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New York Lets Policyholder Choose Which Insurers Must Pay "All Sums" For Claims Spanning Many Years

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Businesses facing asbestos or environmental claims may be encouraged by a decision from New York's highest court earlier this month. This new decision allows the policyholder to choose which of many policy periods should initially be responsible for the policyholder's asbestos litigation, work its way up that particular coverage tower and then select another period and another as may be necessary. *See In re Viking Pump, Inc. and Warren Pumps, LLC, Insurance Appeals,* No. 59 (NY May 3, 2016). The policyholder does *not* have to prorate its claims equally among its many years of possible coverage. *Id. The problem is all too familiar* Your company may already be in a similar situation. If not, imagine your company faces numerous lawsuits by individuals alleging they were recently diagnosed with asbestos-related illnesses caused by their work with your company's products many years or even decades ago, or your company is being pursued for environmental contamination that allegedly occurred over a long period of time. Your company has records of its historical general liability and excess policies. For some of those years, your company has tens of millions of dollars of available coverage. For other years, there is little if any coverage available, the following can happen for any number of reasons:

- in early years your company had no insurance or purchased low limits
- policies had been exhausted by prior claims
- some of the insurers are now insolvent
- in later years asbestos or environmental liabilities were clearly excluded

Can you recover under the policies from the "good" years and avoid the "bad" years? Or do you have to prorate your liabilities across the "good" and "bad" years, leaving your company with minimal insurance recoveries for the "bad" years? *Joint and several liability is based on the insuring agreement to pay "all sums"* Your company probably can maximize its insurance recovery if the governing jurisdiction takes the "all sums" approach. This analysis focuses on the insuring clause of a standard policy, which typically provides: The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages… Courts adopting this approach hold that this language makes all the insurers for multiple years jointly and severally liable for "all sums" that the policyholder is obligated to pay in damages and in defense costs. Therefore, the policyholder can choose one

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primary policy to pay “all sums” and intentionally not touch its primary policies in other years. After the limit of the selected policy has been paid, the policyholder proceeds vertically through its coverage tower for that policy period. After all the limits of all the policies in that period have been paid, the policyholder can select another period and move vertically through those policies. And so on. The policyholder can defer or maybe even disregard entirely the policy periods where it has less coverage available. Some states allow the selected insurers to bring contribution actions against carriers that issued policies in other periods, but the policyholder in an “all sums” jurisdiction does not have to pursue any such allocation. *Pro rata allocation is a legal fiction to limit coverage to injury or damage during policy period* To avoid joint and several liability, insurance companies tend to focus on policy provisions stating that it only covers injury or damage during the policy period. In reality, it’s often impossible to determine the extent of injury or damage that occurred in particular period. Even if there is only one asbestos disease claim against the policyholder, the disease process typically takes many years to progress from exposure to diagnosis, with an immeasurable amount of injury happening in any particular year. When there are multiple asbestos claims, the problem is compounded. Similarly, in an environmental matter, there’s usually no way to measure how damage occurred in any given year, from the period when releases were happening, through the years when contaminants were migrating, to the point when a governmental agency or private claimant seeks a remedy. The New York court in *Viking Pump* recognized that the pro rata approach is a legal fiction because it allocates equal amounts to each year, despite the virtual impossibility that the losses for each year really are equal. The result is often detrimental to a policyholder, which will bear its own costs to the extent that the per-year allocation exceeds its available coverage for any given year. *New York moves from pro rata to joint and several – sort of* New York law tends to favor insurance companies on many coverage issues. In *Consolidated Edison Co. of NY v. Allstate Ins. Co.,* 98 NY2d 208 (2002), New York’s highest court adopted the pro rata allocation method that insurers prefer. Now, in *Viking Pump*, the court has seemingly switched sides by applying the “all sums” method that allows the policyholder to choose among multiple policy periods for which the insurers are jointly and severally liable. The court did not, however, reverse itself outright. Rather, it focused on “anti-stacking” or “non-cumulation” provisions in the policies, which it did not consider in its 2002 *Con Ed* decision. In general, this clause says that when a loss is covered not only by that policy but in policies for earlier or later years, the policyholder gets only one of those limits and can’t stack them up for more coverage. The court recognized that this provision means there must actually be coverage under policies for more than one year, and therefore it applied the “all sums” doctrine in *Viking Pump*. The court cautioned that *Con Ed* remains good law and that each case should be decided on the policies and other facts involved. Several other courts that have adopted pro rata allocation have recognized the inconsistency when the policy has an “anti-stacking” or “non-cumulation” clause. Those courts typically hold the clause unenforceable and continue to apply pro rata allocation. The New York court concluded that doing so would violate the rule of contract construction that all terms must have meaning. In order to preserve the “anti-stacking” clause, the “all sums” joint and several liability rule must apply instead of pro rata allocation. *Where are we headed?* Policyholders should be pleased with the *Viking Pump* result, but its reliance on the “anti-stacking” clause seems flawed. For context, consider that the insurance industry tends to draft and incorporate a new policy provision as a direct response to an expanding

coverage risk in existing policy language. That appears to be what happened when insurance companies began to use “anti-stacking” provisions. The New York court in *Viking Pump* suggested that “anti-stacking” changed the meaning of the insuring agreement to pay “all sums.” That can’t be right. The same insuring agreement language appears in many policies, with and without “anti-stacking” clauses, and that language should always have the same meaning. By inserting “anti-stacking” provisions, insurance companies recognized that “all sums” is unallocable. Pro rata allocation can never be ordered in the face of an “all sums” insuring agreement, even if there is no “anti-stacking” provision. At least the *Viking Pump* court is headed in the right direction. As a prominent jurisdiction that often favors insurance companies, New York may have just taken its first step in leading a broader rejection of pro rata allocation and holding insurers jointly and severally liable under the “all sums” language of their policies.