THE FATE OF PRO RATA ALLOCATION IN LONG-TAIL CLAIMS GOVERNED BY NEW YORK LAW IN THE WAKE OF *VIKING PUMP*: HOLD A VIKING FUNERAL OR PUMP THE BRAKES?

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I. INTRODUCTION

In the fourteen years following the New York Court of Appeals' seminal 2002 decision in *Consolidated Edison Co. of New York, Inc. v. Allstate Insurance Co.*,[1] New York was regarded almost universally, by courts and commentators alike, as a "pro rata" allocation jurisdiction. Against that historical backdrop, the Court of Appeals' May 3, 2016, decision in *In re Viking Pump, Inc.*,[2] holding that "all sums" allocation and "vertical" exhaustion applied to the insureds' asbestos-related losses, sent shockwaves through the insurance coverage bar. This article will examine the observed and anticipated repercussions of the landmark *Viking Pump* decision.

While the New York Court of Appeals made clear in *Viking Pump* that the principles of all sums allocation and vertical exhaustion must govern the allocation of an insured's losses among occurrence policies containing (or following form to policies containing) "prior insurance and non-cumulation clauses," the decision created and/or left open a number of critical allocation-related issues—including how such clauses should function in cases involving long-tail claims. Moreover, while *Viking Pump* was a boon for most policyholders whose policies have non-cumulation language (or equivalent language), it may have placed some policyholders whose policies lack such language in a worse position allocation-wise than they were prior to May 2016.

1. 774 N.E.2d 687 (N.Y. 2002) (*Con Ed*).
2. 52 N.E.3d 1144 (N.Y. 2016) (*Viking Pump*).

While *Viking Pump* clearly effected a sea change in New York allocation law, the decision's complete impact will undoubtedly take many years to be fully realized. Already, however, a handful of courts in various jurisdictions tasked with applying New York law have grappled with and issued decisions addressing a number of allocation and exhaustion issues presented by *Viking Pump*. These include the New York Court of Appeals' March 2018 decision in *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*,[3] the Second Circuit's July 2017 decision in *Olin Corp. v. OneBeacon America Insurance Co.*[4] and the New York district court's April 2018 decision on remand,[5] a New York district court's September 2017 decision in *Liberty Mutual Fire Insurance Co. v. J&S Supply Corp.*,[6] a California district court's March 2018 decision in *Polar-Mohr Maschinenvertribsgesellschaft GMBH, Co. KG. v. Zurich American Insurance Co.*,[7] and the decisions issued in 2017 by New Jersey and California trial courts in *Syngenta Crop Protection, Inc. v. Insurance Co. of North America*[8] and *ITT Cannon, Inc. v. ACE Property & Casualty Co.*,[9] respectively.

This article will discuss the various allocation-related issues presented by *Viking Pump* (only some of which were addressed in the recent decisions enumerated above), including: which type of language, other than that found in non-cumulation clauses, will be deemed to mandate all sums allocation; which allocation methodology applies when some policies in a policyholder's insurance program have non-cumulation language and others do not; which exhaustion methodology applies when one or more triggered primary policies without non-cumulation language are unexhausted; which allocation methodology applies to defense costs where the policies have non-cumulation language; whether, notwithstanding the presence of non-cumulation language, an insured may access more than one tower if there are numerous underlying claims; when and how an insurer's policy limits may be reduced by the operation of non-cumulation clauses to account for payments made under earlier policies; whether non-cumulation clauses may be used only to reduce per-occurrence limits or may also be used to reduce aggregate limits; whether the unavailability exception to proration will continue to apply in long-tail claims; and the method by which settlement credits are to be applied in an all sums allocation.

3. — N.E.3d —, 2018 WL 1472635 (N.Y. Mar. 27, 2018).
4. 864 F.3d 130 (2d Cir. 2017) (*Olin IV*).
5. Olin Corp. v. Lamorak Ins. Co., 2018 WL 1901634, at *12 (S.D.N.Y. Apr. 18, 2018).
6. 2017 WL 4351523 (S.D.N.Y. Sept. 29, 2017) (*J&S*).
7. 2018 WL 1335880 (N.D. Cal. Mar. 15, 2018) (*Polar-Mohr*).
8. No. UNN-L-3230-08 (N.J. Super. Ct. June 9, 2017) (*Syngenta*) (trial order, on file with authors). The authors were members of the legal team representing the insured in this action.
9. No. BC 290354 (Cal. Super. Ct. Aug. 17, 2017) (*ITT*) (trial order, on file with authors).

Although this article focuses on New York law, it will conclude by examining the potential influence of *Viking Pump* on courts tackling allocation issues under the laws of other states.

II. NEW YORK ALLOCATION LAW BEFORE *VIKING PUMP*

In *Con Ed*, the New York Court of Appeals considered the question of whether, based on the language in the occurrence liability policies at issue covering "*all sums* which the insured shall be obligated to pay," the insured's liabilities arising from decades of environmental contamination should be subject to "joint and several allocation," under which the insured would "be permitted to collect its total liability—'all sums'—from any policy in effect during the 50 years that the property damage occurred, up to that policy's limit," or "pro rata allocation," under which "the liability is spread among the policies."[10] The Court of Appeals agreed with the insurers that pro rata allocation should apply, holding that while it was "not explicitly mandated by the policies," it was "consistent with the language of the policies," in particular the policy language providing that the "policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period."[11]

The Court of Appeals further held that the trial court's decision to prorate liability "based on the amount of time the policy was in effect in comparison to the overall duration of the damage . . . was not error," although it noted that "this conclusion does not foreclose pro rata allocation among insurers by other methods either in determining justiciability or at the damages stage of a trial."[12]

