



Insurance Coverage Alert

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PRO RATA REJECTED: NEW YORK HOLDS PRIOR INSURANCE AND NON-CUMULATION CLAUSES REQUIRE ALL SUMS ALLOCATION AND VERTICAL EXHAUSTION

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The New York Court of Appeals has now ruled that all sums allocation and vertical exhaustion apply to continuous loss where the implicated policies contain Prior Insurance and Non-Cumulation clauses. *In re Viking Pump, Inc. et al.*, 2016 N.Y. Slip. Op. 03413 (May 3, 2016).

The Court of Appeals previously held pro rata allocation applied and assigned loss equally over successive triggered policies and uninsured periods in *Consol. Edison Co. of NY, Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002). *Consol. Edison* held pro rata allocation was most consistent with the policies' insuring language covering occurrences happening "during the policy period." *Consol. Edison* expressly rejected an all sums allocation methodology, which initially allocates the entire loss to a single policy period with contribution rights amongst insurers, as "inconsistent with the unambiguous language" of the policies.

Viking Pump limits *Consol. Edison* as standing only for the proposition that the appropriate allocation method is that which is most consistent with the policy language, and that *Consol. Edison* did not otherwise express a preference for pro rata allocation. *Viking Pump* viewed other decisions voiding Prior Insurance and Non-Cumulation clauses in order to apply pro rata allocation as supporting its conclusion that the clauses cannot logically be reconciled with pro rata, and criticized the Second Circuit's decision in *Olin Corp. v. American Home Assur. Co.*, 704 F.3d 89 (2d Cir. 2012), which applied the clauses in a pro rata scheme, as incorrectly viewing New York law as foreclosing an all sums allocation. The Court rejected an interpretation that would render the clauses surplusage, and found that the policies required an all sums allocation.

Viking Pump further held that vertical exhaustion, which allows the insureds to access the excess policies in a given policy year once the immediately underlying policies are exhausted, was consistent with policy language. The Court rejected the insurers' arguments that the other insurance provisions required the insured to horizontally exhaust all primary and umbrella policies in all implicated policy years before accessing excess insurance.

The Takeaway

Viking Pump represents a fundamental change to New York allocation law. Claims professionals confronting long-tail claims under New York law in which the implicated policies contain Prior Insurance and Non-Cumulation clauses should revisit their allocation analysis with counsel. However, *Viking Pump* does not provide guidance as to the allocation methodology to be applied in situations where some of the policies contain Prior Insurance and Non-Cumulation clauses and others do not, and further confusion and litigation over this issue can be expected.

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