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New York Court of Appeals Holds that "All Sums" Method Applies to Allocation of Loss Over Multiple Policy Years

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Recently, the New York Court of Appeals in Matter of Viking Pump, Inc., __ NY3d __ 2016 NY Slip Op 03413 (2016), addressed the law on insurance coverage for multi-year claims, ruling that each insurer that issued a policy to the insureds, Viking Pump and Warren Pumps (the "Insureds"), during the impacted period, can be held liable for the entire continuing loss resulting from asbestos claims, subject to their respective policy limits. In other words, based on the language of the polices at issue, the Court applied an "all sums" allocation of indemnity among successive policy years. Importantly, the Court also rejected the insurers' argument that all of the available primary and umbrella policies over multiple years must be exhausted before higher-level excess policies can be triggered.

In Matter of Viking Pump, the Insureds were exposed to significant potential liability from asbestos exposure claims. Liberty Mutual Insurance Company ("Liberty") issued primary insurance and umbrella excess coverage (the "Liberty Policies") to the Insureds through successive annual policies. The Insureds also obtained additional layers of excess insurance from multiple excess insurers (the "Excess Insurers"). As such, the Insureds were covered for the losses under multiple layers of excess insurance spanning thirteen (13) policy years.

As the Liberty Policies' limits were approaching exhaustion through payment of claims, litigation ensued in Delaware state court as to whether the Insureds were entitled to coverage under the policies issued by the Excess Insurers. Moreover, the litigation delved into the issue of allocation of insurance across the implicated policy periods. The Delaware Court, applying New York law, determined as a threshold matter that the Insureds were entitled to coverage under the excess policies. The Court then looked to the Liberty Policies to determine the issue of allocation. The policies issued by the Excess Insurers either incorporated the Liberty Policies' "all sums,"[1] "non-cumulation"[2] and anti-stacking provisions, or included substantially similar provisions.[3]

The dispute eventually reached the Delaware Supreme Court, which certified the following two questions to the New York Court of Appeals:

"1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions?

2. **Given the Court's answer to Question # 1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?"**

Considering the first question, the New York Court of Appeals determined that under the provisions of the Liberty Policies, an "all sums" allocation was appropriate. The Court explained that under the "all sums" method of allocation, an insured can collect the total amount of its liability (subject to the policy limits) under *any policy triggered by the loss, so long as the loss occurred during a covered policy period.*

In the prior decision of Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 98 N.Y.2d 208 (2002), the Court of Appeals applied the "pro rata" method to a claim involving environmental contamination which occurred over a number of policy periods. Under a "pro rata" method of allocation, indemnity would be allocated among multiple policy periods based on the amount of insurance and years on the risk for each insurer.

In the present case, the Court distinguished Consolidated Edison, stating that the "non-cumulation" clause in the controlling polices mandated a different result. Specifically, the Court noted that "the policy language at issue here, by inclusion of the non-cumulation clauses . . . is substantively distinguishable from the language that we interpreted in Consolidated Edison." Indeed, in the Consolidated Edison case, the Court of Appeals relied on the more general policy language, which provided that the insurers agreed to indemnify the insured for "all sums" for which the insured was liable and which occurred during the policy period, not outside that period.

Here, the Court of Appeals found that under the language of the Liberty Policies, an "all sums" allocation method was appropriate. To reach its "all sums" conclusion, the Court relied on the language of the controlling provision stating, "if the same occurrence gives rise to personal injury . . . which occurs partly before and partly within any annual period of this policy" then "multiple successive insurance policies can indemnify the insured for the same loss." Id. Therefore, the Court concluded that "non-cumulation" clauses "cannot logically be applied in a pro rata allocation." As the Court noted, insurance policies should be construed so as to avoid any provision of the policy becoming superfluous, or without force and effect. Accordingly, the Court held that an "all sums" method of allocation must apply in order to avoid having the "non-cumulation" clause rendered "surplusage."

Next, the Court turned to the question of whether horizontal or vertical exhaustion applied to trigger excess coverage. Under horizontal exhaustion, an insured must exhaust all triggered primary and lower-level excess layers of coverage for all applicable policy periods before being able to collect under higher-level excess insurance policies. By contrast, under a vertical exhaustion approach, an insured can recover under an excess policy once the immediately-underlying policies' limits are depleted, even if "other lower-level policies during different policy periods remain unexhausted." Id.

In the instant matter, the Court held that a vertical exhaustion approach should be utilized, reasoning that vertical exhaustion is consistent with the excess policies' specific references to underlying policies with the same policy period by name, policy number or policy limit. Moreover, the Court stated that vertical exhaustion is "conceptually consistent" with an "all sums" allocation, so that an insured can seek coverage from all layers for a particular policy period.

It is important to note that the Court of Appeals limited its holding to the language of the policies at issue. Notwithstanding, insurers need to be aware that New York has now recognized that the "all sums" approach to allocation may be appropriate depending on the specific policy language at issue. As a result of the foregoing, insurers should decide which method of allocation is preferable and adjust the language of their policies, using the more general Consolidated Edison language for "pro rata" allocation, and using the Viking Pump language, incorporating "non-cumulation" language, for "all sums," to reflect the method of allocation the insurer deems preferable. In addition, excess insurers must be aware that New York courts may force a triggered excess insurer to pay an insured prior to the exhaustion of all primary and lower-level excess insurance and thus consider how this impacts loss reserves and underwriting.

[1] In pertinent part, the Liberty umbrella policy contained the following provision: "[Liberty] will pay on behalf of the insured all sums in excess of the retained limit which the insured shall become legally obligated to pay . . . ." (emphasis in original). The Liberty Policies also stated that "all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence." Matter of Viking Pump, Inc., __ NY3d __, 2016 NY Slip Op 03413 (2016).

2 The provision in the Liberty umbrella policy provides that: "[i]f the same occurrence gives rise to personal injury . . . or damage which occurs partly before and partly within any annual period of this policy, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [Liberty Mutual] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof." (alterations in original). Matter of Viking Pump, Inc., __ NY3d __, 2016 NY Slip Op 03413 (2016).

3 One such provision stated that "if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the [Insured] prior to the inception date hereof[,] the limit of liability hereon . . . shall be reduced by any amounts due to the [Insured] on account of such loss under such prior insurance. Subject to the foregoing paragraph and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy the Company will continue to protect the [Insured] for liability in respect of such personal injury or property damage without payment of additional premium." (alterations in original). Matter of Viking Pump, Inc., __ NY3d __, 2016 NY Slip Op 03413 (2016).