The *Con Ed* decision did not explicitly address whether the insured's defense costs were to be allocated on an all sums or pro rata basis. However, as the Court of Appeals noted nine years earlier in *Continental Casualty Co. v. Rapid-American Corp.*,[13] it had "held that 'pro rata sharing of defense costs may be ordered, but . . . perceive[d] no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies.'"[14] Even after *Con Ed*, a number of courts applying or interpreting New York law held, relying on *Rapid-American Corp.*, that defense costs may be allocated to a primary insurer on an all sums basis.[15]

10. *Con Ed*, 774 N.E.2d at 693–94 (citations omitted).
11. *Id.* at 695.
12. *Id.*
13. 609 N.E.2d 506 (N.Y. 1993).
14. *Con Ed*, 774 N.E.2d at 694 (quoting *Rapid-American Corp.*, 609 N.E.2d at 514).
15. *See, e.g.*, Travelers Cas. & Sur. Co. v. Alfa Laval Inc., 100 A.D.3d 451, 452 (N.Y. App. Div. 2012) (holding that trial court did not err in declining to order sharing among triggered primary policies, given that "[t]he duty to defend is broader than the duty to indemnify, re-

III. *VIKING PUMP*

A. *The Delaware Proceedings*

In *Viking Pump*, plaintiffs Viking Pump, Inc. and Warren Pumps, LLC sought coverage for their asbestos-related losses under numerous liability policies issued to their predecessor, Houdaille, Inc. In a lengthy 2009 decision, after finding that New York law applied,[16] the Delaware Chancery Court held that each plaintiff had the right to seek coverage under the Houdaille policies,[17] and that under New York's "injury-in-fact" theory each asbestos claimant's exposure and injury were to be treated as a single occurrence triggering all policies in place during the period of exposure.[18] The court then held that the plaintiffs' losses should be allocated on an all sums basis.[19] Although the Chancery Court based its allocation decision on a number of grounds, the linchpin for its determination was the presence in the policies of non-cumulation clauses, which it found evinced a clear and unambiguous intent to require all sums allocation.

Each umbrella policy at issue in *Viking Pump* contained the following non-cumulation clause:

> If the same occurrence gives rise to personal injury, property damage or advertising injury or damage *which occurs partly before and partly within any annual period of this policy*, each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [Liberty Mutual] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.[20]

quiring each insurer to defend if there is an asserted occurrence covered by its policy" and that the primary insurer ordered to pay defense costs "may later obtain contribution from other insurers on applicable policies"); SPX Corp. v. Liberty Mut. Ins. Co., 709 S.E.2d 441, 447 (N.C. Ct. App. 2011) ("Thus, *Rapid-American Corp.* stands for the proposition that trial courts may either order that an individual insurer be required to pay 100% of any defense costs and later seek contribution from other applicable insurers, *or* order pro rata time-on-the-risk allocation of defense costs."); Celanese Corp. v. OneBeacon Am. Ins. Co., 2008 WL 5784444, at *8 (Mass. Super. Ct. Dec. 29, 2008) (rejecting insurer's argument "that under New York law each insurer is responsible only for its pro rata share of the cost of defending the insured"); BP Air Conditioning Corp. v. One Beacon Ins. Grp., 33 A.D.3d 116, 131 (N.Y. App. Div. 2006) (holding that primary insurer's ability to seek coverage from other insurers did "not mean that BP is not entitled to require Beacon, as primary insurer, to bear 100% of BP's defense costs in the first instance").

16. Viking Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 89–90 (Del. Ch. 2009) (*Viking Pump* Phase 2 Opinion).

17. *Id.* at 94, 102, 106.

18. *Id.* at 110–11.

19. *Id.* at 119–30.

20. *Id.* at 121 (alteration in original).

Each of the excess policies either followed form to that umbrella policy language or contained a two-part prior insurance and non-cumulation clause (also referred to as "Condition C") stating:

> It is agreed that if *any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof*, the limit of liability hereon stated in the Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
>
> Subject to the foregoing paragraph and to all the other terms and conditions of this Policy *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.[21]

According to the Chancery Court, these non-cumulation provisions were designed to prevent the "stacking" of multiple policy limits for any single occurrence. The court explained:

> The effect of these clauses is to keep an insured from "stacking" coverage so as to exceed the limits of individual policies. That is to say, they prevent an insured from submitting claims under several different policies so that it can evade the per occurrence limits in its insurance policies. For example, under an all sums scheme in which an insured had a $500,000 per occurrence limit but has been found liable for $1 million arising out of an occurrence over two one-year policy periods, these types of provisions keep an insured from claiming $500,000 on each policy period and thus being able to recover twice its normal per occurrence limit.[22]

The Chancery Court distinguished *Con Ed* on the basis that unlike the "narrow policy language considered in" that case, the non-cumulation clauses in the Houdaille policies provided that "recovery under one policy reduces an insured's recovery from policies in effect in other periods for the same occurrence (e.g., continuous asbestos exposure), and an insurer must pay for injuries caused by that occurrence that continues into other periods."[23] Thus, the Chancery Court found, the non-cumulation clauses could not "sensibly be applied within a pro rata allocation scheme."[24]

In October and November 2012, the Delaware Superior Court held a trial resulting in a verdict largely in favor of the plaintiffs.[25] In October

21. *Id.* at 121–22.
22. *Id.* at 122.
23. *Id.* at 121.
24. *Id.*
25. Viking Pump, Inc. v. Century Indem. Co., 2013 WL 7098824, at *1 (Del. Super. Ct. Oct. 31, 2013), *modified*, 2014 WL 1305003 (Del. Super. Ct. Feb. 28, 2014), *aff'd in part*,

