



Courts Address All Sums Coverage Allocation Debate

by Robert M. Horkovich and Raymond A. Mascia Jr.

In 2016, the New York Court of Appeals delivered a long-awaited victory for policyholders facing asbestos and environmental claims spanning multiple years of liability coverage. In *In re Viking Pump, Inc.*, the Court of Appeals rejected the insurance companies' argument that "pro rata" allocation applies and instead adopted the "all sums" rule based on policy language. *Viking Pump* relied on the "non-cumulation" and "non-cumulation and prior insurance" provisions in the policies,

finding that "pro rata allocation is inconsistent" with provisions that expressly acknowledge that a loss also could be covered by a policy in a prior year.

Following the ruling, many attorneys and commentators focused on *Viking Pump's* holding that this specific language mandated all sums. The larger point, however, is that *Viking Pump* opens the door to all sums coverage whenever a loss could be covered under a policy in another year, including policy language that "expressly extends a policy's protections beyond the policy period for continuing injuries." Recognizing this larger point, the Northern District of California held in *Polar-Mohr Maschinenvertriebsgesellschaft GMBH Co. KG v. Zurich Am. Insurance Co.*, that all sums allocation was required under the reasoning of *Viking Pump* when a policy's definition of "bodily injury" contained such language.

THE VIKING PUMP DECISION

In *Viking Pump*, the Court of Appeals accepted certified questions from the Delaware Supreme Court regarding the proper allocation method for long-tail claims—i.e., claims that allege injury or damage due to extended exposure to toxic conditions or gradual environmental contamination. These claims typically trigger coverage under multiple insurance policy periods.

For years, insurance companies wrongfully have sought to

reduce their coverage obligations for long-tail claims by arguing for "pro rata" allocation—namely, for the loss to be artificially divided into even amounts over all of the years that may be at issue. The effect (and the insurance companies' intent) often is to make each annual amount so small as to negate any coverage from any policy year at all. By contrast, policyholders have advocated for an "all sums" method, which recognizes that any insurance policy on the risk during the injury or damage should pay for the entire loss up to policy limits. That method enforces the plain language of the policies and ensures that the policyholders get the benefit of the coverage that they purchased years ago, often for substantial premiums.

Viking Pump considered "whether 'all sums' or 'pro rata' allocation applies where the excess insurance policies at issue either follow form to a non-cumulation provision or contain a non-cumulation and prior insurance provision." It ruled pro rata allocation could not apply in either circumstance.

Specifically, *Viking Pump* found that these clauses were inconsistent with pro rata allocation because they "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 prior policies. By contrast, *Viking Pump* recognized that "[p]ro rata allocation is a legal fiction"



that “limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies... would indemnify the same loss or occurrence.” Thus, *Viking Pump* held that pro rata allocation could not apply to policies that recognize that the same loss can be covered by prior policies.

Viking Pump found further support for this holding in the “continuing coverage” language found within some of the non-cumulation provisions at issue in that case. That language “expressly extends a policy’s protections beyond the policy period for continuing injuries.” The provision stated 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...without payment of additional premium.”

Viking Pump held that this language “reinforced” its holding that all sums applied. Under a pro rata scheme, “no policy covers a loss that began during a particular policy period and continued after termination of that period” since “that subsequent loss would be apportioned to the next policy period as its pro rata share.” Thus, *Viking Pump* noted that the existence of “continuing coverage” language in some of the policies at issue further “compels an interpretation in favor of all sums allocation.”

THE POLAR-MOHR DECISION

Following the ruling, many attorneys and commentators focused only on whether insurance policies contained the language in *Viking Pump* “acknowledging that a covered loss or occurrence may ‘also [be] covered in whole or in part’” under prior policies. While *Viking Pump* leaves no doubt that all sums is required in that circumstance, that focus misses the larger point: that all sums allocation is required in many other circumstances as well. *Viking Pump*’s observation regarding language that “expressly extends a policy’s protections beyond the policy period for

continuing injuries” is just one example of another provision that is inconsistent with pro rata allocation.

In *Polar-Mohr* the Northern District of California applied this principle and held the policy’s definition of “bodily injury”—defined as “bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom”—required an all sums allocation.

Polar-Mohr is significant because the policy in that case did not include the specific non-cumulation clauses at issue in *Viking Pump*. Nonetheless, *Polar-Mohr* recognized that the policy language at issue there was “precisely the type of language that the court in *Viking Pump* found inconsistent with the pro rata method of allocation.” Just like the language in *Viking Pump*, the language in *Polar-Mohr* “contemplates and promises indemnification to damages that arise outside of the policy period.” Thus, just like *Viking Pump*, pro rata allocation is precluded and all sums must apply.

Polar-Mohr affirms the overriding principle that general liability insurance policies containing language that “expressly extends a policy’s protections beyond the policy period” provide policyholders with another significant avenue for obtaining all sums coverage and potentially larger insurance recoveries for long-tail claims. Policyholders should review their policies for any such language, with an eye towards maximizing insurance recovery and rejecting insurance company attempts to apply pro rata allocation. ■

Robert M. Horkovich is managing partner and shareholder in the New York office of Anderson Kill. He is a trial lawyer who has obtained more than \$5 billion in settlements and judgments for policyholders from insurance companies. **Raymond A. Mascia Jr.** is a shareholder in Anderson Kill’s New York office where his practice concentrates in commercial litigation and insurance coverage litigation exclusively on behalf of policyholders.