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'Viking Pump': Allocation, Exhaustion, Policy Interpretation

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In a column written in this space almost three years ago (see Dachs, N. and Dachs, J., "The Importance of the Noncumulation Clause," NYLJ, July 9, 2013), we observed that "There have, in recent years, been several cases dealing with exposure to physical conditions, such as lead paint, asbestos or pollutants, over extended periods of time, and the issue of whether one, or more than one, coverage limit was or could be applicable under the particular circumstances." We further noted that "the results in these cases are highly dependent upon the specific language of the policies at issue" and made specific reference to the existence or non-existence of non-cumulation or anti-stacking clauses as a critical, often determinative, factor.

Indeed, after discussing a number of then-recent cases, including several that had been decided by the Court of Appeals,[1] we concluded that "This line of cases provides yet another fine example of the vital importance of carefully examining and reading the policy. As the court aptly put it in *Roman Catholic Diocese [of Brooklyn v. National Union,]* [note 1], '[i]n determining a dispute over insurance coverage, we first look to the language of the policy.' Whether a specific policy provision, such as a noncumulation clause, is in or out of a policy can make all the difference in the world."

Although we could not possibly have known it at the time, these words would prove to be prescient in the context of an important insurance law decision recently rendered by the Court of Appeals in *Viking Pump and Warren Pumps v. TIG Insurance Company.*[2]

Procedural History

The complex insurance dispute involved in *Viking Pump* arose from efforts by two pump manufacturers, Viking and Warren, to recover under insurance policies issued between 1972 and 1985 to Houdaille Industries, now defunct, which had previously owned both companies. As a result of acquisitions of pump manufacturing businesses from Houdaille, Viking and Warren faced tens of thousands of asbestos-related personal injury suits, most of which alleged exposures to asbestos and progressive injuries that occurred over a period of several years.

After the issue of their entitlement to coverage under primary and umbrella policies issued by

Liberty Mutual was resolved (via settlement) in a prior litigation, Viking and Warren brought actions in the Delaware Court of Chancery against more than 20 other insurers that had issued excess policies—a third layer of coverage totaling over $400 million—to Houdaille.

Motions Below

The parties cross-moved for summary judgment on how to allocate among the policies where the underlying asbestos injuries potentially triggered coverage across multiple policy periods. Viking and Warren argued that allocation should be made pursuant to an "all sums" or "joint and several" method, which would permit them to recover in full up to the policy limit under any single policy in effect and triggered, leaving that insurer to seek contribution from other insurers whose policies were also triggered by the asbestos claims. The excess insurers, on the other hand, argued that the losses should be allocated among all of the triggered policies on a pro rata basis, under which an insurer's liability is limited to sums incurred by the insured during the policy period, requiring each insurer to bear its proportionate share of the loss.

Lower Court Decisions

The Court of Chancery held that New York law applied to the dispute and ruled in favor of Viking and Warren, finding that by specific language in the policies, and, particularly, their "Non-Cumulation" and "Prior Insurance" provisions, the parties had agreed to "all sums" (joint and several) allocation.

The case was then transferred to the Delaware Superior Court to hear and determine several issues, one of which was whether the excess policies were subject to "vertical" or "horizontal" exhaustion. Viking and Warren argued for "vertical exhaustion," which permits an insured to obtain benefits under an excess policy once the primary and umbrella insurance for the same policy year are exhausted. The excess insurers, on the other hand, argued for "horizontal exhaustion," requiring an insured to exhaust all triggered primary and umbrella policies before obtaining any excess coverage.

The Superior Court ruled in favor of the insurers on this point, holding as a matter of New York law that Viking and Warren were required to horizontally exhaust all triggered "primary and umbrella insurance layers before tapping" any of Houdaille's excess coverage.[3] In a subsequent opinion, the Superior Court clarified that this "horizontal-exhaustion" requirement was limited to the primary and umbrella policies.[4]

Court of Appeals

Upon consolidated appeals of the Superior Court's order, the Supreme Court of Delaware concluded that "a resolution of this appeal depends on significant and unsettled questions of New York law that have not been answered, in the first instance, by the New York Court of Appeals." Accordingly, the court certified, and the Court of Appeals accepted, the following two questions for its determination:

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?[5]

The Allocation Issue

In analyzing the allocation issue, the Court of Appeals, in a 6-0 decision authored by Judge Leslie Stein, first recognized the "unique complications" involved with insurance issues pertaining to claims seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations. As the court noted, these types of claims "often involve exposure to an injury-inducing harm over the course of multiple policy periods, spanning 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."