2013, the Superior Court issued a decision in which it rejected the insurers' renewed arguments for pro rata allocation and held that horizontal exhaustion applied, which required that all underlying primary layers in all years be exhausted before a policyholder can access any single layer.[26] In a February 2014 decision, the Superior Court clarified that horizontal exhaustion would apply only to the primary and umbrella policies and not the excess policies.[27]

Following the trial and its post-trial rulings, in June 2014 the Superior Court issued its Final Judgment Order After Trial,[28] in which it ordered as follows with respect to allocation:

> For the reasons set forth in the Phase 2 Opinion,[[29]] Plaintiffs may select any of Defendants' triggered policies whose applicable limits are not exhausted to respond to an asbestos claim. In particular, Warren may select any triggered Joint Excess Policies to respond to any asbestos claim that is brought against Warren, and Viking may select any triggered Joint Excess Policies, the Viking-Only Policies and/or excess-layer Pre-1972 Houdaille Policies to respond to any asbestos claim that is brought against Viking. Any such insurance policies selected to cover asbestos claims (other than ISLIC's policy) must pay all (i) indemnity costs incurred by or on behalf of Warren and/or Viking in connection with their asbestos claims, and (ii) reasonable costs paid by or on behalf of Warren and/or Viking in connection with the defense and administration of their asbestos claims, including costs for national coordinating counsel, subject only to the applicable liability limit(s) of the selected policies, the defense obligations as outlined in paragraphs 11–17 below, and each Defendant's right to seek contribution from other insurers for amounts paid toward the asbestos claim.[30]

As to exhaustion, the Superior Court ordered:

> For the reasons stated in the Court's October 31, 2013 opinion, as clarified in the Court's February 28, 2014 opinion, "horizontal exhaustion" applies to Plaintiffs' primary and umbrella coverage, and therefore applicable primary

rev'd in part sub nom., *In re* Viking Pump, Inc. & Warren Pumps, LLC Insurance Appeals, 148 A.3d 633 (Del. 2016).

26. *Id.* at *21.

27. Viking Pump, Inc. v. Century Indem. Co., 2014 WL 1305003 (Del. Super. Ct. Feb. 28, 2014).

28. Viking Pump, Inc. v. Century Indem. Co., No. 10C-06 141 (Del. Super. Ct. June 9, 2014) (trial order, on file with authors).

29. The "Phase 2 Opinion" was the Chancery Court's October 14, 2009, decision. *See* note 16.

30. *Viking Pump*, No. 10C-06 141, ¶ 8. The Superior Court further ordered: "Subject to paragraph 8 . . . , [the insureds] . . . may select any of Defendants' triggered policies whose applicable limits are not fully exhausted, to pay any other (i) unreimbursed indemnity costs incurred in connection with their asbestos claims and/or (ii) unreimbursed costs incurred in connection with the defense and administration of their asbestos claims, including costs for national coordinating counsel, that Warren or Viking allocated to each policy, subject to the policies' limits and defense obligations. . . ." *Id.* ¶ 22.

> and umbrella policies triggered by a particular asbestos claims must be exhausted before the insured can access any excess policy to provide insurance coverage for such asbestos claim. Horizontal exhaustion does not apply among the layers of the excess policies.[31]

On appeal, the Delaware Supreme Court concluded in June 2015 that the resolution of the issues before it "depends on significant and unsettled questions of New York law that have not been answered, in the first instance, by the New York Court of Appeals."[32] Accordingly, the Delaware Supreme Court certified the following two questions to the New York Court of Appeals:

> 1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions?
> 2. Given the Court's answer to Question # 1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?[33]

The New York Court of Appeals accepted these two certified questions later that month.[34]

B. *The New York Court of Appeals' Decision*

In answering the questions certified by the Delaware Supreme Court, the New York Court of Appeals began by pointing out that it had not reached its "conclusion in [*Con Ed*] by adopting a blanket rule, based on policy concerns, that pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies."[35] Rather, it had relied on New York's "general principles of contract interpretation and made clear that the contract language controls the question of allocation."[36] The Court of Appeals further explained that it had repeatedly emphasized "that [i]n determining a dispute over insurance coverage, [courts] first look to the language of the policy,"[37] and that it "did not adopt a strict rule [in *Con Ed*] mandating either pro rata or all sums allocation because insurance contracts, like other agreements, should be enforced as written, and parties to an insurance arrangement may generally contract

31. *Id.* ¶ 5.
32. *In re* Viking Pump, Inc., 146 A.3d 1046, 1050 (Del. 2015).
33. *Id.*
34. *In re* Viking Pump, Inc., 37 N.E.3d 104 (N.Y. 2015).
35. *Viking Pump*, 52 N.E.3d at 1150.
36. *Id.* at 1150–51.
37. *Id.* at 1151 (alteration in original) (citation and quotation marks omitted).

as they wish and the courts will enforce their agreements without passing on the substance of them."[38]

The court explained that while it had concluded in *Con Ed* that the mere use of the phrase "all sums" by the policies at issue was insufficient to mandate all sums allocation and suggested that "in the absence of language weighing in favor of a different conclusion, pro rata allocation was the preferable method of allocation in long-tail claims in light of the inherent difficulty of tying specific injuries to particular policy periods," it had "recognized that 'different policy language' might compel all sums allocation."[39] The court then stated that the "policy language at issue here, by inclusion of the non-cumulation clauses and the two-part non-cumulation and prior insurance provisions, is substantively distinguishable from the language that we interpreted in" *Con Ed* and "present[s] the very type of language that we signaled might compel all sums allocation."[40] Thus, the court was tasked with "determin[ing] whether the presence of a non-cumulation clause or a non-cumulation and prior insurance provision mandates all sums allocation."[41]

The court explained that while it had "enforced non-cumulation clauses in accordance with their plain language"[42] to "prevent stacking, the situation in which an 'an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period . . . wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss,'"[43] it had "never addressed the interplay between non-cumulation/prior insurance provisions and allocation."[44] However, the court noted that "[c]ourts in other states that have addressed this issue—both those that have adopted all sums allocation and a few that have followed a pro rata approach—have concluded that non-cumulation clauses cannot be reconciled with pro rata allocation."[45] The court found these cases to be "persuasive authority for the proposition that, in policies containing non-cumulation clauses or non-cumulation and prior insurance provisions, such as the excess policies before

38. *Id.* (citation and quotation marks omitted).

