HUNTON& WILLIAMS

INSURANCE LITIGATION ALERT

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Connecticut Supreme Court Reverses Summary Judgment On "Common Cause" Provision In Reinsurance Treaties

In a dispute between a cedent and its reinsurers, the Connecticut Supreme Court has reversed summary judgment in favor of the reinsurers, holding that fact issues exist as to whether a "common cause" provision in excess of loss treaties permit aggregation of asbestos-related losses for the purpose of reinsurance payment. *See Hartford Accident & Indemnity Co. v. ACE American Reinsurance Co*, 2007 Conn. LEXIS 511 (Dec. 25, 2007). The court remanded the matter to the trial court for consideration of extrinsic evidence to determine the parties' intent.

Background

Hartford issued general liability policies to Western MacArthur Co. ("MacArthur"), a manufacturer, distributor and installer of asbestos-containing products, for the period 1967 through 1975. Beginning in the 1970s, MacArthur became the target of asbestos bodily injury claims, many of which Hartford defended and paid until the early 1990s, when it determined that coverage had been exhausted. MacArthur then sued Hartford in California, seeking coverage for thousands of additional claims.

Central to the coverage action was whether the claims against MacArthur were subject to the policies' $500,000 annual aggregate limit for claims coming within the "products hazard," which defined coverage to include "bodily injury and property damage arising out of the named insured's products…but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others." Hartford contended that many of the claims involved injuries caused by MacArthur's products after MacArthur had relinquished possession of the products and, therefore, fell within the now-exhausted aggregate limit for "products hazard" coverage. MacArthur contended, on the other hand, that most of the claims failed to meet the "products hazard" definition. In December 2003, Hartford settled the coverage action with MacArthur and agreed to pay approximately $1.15 billion into a trust established to compensate asbestos claimants. The settlement agreement did not address, however, which coverage section of the Hartford policies would respond to the claims.

Following the settlement, Hartford presented claims to its reinsurers under excess of loss reinsurance treaties, each containing an identical "common cause" provision as part of the definition of "any one accident." Those contracts provided:

> Any one, or more than one, accident, happening or occurrence arising or resulting from one event, casualty or catastrophe upon which liability is predicated, under any one, or more than one, of the policies covered by this Agreement, and, *as respects liability arising out of the product manufactured, made, handled, distributed or sold by an assured, liability arising out of property damage or out of malpractice, said term shall also be deemed and construed to mean any one, or more than one, accident, happening or occurrence*

which the available evidence shows to be the probable common cause or causes of more than one claim under a policy, or policies, or renewals thereof, irrespective of the time of the presentation of such claims to the assured or the Hartford.

The reinsurers rejected the cessions on the grounds that Hartford improperly aggregated claims to meet the threshold for reimbursement. The reinsurers contended that: (1) the "common cause" provision did not apply because the MacArthur settlement was not paid under the "products hazard" coverage part, and (2) even if the claims did arise out of the "products hazard," the MacArthur losses could not be aggregated as "any one accident" because they did not have a "common cause or causes."

In response, Hartford filed a declaratory judgment action, seeking a declaration that it was entitled to recover under the treaties for its losses in the MacArthur settlement. The trial court awarded summary judgment to the reinsurers, concluding that, under *Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, 765 A.2d 891 (Conn. 2001), losses could only be aggregated if they occurred in the same time and place, not where they possessed merely "sufficient commonality," as Hartford argued.

The trial court also held, in the alternative, that because Hartford could not prove that it paid the MacArthur settlement under the "products hazard," the losses could not be aggregated. The "products hazard" clause in the Hartford policies provided coverage for "bodily injury and property damage arising out of the named insured's products…but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others." The trial court agreed with the reinsurers that the similarity of the language in the "common cause" provision in the reinsurance treaties and the "products hazard" language in the Hartford policies meant that only those losses that were paid under the "products hazard" coverage part could be aggregated. Hartford appealed the adverse rulings to the Connecticut Supreme Court.

The Connecticut Supreme Court's Opinion

The Connecticut Supreme Court reversed both summary judgment rulings. First, the court distinguished its holding in *Metropolitan Life*, observing that the "any one accident" definition was unique to these treaties and had never been construed by a court. *Id.* at *18. Given the lack of guidance, the court examined the extrinsic evidence offered by Hartford, including correspondence with its brokers and internal memoranda, and concluded that a remand to the trial court was necessary. The court found persuasive documents that evidenced Hartford's reluctance to include an "aggregate extension clause" that would have permitted all losses — even if entirely unrelated — to be aggregated for reinsurance purposes. Hartford apparently believed, at the time it prepared the treaties, that the unique language of the "common cause" provision was preferable because, unlike an aggregate extension clause, it would allow aggregation of losses arising from multiple policies spanning two or more policy years. Indeed, in one memorandum, a Hartford employee stated that "[t]he 'common cause' wording is so broad as to suggest that nothing should be introduced into the [t]reaty which might lessen its impact." Thus, the court concluded that there was factual dispute as to the parties' intent regarding the "common cause" provision.

Next, the court analyzed the trial court's conclusion that the "products hazard" provision effected a limitation on the treaties, such that only claims arising "after physical possession of such products has been relinquished to others" could be aggregated. Although the court "acknowledge[d] the close linguistic similarity between the language of the treaty's common cause provision and the products hazard provision of the underlying policies," it observed that the "physical possession" requirement was absent from the "common cause" provision. Accordingly, the court remanded this issue as well to the trial court for a determination of the parties' intent.

Implications

The decision in *Hartford Accident & Indemnity Co*. illustrates the ongoing dispute between cedents and reinsurers regarding whether long-tail claims, such as pollution and asbestos claims, can be aggregated for reinsurance purposes. The Connecticut Supreme Court determined that further factual evidence of the parties' contractual intent was needed in this case. The Connecticut Supreme Court did not address, however, whether it was realistic to obtain complete and accurate evidence of the parties' contractual intent for reinsurance treaties written from 1967 through 1975.