MURTHA MEANS
MORE
INDUSTRY INSIGHT

INSURANCE RECOVERY NEWS

May 2016

NEW YORK HOLDS EXCESS INSURERS LIABLE FOR "ALL SUMS" RELATED TO LONG TAIL CLAIMS

by Marilyn B. Fagelson and Rachel Snow Kindseth

For more than two decades, the problem of allocating the costs of long tail claims – such as environmental and asbestos claims – among multiple insurance carriers has generally been resolved in one of two ways. Courts in many states, such as Illinois and California, have adopted the "all sums" or "joint and several" method of allocation, which permits the policyholder to seek full coverage for any claim under any triggered policy, leaving it to that single insurance carrier to collect contributions from other carriers whose policies are also triggered by that claim. Other courts, such as in New Jersey and Connecticut, have adopted "pro rata" allocation, dividing responsibility for the costs of long tail claims among the carriers with triggered policies. Pro rata allocation is often viewed as less favorable to policyholders who, to varying degrees depending upon the jurisdiction, may be required to share in the allocation of costs.

Last week, New York's highest court ruled in favor of policyholders, holding that when policies contain or incorporate a "non-cumulation," "anti-stacking" or "prior insurance" provision, the "all sums" method of allocation must be applied. In concluding that "all sums" allocation was appropriate for the coverage for asbestos personal injury claims in In the Matter of Viking Pump, Inc. and Warren Pumps, LLC, Insurance Appeals (May 3, 2016), the Court of Appeals focused on the plain meaning of the policy language involved in the case. Non-cumulation, anti-stacking and prior insurance clauses provide that, if an occurrence occurs partly before and partly within the policy period, the coverage shall be reduced by amounts due from or paid under such prior insurance. Some excess policies in Viking Pump also provided that "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 Court of Appeals simply could not reconcile the plain meaning of such terms with pro rata allocation. Noting that the carriers' expert conceded that non-cumulation clauses were inconsistent with pro rata allocation and that jurisdictions applying pro rata allocation have held that non-cumulation clauses are unenforceable once a court has determined that a loss is to be shared among sequential insurers on a pro rata basis, the Court of Appeals refused to construe the policies in such a way as to make such provisions mere surplusage. The Court concluded that non-cumulation, anti-stacking and prior insurance provisions evidenced a clear and unambiguous intent by the insurers to use "all sums" allocation.

In its decision, the Court rejected the notion that New York had adopted a blanket rule for application of "pro rata" allocation of long-tail claims in Consolidated Edison Co. of N.Y. v. Allstate Ins. Co., 774 N.E.2d 687 (N.Y. 2002). Although acknowledging that at least some policies involved in Consolidated Edison contained non-cumulation clauses, the Court suggested that Consolidated Edison, which does not address non-cumulation clauses, was properly decided based upon the arguments presented in that case.

If you have any questions about the issues addressed here, please feel free to contact a member of our Insurance Recovery Group:

Marilyn B. Fagelson, Chair
mfagelson@murthalaw.com

Terence J. Brunau
tbrunau@murthalaw.com

George A. Dagon, Jr.
gdagon@murthalaw.com

Michael J. Donnelly
mdonnelly@murthalaw.com

Melissa A. Federico
mfederico@murthalaw.com

David P. Friedman
dfriedman@murthalaw.com

Rachel Snow Kindseth
rkindseth@murthalaw.com

Elizabeth J. Stewart
estewart@murthalaw.com

Ryan M. Suerth
rsuerth@murthalaw.com

Andrew G. Wailgum
awailgum@murthalaw.com

Kristen L. Zaehringer
kzaehringer@murthalaw.com

Indeed the Court of Appeals notes that the Consolidated Edison decision itself recognizes that "'different policy language' might compel all sums allocation."

Having concluded that "all sums" was the appropriate allocation method, the Court of Appeals next addressed the type of exhaustion to be applied. The excess carriers had argued for "horizontal exhaustion," which requires that all lower level policies across all triggered policy periods be exhausted before the next layer of insurance can be called upon for coverage. By contrast, "vertical exhaustion" requires the exhaustion of only those policies directly underlying the policy that is being called upon for coverage. The Viking Pump Court concluded that vertical exhaustion is conceptually consistent with an "all sums" allocation, permitting the policyholder to seek coverage through the layers of insurance available for a specific year. The Court reasoned that the language of an excess policy ties its attachment only to the specific underlying policies in effect during the same policy period as the applicable excess policy and therefore, absent policy language suggesting a contrary intent, the excess policies are triggered by vertical exhaustion - exhaustion of the underlying available coverage within the same policy period.

The Viking Pump decision holds out the hope for policyholders that other courts will follow New York's example and apply "all sums" to policies with non-cumulation, anti-stacking or prior insurance provisions, even in jurisdictions that have previously issued rulings adopting "pro rata" allocation. Policyholders with occurrence-based policies that could potentially respond to long-tail claims should carefully review their policies for provisions supportive of "all sums" allocation when seeking coverage and before entering into cost-sharing agreements with insurance carriers.

If you have any questions about the information contained in this Alert, please contact:

Marilyn B. Fagelson at 203.772.7725 or mfagelson@murthalaw.com
Rachel Snow Kindseth at 203.772.7774 or rkindseth@murthalaw.com