39. *Id.* at 1152 (citing *Con Ed*, 774 N.E.2d at 694–95).

40. *Id.* The court noted that while some of the policies at issue in *Con Ed* contained non-cumulation clauses, it had not been presented in that case with an argument that such clauses compelled an all sums allocation and, accordingly, "there was no reference in our decision to their existence." *Id.* at 1152 n.5.

41. *Id.*

42. *Id.* at 1152 (citing Nesmith v. Allstate Ins. Co., 25 N.E.3d 924 (N.Y. 2014), and Hiraldo v. Allstate Ins. Co., 840 N.E.2d 563 (N.Y. 2005)).

43. *Id.* (quoting 12 Steven Plitt et al., Couch on Insurance § 169:5 (3d ed. 2017)).

44. *Id.*

45. *Id.* (collecting cases).

us, all sums is the appropriate allocation method."[46] The court further explained its reasoning as follows:

> [I]t would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation here. Such policy provisions 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 any other excess [p]olicy issued to the [insured] prior to the inception date" of the instant policy.
>
> By contrast, the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the "during the policy period" limitation, despite the fact that the injuries may not actually be capable of being confined to specific time periods. The non-cumulation clause negates that premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence. Indeed, even commentators who have advocated for pro rata allocation and propounded the complications that can be caused by all sums allocation have recognized that non-cumulation clauses cannot logically be applied in a pro rata allocation. . . . In a pro rata allocation, the non-cumulation clauses would, therefore, be rendered surplus-age—a construction that cannot be countenanced under our principles of contract interpretation . . . , and a result that would conflict with our previous recognition that such clauses are enforceable.[47]

The court further noted that "[s]everal of the excess policies here also contain continuing coverage clauses within the non-cumulation and prior insurance provisions, reinforcing our conclusion that all sums—not pro rata—allocation was intended in such policies," since the language in such clauses "expressly extends a policy's protections beyond the policy period for continuing injuries."[48]

In conclusion, the court held, "based on the policy language and the persuasive authority holding that pro rata allocation is inconsistent with non-cumulation and non-cumulation/prior insurance provisions, . . . that all sums allocation is appropriate in policies containing such provisions, like the ones at issue here."[49]

46. *Id.* at 1153.
47. *Id.* at 1153–54 (citations omitted).
48. *Id.* at 1154.
49. *Id.* at 1156.

The court then turned to the issue of "whether the Insureds are required under the terms of the excess policies to 'horizontally' exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess insurance policies, or whether the Insureds need only 'vertically' exhaust the primary and umbrella policies, which would allow the Insureds to access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted."[50]

The court held that vertical exhaustion should apply, for two reasons. First, it found that vertical exhaustion is more consistent than horizontal exhaustion with the language in the excess policies at issue, hinging "their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit."[51] Second, it found that "vertical exhaustion is conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year."[52] As a final matter, the court rejected the insurers' arguments that horizontal exhaustion was compelled by the "other insurance" clauses in the policies on the grounds that such "clauses are not implicated in situations involving successive—as opposed to concurrent—insurance policies."[53]

IV. NEW YORK ALLOCATION ISSUES PRESENTED BY *VIKING PUMP*

A. *What Specific Policy Language Is Necessary to Compel All Sums Allocation?*

If nothing else, the New York Court of Appeals' decision in *Viking Pump* made crystal clear that courts applying New York allocation law must look to the specific language in the policy to determine whether it mandates an all sums allocation.

While the Court of Appeals made clear that all sums will govern any policies containing or incorporating either non-cumulation provisions or prior insurance and non-cumulation provisions identical or substantially similar to the clauses at issue in *Viking Pump*, this does not mean that this is the only kind of language that a court will find requires the imposition of all sums. Policyholders with long-tail claims are likely to scour their policies for any language they can argue was intended to indemnify

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1157.

them for losses beyond the policy periods and thus compels the application of all sums.

Following *Viking Pump*, two courts applying New York law have found that policies whose definitions of "bodily injury" or "personal injury" include the phrase "including death at any time resulting therefrom" demonstrate an intent to provide indemnification for damages arising beyond the policy period and, thus, are subject to all sums allocation, notwithstanding the absence of non-cumulation language. In the *ITT* case, a California action involving asbestos losses and applying New York law (as well as California law), a policy issued by Affiliated FM Insurance Company did not contain a non-cumulation clause and applied "only to occurrences during the Policy period" but promised to insure the policyholder for personal injury liability for "damages including damages for care and loss of services because of personal injury, including death at any time resulting therefrom, sustained by any person or persons."[54] The court found that the Affiliated FM policy's "express contract terms promise to protect the policyholder from liability for damages arising from injury that takes place during, but continues beyond, the policy period" and that "[t]his promise is identical to the promise inferred by [sic] a non-cumulation condition."[55] The court further explained that while the New York Court of Appeals in *Viking Pump*

