advantage of the efficiencies that Big Data and new technology have to offer, as they may collect information that is not covered by other privacy laws. This distinction is important because information collected pursuant to laws that have traditionally applied to insurance companies, such as the Gramm-Leach-Bliley Act ("GLBA"), the California Financial Information Privacy Act ("CFIPA"), the Health Insurance Portability and Accountability Act ("HIPAA"), and the Fair Credit Reporting Act ("FCRA"), is exempt from the CCPA. The CCPA does not, however, provide insurance companies with an industry-wide exemption or provide financial institutions subject to the GLBA with an entity-wide exemption,[1] which means that insurance companies that meet certain threshold requirements and collect personal information from California residents in certain situations will have to comply with the law in some form or fashion. Understanding the scope of the applicable exemptions will be critical for insurance companies to recognize their compliance responsibilities under the CCPA.

The Definition of "Occupational Disease"

In addition to affirming the Appellate Court's holding on the above three matters, the Supreme Court also affirmed the Appellate Court's ruling in a matter of first impression nationally – the application of the occupational disease exclusion ("ODE"), an exclusion found in certain primary and higher level policies and, surprisingly, never subject to judicial interpretation prior to the *Vanderbilt* action. Interestingly, instead of just affirming and adopting the Appellate Court's analysis, as it did with the issues noted above, the Supreme Court expounded upon the Appellate Court's reasoning, and concluded that the Appellate Court properly interpreted the occupational disease exclusions at issue to, "unambiguously bar coverage for occupational disease claims brought not only by employees of [the insured], but also by individuals who contracted an occupational disease in the course of their work for other employers."[3] With its decision, the Supreme Court made it clear that the phrase "occupational disease," has a specific meaning that is independent of any attempt to chain it exclusively to a workers' compensation context.

There were two occupational disease exclusions at issue before the Supreme Court, each with slightly different wording. The first ODE, included in a Pacific Employers Insurance Company ("PEIC") umbrella policy, effective 1985-86, and incorporated

into a National Casualty Company ("NCC") high-level excess policy, states in its entirety:

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

The other ODE at issue was contained in a policy subscribed to by Certain London Market Insurance Companies, effective 1977-79, and incorporated into other higher-level policies during this period, stating in its entirety:

> *Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that this Policy shall not apply to Personal Injury (fatal or non-fatal) by Occupational Disease.*

Vanderbilt, the insured under these policies, asserted that these exclusions only apply to claims brought against Vanderbilt by its own employees, arguing that, "the term occupational disease is so interwoven with the concept of workers' compensation and other claims by an employee against his employer as to be meaningless outside of that particular context."[4]

By claiming the phrase "occupational disease" is a "term of art" without meaning outside of a workers' compensation context,[5] Vanderbilt tried to narrow the phrase's definition and strip away most of its natural meaning. In contrast, NCC and the other joining insurers argued, and the Supreme Court agreed, that in accordance with basic principles of contract interpretation, "occupational disease" should be given its plain, unambiguous meaning; an "occupational disease" is a disease in which there is a "direct causal connection between the duties of the employment and the disease contracted."[6] In other words, "if an employee develops a condition arising out of his or her employment, that employee has an 'occupational disease,' *no matter where that employee works*."[7]

That the Supreme Court's acceptance of the more expansive and natural meaning of "occupational disease" is correct can be shown in two ways. First, the phrase "occupational disease" plays a crucial role in a multitude of case law decisions, is similarly defined in multiple dictionaries, and is the subject of numerous state statutes. It is applied in the context of workers' compensation, product liability, independent contractor, and wrongful death matters.[8] Second, while today statutory workers' compensation schemes are the principal remedy through which an employer's own employees are compensated for an occupational disease, workers suffered from "occupational disease" before there was a workers' compensation system in-place to address such matters. In other words, a miner who was afflicted with black lung disease in the eighteenth century suffered from the same "occupational disease" that a worker afflicted with black lung suffers today. By arguing that the phrase "occupational disease" has no meaning outside of a workers' compensation context, what Vanderbilt actually argued is that the phrase "occupational disease" cannot be *applied* outside of a strict workers' compensation context, conflating the *meaning* of the phrase with the *remedy* to the condition.

Potential Impact of the Decision

Given the Supreme Court's liberation of the phrase "occupational disease," the obvious question is what impact will flow from the decision. There are several considerations. First, ODEs are "old" exclusions, being found in policies before the advent of, for example, the asbestos exclusion.[9] As a result, it is difficult to gain a general sense of how often an occupational disease exclusion was included in a primary or umbrella or excess policy. Given the large-scale nature of the manufacturing industries in which such an exclusion might be relevant to coverage obtained, however, individual companies likely purchased multiple policies extending over many years and including multiple excess layers. As a result, an ODE contained in a lower coverage layer would extend its impact by working its way up the coverage tower, being incorporated by other higher-level, follow-form policies.

Second, while the *Vanderbilt* case involved underlying asbestos-related claims, nothing in the Supreme Court's decision, or in the inherent definition, limits "occupational disease" solely to asbestos exposure. Other "toxic" exposures, for example, also can cause "occupational disease." Third, contrary to concerns raised by Vanderbilt and Amicus filings, the Supreme Court's decision does not render coverage by policies that contain an ODE illusory[10] as, by definition, non-employment-related disease through exposure is not "occupational disease," and still covered by these policies. Finally, while insurers might want to reexamine their old policies to see if they contain a newly reanimated ODE, given the proliferation of new chemical exposure suits, such as those involving glyphosate and PFAS, insurers also might want to consider including ODEs in future policies, given the potential broad nature of the exclusion and the ongoing legal debate over whether workplace chemical exposures are excluded through the pollution exclusion.[11]

Conclusion

The Supreme Court's *Vanderbilt* Decision on the meaning of the phrase "occupational disease," and the concomitant application of the Occupational Disease Exclusion, makes it clear that the phrase "occupational disease" has a specific meaning that is independent of any attempt to confine it exclusively to a statutory workers' compensation context. As a

result, insurers should take a fresh look at the potential applications of this "old" and previously underappreciated policy provision.

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Notes

[1]. 333 Conn. 343 (2019).

[2]. *Id.* at 357; *see generally, R. T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 171 Conn. App. 61 (2017).

[3]. 333 Conn. 361; 171 Conn. App. 269-70.

[4]. 333 Conn. 362; 171 Conn. App. 262-63.

[5]. 333 Conn. 362.

[6]. *Ricigliano v. Ideal Forging Corp.*, 280 Conn. 723, 731 (Conn. 2006).

[7]. 333 Conn. 363.

[8]. *See generally, Brief of Defendants-Appellees, National Casualty Co., et al.*, SC 20003.

[9]. An "asbestos exclusion" was included in most CGL policies by 1986.

[10]. 333 Conn. 363, 373.

[11]. The Supreme Court, for example, in the *Vanderbilt* Decision at issue, upheld the Appellate Court's holding that workplace asbestos exposure was not covered under the pollution exclusions at issue, not being "traditional environmental pollution." 333 Conn. 357.