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How 2 Cases Have Settled NY Insurance Allocation Law

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The past two years have seen insurance coverage lawyers coming to terms with the impact of two landscape-changing decisions from New York's highest court, colloquially referred to as Viking Pump and Keyspan. These cases addressed the proper allocation scheme and methodology applicable to "long-tail" liabilities such as environmental or asbestos claims. Specifically, the decisions mandated whether all sums or pro rata allocation applies based on the relevant policy language at issue, and how those allocation schemes should be applied in practice under the specific facts of those cases.

Many in the insurance industry and legal community were quick to characterize Viking Pump as "pro-policyholder" and Keyspan as "pro-insurance company" because of Viking Pump's endorsement of all sums allocation as compatible with New York law and Keyspan's rejection of the "unavailability rule" in pro rata allocation. Before Keyspan (which deals specifically with environmental claims), New York law held that insurance companies could not allocate a share of losses to policyholders for periods when insurance for certain types of liabilities (such as pollution or asbestos) was not available for purchase. Keyspan reached the opposite conclusion under the specific facts of that case, placing the burden on the policyholder for all years during which it did not have coverage whether insurance was available or not.

Despite this seemingly negative result on the unavailability issue, Keyspan is potentially just as critical a case in favor of policyholders seeking to have all sums allocation apply to their claims. Both Viking Pump and Keyspan make clear that under New York law, the allocation approach that will apply to long tail claims is governed by the presence (or absence) of certain policy language. Keyspan states that "the method of allocation is governed foremost by the particular language of the relevant insurance policy," and Viking Pump states that "the contract language controls the question of allocation").[1] Under the Keyspan and Viking Pump line of cases, the Court of Appeals of New York has made clear that policy language will dictate the applicable allocation scheme, and that any policy containing "continuing coverage" language extending coverage for injuries or property damage beyond the policy period mandates application of the all sums allocation methodology. Where all sums allocation applies, insurance companies cannot prorate their liability for these claims to the policyholder — even for periods when insurance was "unavailable."

Viking Pump Expressly Held that "Continuing Coverage" Policy Language Compels All Sums Allocation

Following Viking Pump, lawyers for policyholders and insurance companies alike have focused their attention on whether their policies contain "prior allocation and non-cumulation clauses" like those that the Viking Pump court held require application of an "all sums" allocation scheme. But Viking Pump opened up more than one door to application of all sums allocation based on certain policy language. The Viking Pump Court also held that policy language that "expressly extends a policy's protections beyond the policy period for continuing injuries … compels an interpretation in favor of all sums allocation."[2]

In Viking Pump, which involved coverage for asbestos bodily injury liabilities, the policies defined an occurrence as "injury which occurs during the policy period," but elsewhere included the following "continuing coverage" language: "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."[3] The Court of Appeals held that despite the "during the policy period" qualification in the definition of "bodily injury," the presence of that "continuing coverage" clause warranted application of all sums allocation.[4]

The flip side of this coin is presented by the Court of Appeals' holding that the strict and complete limitation of coverage to injuries occurring during the policy period is essential and foundational to the application of pro rata allocation. Specifically, Keyspan referenced "the contract language that provides the *foundation* for the pro rata approach — namely, the 'during the policy period' *limitation*," and Viking Pump stated that "the very *essence* of pro rata allocation is that the insurance policy language *limits* indemnification to losses and occurrences during the policy period".[5] Thus, in the absence of this specific and uncontradicted foundational limiting language, all sums allocation is warranted under New York law.[6]

The Viking Pump court itself noted that in jurisdictions applying pro rata allocation as a matter of course, the courts have "emphasiz[ed] language in the insurance policies that may be interpreted as limiting the 'all sums' owed to those resulting from an occurrence during the 'policy period,' or public policy reasons supporting pro rata allocation, or a combination of the two[.]"[7] Based on the foundational requirements laid out by the Court of Appeals in Viking Pump and Keyspan, when policy language does not limit bodily injury or property damage to injury or damage occurring entirely during the policy period (or allows for any "continuing coverage" beyond the policy period), all sums is the only appropriate method of allocation.