> undoubtedly focused on the non-cumulation/prior insurance condition to support its conclusion regarding the parties' intentions, other policy terms are entitled to equal weight if they evince the parties' mutual intention to afford indemnity where a continuous injury implicates a prior policy. In this case, the Affiliated FM policy's terms demonstrate an intention to provide indemnification for ongoing losses that arose before and continued during the policy term.[56]

Applying both New York law and California law and citing *ITT* and *Viking Pump*, the district court in *Polar-Mohr*, which also involved asbestos exposure, held that a policy's language necessitated all sums allocation although it lacked non-cumulation language because it 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*."[57] The court found that this definition "contemplates and promises indemnification to [sic] damages that arise outside of the policy period"

54. *ITT*, No. BC 290354, at Ex. B at 1.
55. *Id.* at 39–40.
56. *Id.* at 39 n.38.
57. *Polar-Mohr*, 2018 WL 1335880, at *3–4.

and that "[t]his is precisely the type of language that the court in *Viking Pump* found inconsistent with the pro rata method of allocation."[58]

A different result was reached by the district court in *J&S*, yet another asbestos exposure case. On a motion for reconsideration filed after the issuance of *Viking Pump*, the court declined to modify its prior ruling that a policy without non-cumulation language was subject to pro rata allocation.[59] While the policy 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,"[60] the court did not address this policy language in denying the plaintiff's motion. Instead, the court relied on the absence of non-cumulation language from the policy at issue, explaining that the New York Court of Appeals had noted in *Viking Pump* "that the policy at issue was distinguishable from [*Con Ed*] precisely because of its inclusion of non-cumulation clauses and the two-part non-cumulation and prior insurance provisions."[61]

Policyholders have also argued that language in policies' "other insurance" clauses mandates all sums allocation. In *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*, the insured argued to the New York Court of Appeals that the Appellate Division had erred in holding *sua sponte* that the insured's policies did not contain anti-stacking language requiring an all sums allocation.[62] The insured pointed to the following language in its policies' "other insurance" clauses, which it argued had the same effect as the language at issue in *Viking Pump*:

> If collectible insurance under any other policy(ies) of the company is available to the insured, covering a loss also covered hereunder (other than underlying insurance of which the insurance afforded by this policy is in excess), the company's total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy(ies).[63]

The insured asserted that the insurer had argued earlier in the litigation, and in other litigations, that such language unambiguously limits its obligation to one policy limit where two or more successive policies it had issued are triggered by the same loss.[64] In response, the insurer asserted that the New York Court of Appeals had found in *Viking Pump* that

58. *Id.* at *4.
59. *J&S*, 2017 WL 4351523, at *2.
60. Liberty Mut. Fire Ins. Co. v. J.&S. Supply Corp., 2015 WL 13649824, at *1 (S.D.N.Y. June 29, 2015).
61. *J&S*, 2017 WL 4351523, at *2.
62. Brief for Plaintiff-Appellant at 45, Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., No. APL-2016-00236 (N.Y. Feb. 21, 2017) (available at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx).
63. *Id.* at 47–48.
64. *Id.* at 49–50.

the kind of language found in the insured's other insurance clauses applies only to policies providing coverage for the same period, not successive periods.[65]

The Court of Appeals did not decide this issue in *Keyspan*, holding that the insured's "alternative argument that certain 'other insurance' clauses in the policies constitute noncumulation clauses and, therefore, mandate all sums allocation, is not properly before us on appeal."[66] Likewise, in *Polar-Mohr*, the policyholder argued that the policy's "other insurance" clauses "exclude pro rata allocation," but the court did not reach the issue.[67]

B. *How Should Losses Be Allocated When Some Policies Contain Non-Cumulation Language and Others Do Not?*

Several courts have recently addressed the issue of which allocation methodology or methodologies should apply when some but not all of the policies at issue in a multi-year insurance program have non-cumulation language.

In the *Syngenta* case, a New Jersey action involving coverage claims arising from two class actions brought by community water systems alleging contamination by the insured's herbicide products, most but not all of the excess policies either contained or followed form to policies that contained non-cumulation and prior insurance clauses. Syngenta argued that in accordance with *Viking Pump*, all sums allocation should apply, that "for any occurrence or batch of occurrences, it can choose a policy period and allocate its losses to any excess policies in that policy period, as long as the policy directly underlying any such selected policy is exhausted," and "that in the event it chooses a policy period in which there are unexhausted policies without non-cumulation provisions, any such policy is to be allocated its *pro rata* share."[68] Certain insurers, on the other hand, argued that the pro rata method of *Con Ed* should apply to Syngenta's losses because "applying *pro rata* to policies without non-cumulation [clauses], and all sums to those with non-cumulation clauses, would be an administrative nightmare," that "*Con Ed* dealt with policies with non-cumulation clauses, and *Viking Pump* in no way hints at dissatisfaction with *Con Ed*'s

65. Brief for Defendant-Respondent Century Indem. Co. at 58, Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., No. APL-2016-00236 (N.Y. Apr. 20, 2017) (available at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx).

66. Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., No. 20, 2018 WL 1472635, at *4 n.1 (N.Y. Mar. 27, 2018).

67. *Polar-Mohr*, 2018 WL 1335880, at *4 n.1 ("Given that the definition of 'bodily language' mandates 'all sums' allocation, I do not address whether the 'other insurance' provisions of the policy also exclude pro rata allocation.").

