

[Insurance Law Daily Wrap Up, TOP STORY—Del. Super.: Horizontal exhaustion does not apply to excess policies in determining liability in asbestos litigation, \(Apr. 9, 2014\)](#)

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Two insureds, facing multiple bodily injury suits for asbestos liability, were entitled to trigger coverage from their excess insurers without exhausting other layers of excess coverage, after exhausting their primary and umbrella policy limits, a Delaware superior court ruled, applying New York law ([Viking Pump Inc. v. Century Indemnity Co.](#), filed February 28, 2014; released April 8, 2014; Silverman, F.).

Background. Houdaille Industries briefly owned Viking Pump Inc. and Warren Pumps (plaintiffs), two industrial pump manufacturers of asbestos-containing products. From 1972 through 1985, Houdaille bought commercial general liability insurance in a layered plan consisting of occurrence-based primary and umbrella insurance from Liberty Mutual Insurance Company, as well as layers of excess insurance above the Liberty policies. In total, Houdaille purchased thirty-five excess policies from twenty different insurers. Its fourteen-year insurance purchases provided \$17.5 million in primary coverage, \$42 million in umbrella coverage, and millions more in excess coverage.

In 1985, Houdaille sold its interests in Viking and Warren, both independent entities. In October 1987, Warren submitted its first asbestos claim to Liberty, and thereafter, multiple asbestos claims have been filed against Warren and Viking.

Fearing that Warren was draining its shared insurance, Viking filed suit against Liberty, seeking injunctive relief, and Warren intervened. Liberty, Warren, and Viking settled and Liberty was dismissed. At that point, following the settlement, the excess insurers joined the litigation.

In that proceeding, the court upheld the verdict for the plaintiffs as to the “injury-in-fact trigger”—injury that occurred through significant exposure to asbestos fibers even before manifesting itself as an illness. That court also clarified the verdict as to certain inadvertently omitted policies’ defense obligations. Importantly, the opinion also addressed the new legal issue of horizontal vs. vertical exhaustion, where the court found that horizontal exhaustion was New York’s law and must apply here.

The insurers sought a clarification of the order, arguing that when the court ruled horizontal exhaustion applied, it applied to every layer of insurance, not just the primary and umbrella layers. Thus, they reasoned, all first-layer excess policies must be exhausted before any second-layer excess policy was triggered; all second-layer policies must be exhausted before any third-layer policy was triggered, and so on. Warren and Viking argued, however, that none of the cases cited by the insurers held that horizontal exhaustion applied to excess layers in subsequent policy periods, and that horizontal exhaustion applied only to the primary and umbrella policies, and once those policies were exhausted, any excess policy could be triggered.

Decision. The court first explained that the horizontal exhaustion concept required that all triggered primary policies must be exhausted before any excess policy will be triggered. It next considered decisions from other jurisdictions on the question of whether excess policies are likewise to be horizontally exhausted because New York had not yet decided the question.

After a discussion of those decisions, the court noted that New York’s highest court would hold that horizontal exhaustion governed only the primary and umbrella policies at issue in this case, not the excess policies. Here, the court observed that New York emphasized the policies’ purposes as evidenced by their language and the amount of premium and had held that only policies insuring the same risk should respond simultaneously and that “other insurance” clauses in policies were not relevant in allocating damages to policies over different time periods.

Therefore, the court concluded that neither New York law nor the policy language required horizontal exhaustion of the excess policies. Accordingly, the court ruled that, following New York law, horizontal exhaustion of all

policies in each excess layer was not required before triggering the liability of the higher layer policies.

The case number is [10C-06-141 FSS CCLD](#).

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Companies: Viking Pump Inc.; Warren Pumps LLC; Century Indemnity Co.

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