After observing that state and federal courts throughout the country were divided on the issue of allocation in relation to such claims—some expressing a preference for the "all sums" method, based upon language in the policies obligating the insurers to pay "all sums" for which an insured becomes liable, and others utilizing the pro rata method, based upon language in the policies that could be interpreted as limiting the "all sums" owed to those resulting from an occurrence "during the policy period," or public policy reasons supporting pro rata allocation (or a combination of the two)—the court went on to note that it had in fact, confronted the "pro rata" v. "all sums" allocation issue in a case involving claims of environmental contamination over a number of years and insurance policy periods, 14 years earlier, in *Consolidated Edison v. Allstate*, 98 NY2d 208 (2002), and, indeed, decided to apply the pro rata method in that case.

However, the court was quick to note that "we did not reach our conclusion in *Consolidated Edison* by adopting a blanket rule, based on policy concerns, that pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies." Rather, the court noted that "the contract language controls the question of allocation," and relied, therefore, on "general principles of contract interpretation," such as: (1) the policy should be "enforced as written"; (2) the parties may contract as they wish; (3) the policy must be interpreted according to common speech, consistent with the reasonable understanding of the average insured, and in a way that affords a fair meaning to all of its language and leaves no provision without force and effect; and (4) that ambiguities are to be construed against the insurer.

Indeed, in *Consolidated Edison*, the court specifically stated that "different policy language" might compel a different result and might justify application of the "all sums" method. These words also proved prescient in connection with the Viking Pump case.

Based upon the foregoing, the court focused attention on the specific policy language involved in *Consolidated Edison* and *Viking Pump*. As indicated by the chart provided here, the basic policy coverage language in the two policies was in all significant respects similar—both containing references to "all sums" as well as to the duration of the "policy period."

However, what distinguished the Viking Pump policies from the Consolidated Edison policies was that the former contained additional provisions —"Non-Cumulation" and "Prior Insurance" provisions, which the Chancery Court below, as well as the New York Court of Appeals, viewed as inconsistent with a pro rata allocation.

Specifically, the umbrella policies all contained the following non-cumulation provisions:

> If the same occurrence gives rise to personal injury, property damage or advertising 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.

Twenty-eight of the excess policies followed form to this language.

Similarly, 17 of the excess policies, and all of the policies that did not incorporate the non-cumulation provisions, had substantively identical prior insurance provisions, which generally stated that:

> It is agreed 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.

The Language Construed in 'Consolidated Edison'

To indemnify the insured for *all sums* which the insured shall be obligated to pay by reason of the liability...for damages, direct or consequential, and expenses, all as more fully defined by the term ultimate net loss, on account of...property damage, caused by or arising out of each occurrence [with occurrence defined to mean 'an event, or continuous or repeated exposure to conditions, which causes injury, damage or destruction *during the policy period*'] [emphasis added].

The Language in 'Viking Pump'

The company will pay on behalf of the insured *all sums* in excess of the retained limit which the insured shall become legally obligated to pay...as damages, direct or consequential, because of...personal injury [with personal injury defined as 'personal or bodily injury which occurs *during the policy period* sustained by a natural person....']...with respect to which this policy applies and caused by an occurrence [emphasis added].

The Viking Pump court found that "The policy language at issue here, by inclusion of the non-cumulation clauses and the two-part non-cumulation and prior insurance provisions, is substantively distinguishable from the language that we interpreted in *Consolidated Edison*" and, indeed, that "the excess policies before us here present the very type of language that we signaled might compel all sums allocation in *Consolidated Edison*."