68. *Syngenta*, No. UNN-L-3230-08, at 10.

pro rata approach,"[69] and that "*Viking Pump* never suggested that, for mixed programs, the rule should still be all sums."[70]

The New Jersey court agreed with Syngenta's proposed approach, holding:

> *Viking Pump*, which specifically addressed *excess* policies, controls the disposition of the allocation issue. The insurers' arguments that *Con Ed* is applicable, are rejected. The same other insurance and non-cumulation provisions cited above, are present. . . .
>
> To the extent that here there are a few excess policies that do not have non-cumulation provisions—and assuming that Syngenta is successful at trial, and those few policies are within the tower selected—they will be allocated *pro rata*, consistent with the policy language.[71]

Other recent decisions likewise support the notion that allocation is not an "all or nothing" proposition. For instance, in *Liberty Mutual Insurance Co. v. Fairbanks Co.*, the court reconsidered in light of *Viking Pump* its earlier decision that the insured's losses should be allocated among Liberty Mutual's primary and umbrella policies on a pro rata basis and agreed with the insured that the umbrella policies containing non-cumulation clauses were subject to all sums allocation.[72] The court was not asked to, and did not, reconsider the portion of its earlier decision holding that the primary policies, which did not contain non-cumulation clauses, were subject to pro rata allocation.[73] The court also did not disturb its earlier determination that the policies issued by Fairbanks' other insurers were to be allocated on a pro rata basis in accordance with Georgia law.[74]

In *J&S*, the court refused to reconsider, despite *Viking Pump*, its prior decision finding that policies lacking non-cumulation clauses were to be allocated on a pro rata basis even though other policies contained such clauses. The court reaffirmed its finding that it was not unfair to allocate the former policies on a pro rata basis because the latter policies were not implicated by the prior motion as they did not provide coverage for the specific claim at issue on that motion.[75]

69. *Id.* at 8.
70. *Id.* at 18.
71. *Id.* at 28–29.
72. 2016 WL 4203543, at *1–2 (S.D.N.Y. Aug. 8, 2016).
73. *Id.*
74. Liberty Mut. Ins. Co. v. Fairbanks Co., 170 F. Supp. 3d 634, 651 (S.D.N.Y. 2016).
75. *J&S*, 2017 WL 4351523, at *2.

C. *What Exhaustion Methodology Should Apply When Excess Policies Have Non-Cumulation Language But One or More Unexhausted Primary Policies Do Not?*

The notoriously protracted *Olin* coverage litigation, arising from environmental claims spanning the country, involves a mixed insurance program comprising primary policies issued by the Insurance Company of North America (INA) without non-cumulation provisions, some of which were unexhausted, and excess policies with non-cumulation provisions. OneBeacon America Insurance Company, an excess insurer with a $300,000 attachment point, argued that because the primary policies did not contain non-cumulation clauses, the court "should apply horizontal exhaustion to the INA primary layers and vertical exhaustion to its policies" and that "[u]nder this 'hybrid' approach, . . . the underlying INA primary policies have not been exhausted, and therefore OneBeacon's $300,000 attachment point has not been met."[76]

The Second Circuit rejected this argument, holding that "[t]o somehow import horizontal exhaustion into OneBeacon's policies by virtue of the underlying INA policies would contradict *Viking Pump*'s rule that vertical exhaustion controls when policies contain a prior insurance provision" and that "[b]y demanding vertical exhaustion for policies contemplating all sums allocation, *Viking Pump* explicitly determined that an insured in Olin's position does not need to exhaust primary policies outside the policy year to reach the excess layer for its chosen policy year."[77] Thus, the Second Circuit concluded that "Olin's underlying policies have been exhausted and OneBeacon's policies have attached."[78]

D. *Does a Policy's Inclusion or Incorporation of Non-Cumulation Language Mandate All Sums Allocation of Defense Costs?*

Courts continue to disagree as to whether defense costs should be allocated on an all sums basis where the policies at issue contain or follow form to policies containing non-cumulation provisions. This divergence is a consequence of the New York Court of Appeals' failure to explicitly address defense costs in *Viking Pump*.

In *Syngenta*, although the insurers argued merely that "defense costs must be allocated on a *pro rata* basis . . . to primary policies that do not have non-cumulation clauses,"[79] the court found *sua sponte* that defense costs must also be allocated to Syngenta's excess policies on a pro rata

76. *Olin IV*, 864 F.3d at 144.
77. *Id.* at 145.
78. *Id.* at 144.
79. *Syngenta*, No. UNN-L-3230-08, at 16.

basis, even though such policies had non-cumulation provisions.[80] The court reasoned:

> While it may be convenient to assume that *Viking Pump* would similarly require an all sums approach to allocation of defense costs, that case was decided on interpretation of the policy language. Because the non-cumulation clause, by its very terms, does not relate to defense costs, the court declines to expand *Viking Pump* and will default to *Con Ed* as controlling precedent.[81]

The court in *ITT*, however, reached the opposite result. One of the issues addressed in *ITT* was the allocation methodology to be applied to ITT's losses, including the costs of defense; the court framed that issue as follows:

> What is the rule or method for allocating loss among triggered policies for the costs and expenses of defending, settling and paying judgments for asbestos-related bodily injury suits arising from the alleged manufacture, sale and distribution of various ITT businesses under the defendants' and the primary insurers' policies[?][82]

The court concluded that "as with *Viking Pump*, ITT's losses in this case should be allocated based on an all sums methodology."[83] Thus, the court found that ITT's "costs and expenses of defending" itself in the underlying asbestos litigations must be allocated on an all sums basis.

There are several reasons to believe that courts are likely to follow *ITT*'s lead and find that, notwithstanding the New York Court of Appeals' "silence" as to defense costs, such costs should be allocated on an all sums basis where the policies at issue have non-cumulation or anti-stacking language.