In a recent decision applying Viking Pump, Polar-Mohr Maschinenvertriebsgesellschaft GMBH Co. KG v. Zurich Am. Insurance Co, one court found that certain language in a policy's "bodily injury" definition "mandate[d] 'all sums' allocation" under Viking Pump.[8] The policy in Polar-Mohr defined bodily injury as "bodily injury, sickness or disease sustained by any person which occurs during the policy period, *including death at any time resulting therefrom*."[9] The Polar-Mohr court held that the continuing coverage clause it emphasized in the "bodily injury" definition was "precisely the type of language that the court in Viking Pump found inconsistent with the pro rata method of allocation."[10] On that ground alone, the Polar-Mohr Court held that all sums allocation applied.[11]

Other common examples of "continuing coverage" language within insurance policies include the policies' promise to cover "personal injury … including death at any time resulting therefrom," or "bodily injury … including death, mental anguish and mental injury resulting therefrom." The presence of any

such language extending coverage for injuries (or property damage) beyond the policy period mandates that all sums allocation applies under the Court of Appeals' holdings in Viking Pump and Keyspan.

Keyspan's Holding Regarding Allocation to Years When Insurance Was Unavailable Cannot Apply Where "Continuing Coverage" Policy Language Mandates All Sums Allocation

In both Keyspan and Viking Pump, the Court of Appeals held that the language of an insurance policy determines whether a court should apply pro rata or all sums allocation to apportion liability among multiple, successive insurance policies.[12] In Keyspan, the Court of Appeals held that "the unavailability rule is inconsistent with the policy language that mandates pro rata allocation in the first instance."[13] Thus, any New York court analyzing an insurance allocation case cannot consider the "unavailability rule" unless it finds that pro rata allocation applies. And where the relevant insurance companies' policies expressly extend coverage for death and/or other injuries (or property damage) occurring outside the policy period, as a matter of New York law, the court will be required to adopt all sums allocation. The only cases in which the unavailability rule should be analyzed and potentially applied in favor of insurance companies are those in which all policies expressly limit coverage to injury during the policy period and no policies contain any "continuing coverage" language.

Under Keyspan and Viking Pump, the presence of clauses that expressly extend coverage for injury or damage that occurs outside the policy period requires a court to adopt all sums allocation because such clauses would be rendered "irrelevant" if pro rata allocation were applied. As the Court of Appeals reasoned in Viking Pump:

The continuing coverage clause expressly extends a policy's protections beyond the policy period for continuing injuries. Yet, under a pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period because that subsequent loss would be apportioned to the next policy period as its pro rata share. Using the pro rata allocation would, therefore, render the continuing coverage clause irrelevant. Thus, presence of that clause in the respective policies further compels an interpretation in favor of all sums allocation[.][14]

Thus, for any insurance policies that expressly extend their "protections beyond the policy period for continuing injuries,"[15] the plain language of the policies "compels an interpretation in favor of all sums allocation."[16]

Conclusion

To maximize insurance recovery for long tail liability claims, policyholders should check their liability policies for an extension of coverage to injuries or damage occurring outside the policy period. Like the policies in Viking Pump and Polar Mohr, policies with similar language "expressly extend a policy's protections beyond the policy period for continuing injuries, … [which] compels an interpretation in favor of all sums allocation."[17]

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[1] Keyspan Gas E. Corp. v. Munich Reinsurance Am. Inc., 31 N.Y. 3d 51, 58 (2018); In re Viking Pump, Inc., 27 N.Y.3d 244, 257 (2016).

[2] Viking Pump, 27 N.Y.3d at 262.

[3] Viking Pump, 27 N.Y.3d at 252-53 (emphasis added)

[4] Id. at 262.

[5] Keyspan, 31 N.Y.3d at 61 (emphasis added); Viking Pump, 27 N.Y.3d at 261 (emphasis added).

[6] Viking Pump, 27 N.Y.3d at 262.

[7] Id. at 256-57 (citing cases)

[8] Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Insurance Co., No. 17-CV-01804, 2018 U.S. Dist. LEXIS 42955, at *18 n.1 (N.D. Cal. Mar. 15, 2018) ("Polar-Mohr").

[9] Id. at *11 (emphasis original)

[10] Id. at *12

[11] Id. at *12 n.1 ("Given that the definition of [bodily injury] mandates 'all sums' allocation, I do not address whether the 'other insurance' provisions of the policy also exclude pro rata allocation.").

[12] Keyspan, 31 N.Y. 3d at 58; Viking Pump, 27 N.Y.3d at 257

[13] Keyspan, 31 N.Y. 3d at 60.

[14] Viking Pump, 27 N.Y.3d at 262.

[15] Id.

[16] Id.

[17] Id.