Faced squarely with the issue in this case, the court adopted the view of many other courts that non-cumulation clauses cannot be reconciled with pro rata allocation. Accordingly, the court held that "in policies containing non-cumulation clauses or non-cumulation and prior insurance

provisions, such as the excess policies before us, all sums is the appropriate allocation method."

The court went further to note that several of the excess policies at issue also contained "continuing coverage" clauses within their non-cumulation and prior insurance provisions, and that those clauses reinforced the conclusion that "all sums" and not "pro rata" allocation was intended in those policies. As explained by the court, "The continuing coverage clause expressly extends a policy's protections beyond the policy period for continuing injuries. Yet, under a pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period because that subsequent loss would be apportioned to the next policy period as its pro rata share. Using the pro rata allocation would, therefore, render the continuing coverage clause irrelevant. Thus, presence of that clause in the respective policies further compels an interpretation in favor of all sums allocation [citations omitted]."

Exhaustion

Having answered the first certified question in favor of coverage and "all sums" allocation, the court then turned to the second certified question—whether the insureds were required under the terms of the excess policies to "horizontally" exhaust all triggered primary and umbrella excess layers before accessing any of the additional excess insurance policies, or whether they needed only to "vertically" exhaust the primary and umbrella policies.

In concluding that "vertical exhaustion" applied, the court found it significant that all of the excess policies "primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit." The court further concluded that "vertical exhaustion is conceptually consistent with an all sums allocation, permitting the insured to seek coverage through the layers of insurance applicable for a specific year."

The court rejected the insurer's contention that the "other insurance" clauses contained in the Liberty Mutual umbrella policies and the subject excess policies included coverage provided by successive policies. Relying upon its prior decision in *Consolidated Edison*, supra, the court stated that these "other insurance" clauses were not implicated in situations involving successive, as opposed to concurrent, insurance policies. Since the insureds herein were not seeking multiple recoveries from different insurers under concurrent policies for the same loss, and the "other insurance" clauses do not apply to successive insurance policies, "in light of the language in the excess policies tying their attachment only to specific underlying policies in effect during the same policy period as the applicable excess policy, and the absence of any policy language suggesting a contrary intent," the court concluded that "the excess policies are triggered by vertical exhaustion of the underlying available coverage within the same policy period."

Conclusion

The Viking Pump decision is sure to have significant effects on insurers and insureds involved in asbestos and toxic exposure cases going forward. It also presents still another important example of the importance in insurance litigation of carefully examining and reading the actual policies, and of familiarity with the oft-cited general rules of contract policy interpretation, upon

which many insurance law decisions are founded.

Endnotes:

1. *Greenidge v. Allstate Ins. Co.*, 312 F.Supp.2d 430 (S.D.N.Y. 2004), affd. 446 F.3d 356 (2d Cir. 2006); *Hiraldo v. Allstate Ins. Co.*, 8 AD3d 230 (2d Dept. 2004), affd. 5 NY3d 508 (2005); *Ramirez v. Allstate Ins. Co.*, 26 AD3d 266 (1st Dept. 2006); *International Flavors and Fragrances v. Royal Ins. Co. of America*, 46 AD3d 224 (1st Dept. 2007); *Nesmith v. Allstate Ins. Co.*, 103 AD3d 190 (4th Dept. 2013), affd. 24 NY3d 520 (2014); and *Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co.*, 87 AD3d 1057 (2d Dept. 2011), affd. 21 NY3d 139 (2013).

2. *In the Matter of Viking Pump and Warren Pumps v. TIG Insurance Company*, NY3d, NYS3d, 2016 WL 1735790, 2016 N.Y. Slip Op. 03413 (May 3, 2016).

3. *Viking Pump, Inc. v. Century Indemn. Co.*, 2013 WL 7098824, at *21 (Del. Super. Ct., Oct. 31, 2013).

4. *Viking Pump, Inc. v. Century Indemn. Co.*, 2014 WL 1305003, at *11-12 (Del. Super. Ct., Feb. 28, 2014).

5. See *In re Viking Pump, Inc.*, ___ A.3d___, 2015 WL 3618924, at *2-3 (Del. Sup. Ct., June 10, 2015); Matter of Viking Pump, Inc., 25 NY3d 1188 (2015).

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