First, this conclusion is supported by a close examination of the Delaware proceedings in the *Viking Pump* litigation and the parties' subsequent submissions to the New York Court of Appeals. As noted above, the Delaware Superior Court explicitly ordered that both indemnity costs and defense costs were to be allocated on an all sums basis, stating in its Final Judgment Order After Trial that "Plaintiffs may select any of Defendants' triggered policies whose applicable limits are not exhausted to respond to an asbestos claims" and that "[a]ny such insurance policies selected to cover asbestos claims . . . must pay all (i) indemnity costs incurred by or on behalf of Warren and/or Viking in connection with their asbestos claims, and (ii) reasonable costs paid by or on behalf of Warren and/or Viking in connection with the defense and administration of their asbestos

80. *Id.* at 30.
81. *Id.*
82. *ITT*, No. BC 290354, at 22.
83. *Id.* at 47.

claims, including costs for national coordinating counsel. . . ."[84] Given the fact that the final order appealed from in *Viking Pump* directed both indemnity and defense costs to be allocated on an all sums basis, it is not surprising that the first question certified by the Delaware Supreme Court to the New York Court of Appeals simply addressed "the proper method of allocation" and did not distinguish between the allocation of defense costs and the allocation of indemnity costs.

Furthermore, the insurers never argued to the New York Court of Appeals that defense costs should be allocated on a pro rata basis even if indemnity were to be allocated on an all sums basis. Rather, the parties appeared to be in agreement that if it were determined that indemnity must be allocated on an all sums basis, the allocation for defense costs would likewise be done on an all sums basis. While the insurers noted that the insureds had argued in the Delaware proceedings "that if indemnity costs were subject to joint and several allocation, then defense costs *also* should be allocated jointly and severally," they did not contest this argument.[85] Rather, they merely asserted that the insureds should not be permitted to make a new argument "that *even if* indemnity costs are allocated pro rata, defense costs should be allocated *differently*, on a joint and several basis."[86] Of course, the New York Court of Appeals went on to find that the Delaware courts had properly held that the language of the non-cumulation provisions required that the insureds' losses be allocated on an all sums basis, so the Court of Appeals did not need to reach the insureds' argument in the alternative. In sum, neither the parties nor the Delaware courts gave the New York Court of Appeals any reason to separately address defense costs in its decision.

Based on the foregoing, it would appear reasonable to conclude that if the New York Court of Appeals had wished to repudiate the Delaware Superior Court's final order—effectively forcing the Delaware Supreme Court to order the parties to stop allocating defense costs on an all sums basis and start allocating them on a pro rata basis—the Court of Appeals would have announced its intention to do so and likely would have provided an explanation of some sort. In the absence of such a repudiation, the Delaware Supreme Court did not countermand the Superior Court's order requiring the all sums allocation of defense costs.[87]

84. *Viking Pump*, No. 10C-06 141, ¶ 8; *see also id.* ¶ 22.

85. Sur-Reply Brief for Respondents at 10-11, *Viking Pump*, 52 N.E.3d 1144 (N.Y. 2016) (CTQ-2015-00003) (available at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx).

86. *Id.* at 11.

87. *In re* Viking Pump, Inc. & Warren Pumps, LLC Insurance Appeals, 148 A.3d 633 (Del. 2016).

Second, the language of the non-cumulation provisions supports the conclusion that where such provisions mandate the allocation of indemnity on an all sums basis, defense costs must also be allocated on an all sums basis. The non-cumulation clauses discussed herein do not contain any language that suggests—much less that states unambiguously—that such clauses apply only to indemnity and exclude defense costs. Moreover, many prior insurance and non-cumulation clauses explicitly use the term "loss," which would appear to unambiguously include defense costs. Indeed, the term "loss" is commonly understood to be the total amount incurred by the insured and owed by the insurer under a policy for an occurrence covered by that policy, including defense costs if covered by such policy.[88] Furthermore, when an excess policy requires an insurer to pay defense costs, it often does so by defining "Ultimate Net Loss" to include "expenses for . . . litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder," i.e., defense costs.[89] The authors are not aware of any case in which an insurer has argued that non-cumulation clauses apply only to indemnity payments. This is not surprising since, if that were true, it would mean that such clauses would not reduce policy limits to account for defense costs paid under earlier policies insuring defense costs within policy limits for the same loss or occurrence.

Third, the conclusion that defense costs should be allocated on an all sums basis when indemnity is being allocated according to all sums is further supported by the fact that where an insurer has a duty to pay defense costs, such a duty is either broader than or part of its duty to indemnify. As discussed above, the New York Court of Appeals has held that where a policy imposes a duty to defend on an insurer, a court may order that the insurer to pay 100 percent of defense costs—subject to that insurer's right to seek contribution from other insurers—even in the absence of non-cumulation language.[90] In light of this precedent, it seems implausible that the New York Court of Appeals, had it had occasion to directly address the issue, would have held in *Viking Pump* that where a policy both

88. *See, e.g.*, Stephen Michael Sheppard, *Insurance Loss (Loss Insured)*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012) ("An insurance loss is a loss suffered by policy-holder . . . that is within the scope of the coverage of the insurance policy. In other words, an insurance loss is a loss that an insurer must cover, at least to the lesser amount of the value of the loss or the value of the extent of the policy limit.").

89. *See, e.g.*, N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am., Inc., 599 F.3d 102, 126–27 (2d Cir. 2010) (excess policy defining Ultimate Net Loss to include "expenses for . . . litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder" deemed to "cover legal expenses that are not covered by the primary policy").

