

Article / March 2008

Connecticut Supreme Court rules that common cause provision of reinsurance treaty is ambiguous with respect to the aggregation of claims

In a recent decision, *Hartford Accident and Indemnity Co. v Ace American Reinsurance Co.*, 266 Conn. 744, 934 A.2d 224 (Conn. 2007), the Connecticut Supreme Court considered the proper construction of the phrase “*any one accident*” as used in reinsurance contracts between the plaintiffs, Hartford Accident and Indemnity Company and several of its affiliates (the Hartford), and the defendants, various reinsurers (the Reinsurers). The Supreme Court found a common cause provision in the contracts to be ambiguous for purposes of whether multiple asbestos claims could be aggregated as a single occurrence, and reversed the lower court’s decision granting summary judgment to Reinsurers

In the underlying case, *Hartford Accident and Indemnity Co. v Ace American Reinsurance Co.*, 2005 Conn. Super LEXIS 2576 (Conn. Super Ct. Dec. 14, 2005), the Hartford brought a declaratory judgment action seeking coverage under a series of multilayered excess of loss reinsurance treaties, referred to collectively as the blanket casualty treaty (the Treaty), covering losses arising under general liability policies issued by the Hartford to the MacArthur Company (MacArthur). MacArthur was a manufacturer, distributor and installer of asbestos-containing products, including insulation, in northern California and the Midwest. MacArthur had been engaged in that business since the 1930s, and the Hartford insured MacArthur for the years 1967-1975. People who claimed to have developed debilitating illnesses after alleged exposure to asbestos dust released into the air during the transportation and installation of MacArthur’s products began suing MacArthur in the late 1970s. The Hartford had paid and defended many claims until it determined that MacArthur’s coverage was exhausted. A coverage action then ensued between the Hartford and MacArthur, which was ultimately settled by the Hartford agreeing to pay a sum to a trust responsible for paying the asbestos claimants.

The Treaty provided that the Reinsurers would be liable for losses, above a particular threshold and below a specified limit, incurred by Hartford under its policies “*by reason of any one accident.*” The Treaty defined “*any one accident*” as:

“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 the Agreement and, as respects liability arising out of products manufactured, handled, distributed or sold by an assured... 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.”

In billing the Reinsurers for a portion of the settlement with MacArthur, Hartford presented the claim as arising “*from the insured’s alleged handling, distribution and/or sale of asbestos containing products*” and therefore falling within the ambit of the common cause provision cited above. The Reinsurers, however, refused to reimburse the Hartford on the grounds that the losses under the settlement could not be aggregated under the common cause language. Subsequently, the Hartford brought an action for declaratory judgment, and the Reinsurers filed a counterclaim for declaratory judgment. The Reinsurers also filed a motion for summary judgment, in which the central issue was the proper legal interpretation of the Treaty as applied to the facts of the Hartford’s reinsurance claim.

The Hartford contended that a material issue of fact existed as to whether or not the common cause provision applied, ie whether the claims were paid for liability arising out of products manufactured, made, handled, distributed or sold by MacArthur. The Reinsurers argued that the clause did not apply because the liabilities were incurred in the operations part of the business. The trial court found that there could be an issue of fact on the question of whether or not the Hartford paid the claims as part of the definition relating to liability resulting from products manufactured, made, handled, distributed or sold by the assured. The court then considered the phrase “*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”, since that phrase is activated when there was a finding that liability arose out of products manufactured.

The Reinsurers contended that both New York and Connecticut law held that the unambiguous meaning of “occurrence” in the asbestos bodily injury context was each claimant’s initial exposure to asbestos, and that multiple asbestos claims cannot be aggregated to reach the retention level of an excess policy. The Hartford contended that, even if the 17,000 MacArthur claims were indisputably caused by separate occurrences (the separate inhalation of asbestos by each worker), there was sufficient commonality between the occurrences to support the aggregation of the claims.

The trial court found there was no genuine issue of material fact on whether the individual exposures were a “common cause” or causes of the other claims finding there was no such common cause. The court also found that the terms of the Treaty were unambiguous and, therefore, that there was no need to resort to extrinsic evidence to support a particular interpretation. Consequently, the court held that the plain language of the Treaty barred the Hartford’s claim, and the Reinsurers’ motion for summary judgment was granted.

On appeal, the Hartford argued that the language of the common cause provision was unique to the Treaty and had never been construed by any court. It further contended that, under the provision, the MacArthur claims constituted one occurrence because each MacArthur claimant alleged injury from inhaling asbestos dust generated by the same company in the same manner, using the same products and practices at each of its job sites. Therefore, the same causes were common to each of the thousands of claims. Further, the provision’s use of the phrases “any one or more than one, accident, happening or occurrence” supported the interpretation that the provision permitted the aggregation of multiple causes that were the same in kind. The Hartford used memoranda and correspondence from the 1960s and 1970s relating to the common cause provision to show that it had specifically rejected standard aggregation provisions contained in most reinsurance agreements in favor of the much broader common cause provision because it would allow aggregation of losses arising from multiple policies spanning two or more policy years.

The Connecticut Supreme Court was persuaded that the

language of the common cause provision was ambiguous as to whether it allowed aggregation of losses that arose out of the same pattern of events or contained spatial and temporal limitations that precluded the aggregation of claims incurred at hundreds of different locations over decades. Therefore, the Supreme Court held that the trial court had improperly granted summary judgment in favor of the Reinsurers, and that the Hartford was entitled to present documentary evidence in support of its interpretation to a fact finder.

The Supreme Court also held that the “arising out of products” portion of the common cause provision was ambiguous as to whether it referred to liability arising out of the products hazard provision of the underlying MacArthur policies or, instead, referred to claims arising from a product, regardless whether MacArthur had relinquished physical possession of the product at the time liability was incurred. The Supreme Court ruled that the meaning of this provision must also be determined on remand by the fact finder. The Supreme Court declined to hear the Reinsurers’ contention that, even if the common cause provision applied to the MacArthur claims, the claims would have to be aggregated in one treaty year and subject to one retention by the Hartford and one reinsurance limit.

As evidenced by the filing of an amicus curiae brief by the Reinsurance Association of America, this was a widely discussed and avidly awaited decision in the reinsurance community. The RAA’s brief contended, in support of the Reinsurers’ position, that the trial court properly determined that the follow the fortunes doctrine did not require a reinsurer to indemnify a reinsured whenever it has paid a claim. However, because resolution of the appeal was not predicated on the follow the fortunes doctrine, the Supreme Court declined to address that claim.

This article first appeared in *The In-Insurance and Reinsurance Review* (March 2008). It is for guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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