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New York's High Court Supports Policyholders on Key Allocation Issues for Long-Tail Claims

By Robert M. Horkovich and Edward J. Stein

New York's highest court recently rewarded policyholders' persistent pressure for coverage of "all sums" that their liability insurance companies promised to pay for long-tail environmental and asbestos claims. *In the Matter of Viking Pump, Inc.*, 2016 N.Y. LEXIS 1018, 2016 NY Slip Op 03413 (May 3, 2016), the New York Court of Appeals acknowledged that its prior pro rata ruling in *Consolidated Edison Co. of N.Y. v. Allstate Insurance Co.*, 98 N.Y.2d 208 (2002) was premised on a "legal fiction." The court had stated in Con Ed that the 2002 decision "[c]learly . . . is not the last word," yet since then, insurance companies sought unconditional surrender in long-tail coverage cases under New York law. In many instances, insurance companies affirmatively sued policyholders in New York, seeking to slice and dice liability into small annual amounts over the duration of a loss that would never reach excess layers, and claiming that the policyholder had to exhaust decades of primary coverage before collecting excess insurance in any year.

Viking Pump put an end to that shell game, as requested by the policyholders in that action and by a brief that the court accepted from Anderson Kill on behalf of a group of *amici curiae*, including non-profit United Policyholders and five policyholders with an interest in New York allocation law. As *Viking Pump* explained, "[c]ourts across the country have grappled with so-called 'long-tail' claims — such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations — in the insurance context." Such claims "often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage."

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"All Sums" in Response to Anti-Stacking Provisions

Viking Pump clarified New York law on two of these three issues, allocation among triggered policies and the availability of excess insurance upon exhaustion of underlying policies. The New York high court addressed these issues on certified questions from the Delaware Supreme Court, in litigation brought by policyholders facing multi-year asbestos exposure claims. Their excess policies included standard general liability insurance provisions promising to pay "all sums" in excess of underlying insurance that they became liable to pay because of personal injuries caused by an "occurrence." The leading example of "all sums" allocation cited by the *Viking Pump* court was *State of California v. Continental Ins. Co.*, 55 Cal.4th 186 (2012), in which Anderson Kill represented the prevailing policyholder. The *Viking Pump* policies also included "non-cumulation" or "prior insurance" clauses that restrict coverage to the limits of a single period when injury or damage occurs over multiple insurance periods.

Such "anti-stacking" provisions led the court in *Viking Pump* to apply all sums allocation. Since the 2002 *Con Ed* decision, insurance companies had argued for the pro rata rule to minimize their payout on long-tail claims under New York law regardless of policy language, even though *Con Ed* expressly acknowledged that "different policy language" might compel a different result and recognized that pro rata allocation was "not explicitly mandated by the policies." The New York high court found the anti-stacking clauses in *Viking Pump* substantively distinguishable from *Con Ed*, noting it had "never addressed the interplay between non-cumulation/prior insurance provisions and allocation."

In policies containing such anti-stacking provisions, the court found that "all sums is the appropriate allocation method," agreeing that "it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation." The court reasoned that "[s]uch policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may 'also [be] covered in whole or in part'" under prior policies. In contrast, "the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period — meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence." Given these considerations the court observed that "[p]ro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the 'during the policy period' limitation, despite the fact that the injuries may not actually be capable of being confined to specific time periods." Accordingly, the *Viking Pump* court found that its prior *Con Ed* decision "does not require pro rata allocation in the face of policy language undermining the very premise upon which the imposition of pro rata allocation rests."

Vertical Exhaustion

As to the exhaustion issue, the *Viking Pump* court adopted a "vertical exhaustion" rule, allowing policyholders to access each excess policy when the limits of immediately underlying primary and umbrella policies in the same period are depleted, even if other lower-level policies during different policy periods remain unexhausted. The court gave short shrift to the insurance companies' argument for "horizontal" exhaustion, under which an excess insurance policy would pay only after exhaustion of all the underlying primary and umbrella insurance policies in every period of a continuing loss, noting that such policies before or after the excess policies were not in the excess policies' schedules of underlying insurance. The court also noted that its prior *Con Ed* decision had concluded that "other insurance" clauses applied only to concurrent coverage and were not implicated in situations involving successive insurance policies. Unlike the all sums allocation ruling, the vertical exhaustion ruling in *Viking Pump* was not limited to policies with anti-stacking provisions (e.g., non-cumulation or prior insurance clauses), but rather should apply to a broad range of excess liability insurance policies.

Policyholders nationwide as well as in New York should consider the broad implications of *Viking Pump*. Obviously, it directly benefits policyholders with long-tail claims subject to New

York law whose policies include anti-stacking language, and any New York policyholders whose claims are not finally resolved should double-check their policies for such language. But *Viking Pump* also should encourage policyholders in states with unsettled allocation law, or states with pro rata rulings that failed to consider anti-stacking arguments, to continue fighting for their insurers to pay all sums of their liability, as promised. *Viking Pump* also is persuasive authority for rejecting unfavorable horizontal exhaustion arguments whenever an excess insurance policy's schedule of underlying insurance refers only to insurance in the particular policy period, which seems the universal custom and practice.

More broadly, *Viking Pump* reaffirms that "settled law" on coverage issues is settled only on the particular language in the policies on which it was decided. In subsequent cases, the contract language of the applicable insurance policies controls, and policyholders should continue to demand and to litigate as needed to get the coverage they reasonably expect, consistent with their own policy language and the facts of their claim.