Insurance Law Daily Wrap Up, TOP STORY—N.Y. Ct. App.: 'All sums' allocation method applied to asbestos liability under excess policies, (May 3, 2016)

By Susan Engstrom

Losses sustained by two pump manufacturers as a result of asbestos-exposure suits should be allocated pursuant to an "all sums" method under their excess insurance policies, New York's highest court ruled, finding that a "pro rata" approach would be inconsistent with the policies' "non-cumulation" clauses. In addition, the excess policies were triggered by vertical exhaustion of the underlying available coverage within the same policy period (*In re: Viking Pump, Inc. and Warren Pumps, LLC (Viking Pump, Inc. v. TIG Insurance Co.)*, May 3, 2016, Stein, L.).

Viking Pump, Inc., and Warren Pumps, LLC, acquired pump manufacturing businesses from Houdaille Industries in the late 1980s. Those acquisitions later subjected Viking and Warren to significant potential liability in connection with asbestos-exposure claims. Liberty Mutual Insurance Co. had provided Houdaille with primary and umbrella insurance coverage, and various other insurers had provided excess coverage.

The Delaware Court of Chancery determined that Viking and Warren were entitled to coverage under the Liberty Mutual policy. As that coverage neared exhaustion, however, litigation arose as to whether the manufacturers were entitled to coverage under the excess policies and, if so, how indemnity should be allocated across the triggered policy periods.

The insureds argued that the losses should be allocated via a "joint and several" or "all sums" method, which permits an insured to collect its total liability under any policy in effect during the periods that the damage occurred, up to the policy limits. The insurer then has the burden of seeking contribution from the insurers that had issued the other triggered policies.

The excess insurers, on the other hand, asserted that the "pro rata" allocation method applied, under which an insurer's liability is limited to sums incurred by the insured during the policy period. In other words, each policy is allocated a pro rata share of the total loss representing the portion of the loss that occurred during the policy period.

Policy provisions. Most of the excess policies at issue incorporated a "non-cumulation of liability" or "anti-stacking" provision in the Liberty Mutual policies, which provided that:

> 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.

The excess policies that did not incorporate this provision contained a similar clause called a "Prior Insurance and Non[-]Cumulation of Liability" provision.

Prior rulings. The Delaware Court of Chancery held that New York law applied to the dispute and that Viking and Warren were each entitled to coverage under the excess policies. The court also concluded that the proper method of allocation was the all sums approach.

The Delaware Superior Court rejected the insurers' renewed arguments that pro rata allocation applied and also determined that the insureds were obligated to horizontally exhaust (i.e., deplete) every triggered primary and umbrella layer of insurance before accessing the excess policies.

Certified questions. On appeal, the Delaware Supreme Court concluded that resolution of the allocation and exhaustion disputes depended on significant and unsettled questions of New York law. Thus, the court certified the following questions to New York's highest court:

> 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?
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> 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?

Allocation. Courts in other states that have addressed the allocation issue have concluded that non-cumulation clauses cannot be reconciled with pro rata allocation. New York's high court found this to be persuasive authority for the proposition that in policies containing non-cumulation clauses, such as the ones at issue here, "all sums" is the appropriate allocation method. The court agreed that it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation here. Such clauses 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 any other excess policy issued to the insured prior to the inception date of the instant policy.

In contrast, the essence of pro rata allocation is that the policy language limits indemnification to losses and occurrences during the policy period, meaning that no two policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. Pro rata allocation treats continuous and divisible injuries as distinct in each policy period despite the fact that the injuries may not actually be capable of being confined to specific time periods. According to the court, the non-cumulation clause negates this premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence.

Reinforcing the court's conclusion was the fact that several of the excess policies contained "continuing coverage" clauses within the non-cumulation provisions that expressly extended a policy's protections beyond the policy period for continuing injuries. Under pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period because the subsequent loss would be apportioned to the next policy period as its pro rata share. Thus, applying pro rata allocation would render the continuing coverage clause irrelevant.

Accordingly, based on the policy language and persuasive authority from other jurisdictions, the court held that all sums allocation was appropriate in policies containing non-cumulation provisions, such as the ones at issue in this case.

Exhaustion. The court also determined that the insureds need only "vertically" exhaust the primary and umbrella policies, meaning that they can access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted.

All of the excess policies at issue primarily hinged their attachment on the exhaustion of underlying policies that covered the same policy period as the overlying excess policy and that were specifically identified by name, policy number, or policy limit. In the court's view, vertical exhaustion was more consistent than horizontal exhaustion under this policy language. Moreover, vertical exhaustion is conceptually consistent with an all sums

allocation, permitting the insured to seek coverage through the layers of insurance available for a specific year.

Accordingly, the excess policies were triggered by vertical exhaustion of the underlying available coverage within the same policy period.

The case is No. 59.

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Companies: Viking Pump, Inc.; Warren Pumps, LLC; TIG Insurance Co.

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