90. *Rapid-American Corp.* and its progeny did not involve—or at least did not address—policies containing or incorporating non-cumulation clauses.

contains a non-cumulation provision and imposes on the insurer a duty to defend, defense costs must be allocated on a pro rata basis. With respect to excess policies that do not impose a duty to defend but merely require the insurer to reimburse defense costs incurred by the insured (through the Ultimate Net Loss definition or some other provision), that latter duty is inarguably part and parcel of the insurer's duty to indemnify.[91] Accordingly, there appears to be no principled reason to distinguish between amounts paid in connection with judgments or settlements and defense costs for purposes of interpreting or enforcing non-cumulation provisions.

Fourth and finally, apart from *Syngenta*, the authors are not aware of a single decision from any jurisdiction in which a court has held that indemnity costs must be allocated on an all sums basis while defense costs must be allocated on a pro rata basis. On the other hand, numerous courts have held that where policy language requires the all sums allocation of indemnity costs, it also requires the all sums allocation of defense costs.[92] While none of these decisions hinged on the specific non-cumulation language that was so critical in *Viking Pump*, one would think that had the New York Court of Appeals intended to make New York the first and only jurisdiction in the United States to allow for the pro rata allocation of defense costs even where indemnity costs are being allocated on an all sums basis,

91. *See, e.g.*, Stonewall Ins. Co. v. Nat'l Gypsum Co., 1992 WL 296435, at *2 (S.D.N.Y. Oct. 6, 1992) (explaining that where insurers' policies defined "Ultimate Net Loss" to include defense costs, their "obligation to reimburse for defense costs is co-extensive with their indemnification obligation" and that "[w]hen coverage has been established, either through litigation or settlement, the obligation to pay defense costs, as part of indemnification obligations, kicks in"), *aff'd*, 73 F.3d 1178 (2d Cir. 1995); Dresser-Rand Co. v. Ingersoll Rand Co., 2015 WL 4254033, at *9 n.8 (S.D.N.Y. July 14, 2015) (noting that "indemnification and defense [reimbursement] obligations are co-extensive"); Allstate Ins. Co. v. Am. Home Prods. Corp., 2009 WL 890078, at *8 (S.D.N.Y. Mar. 31, 2009) (referring to "duty to indemnify for defense costs").

92. *See, e.g.*, Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1050 (D.C. Cir. 1981) ("Because we hold that each insurer is fully liable to Keene for indemnification, it follows that each is fully liable for defense costs."); Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613, 627 (Wis. 2009) ("In addition to our conclusion that a pro rata approach does not apply to allocating damages here, we also conclude that there can be no pro rata approach to the duty to defend."); Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150, 165 (Ill. 1987) ("Having rejected the premise underlying the *pro rata* allocation approach . . . , we conclude that the appellate court did not err insofar as it declined to order the *pro rata* allocation of defense and indemnity obligations among the triggered policies."); Emhart Indus., Inc. v. Century Indem. Co., 559 F.3d 57, 70–74 (1st Cir. 2009) (finding that under Rhode Island law, defense costs are to be allocated on an all sums basis); *cf.* Pa. Gen. Ins. Co. v. Park-Ohio Indus., 930 N.E.2d 800, 805 (Ohio 2010) (explaining that under the all sums approach, an insured may select an insurer "from which it is able to obtain a defense to the action and full coverage for any eventual judgment" and the "targeted insurer is then able to file a later action against any other insurers . . . to obtain contribution"); Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co., 996 A.2d 1254, 1259 (Del. 2010) ("Under the all sums approach, DuPont may choose a single tower of coverage, applicable to a single year, from which to seek indemnity and defense costs.").

it presumably would have expressly announced its intention to bring about such a drastic result and provided the basis for such a holding.

E. *Notwithstanding the Presence of Non-Cumulation Language, May an Insured Allocate Its Losses into More Than One Policy Period?*

Given that *Viking Pump* reinforced the unambiguousness and enforceability of non-cumulation clauses designed to prevent the "stacking" of limits from successive policy periods, it might seem obvious that where an insured's successive policies have non-cumulation (i.e., anti-stacking) language, it cannot allocate its losses to—and thereby access the limits of—policies in multiple years. This will not necessarily be the case, however. Rather, when and how an insured can allocate its losses to multiple policy periods in the context of an all sums allocation may depend on whether the underlying claims are deemed to constitute one occurrence or multiple occurrences. For example, in a case involving numerous underlying claims deemed to constitute separate occurrences under New York law, a court may find that non-cumulation provisions only apply to prevent the stacking of limits as to each occurrence—rather than the insured's loss as a whole—thus permitting the insured to batch its claims into groups and allocate them into different policy periods. In that scenario, the non-cumulation clauses still would be enforceable to prevent stacking as to each separate occurrence.

When determining whether a set of claims is a single occurrence or multiple occurrences for insurance coverage purposes, New York courts use the "unfortunate event" test.[93] That test focuses on the events for which the insured's liability has been imposed, "not a point further back in the causal chain."[94] A court applying New York law must consider "whether there is a close temporal and spatial relationship between [multiple] incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors."[95] Where multiple incidents do not share a "close temporal and spatial relationship" or where there exist "intervening agents or factors" in the "causal continuum," then a court will decline to deem such incidents "a single unfortunate event—a single occurrence."[96]

In *Appalachian*, more than 400,000 claimants sued General Electric Company (GE) for personal injury arising out of exposure to asbestos occurring over decades at 22,000 work sites throughout the nation where

93. Appalachian Ins. Co. v. Gen. Elec. Co., 863 N.E.2d 994, 997 (N.Y. 2007); Arthur A. Johnson Corp. v. Indem. Ins. Co. of N. Am., 164 N.E.2d 704 (N.Y. 1959).
94. *Appalachian*, 863 N.E.2d at 997.
95. *Id.* at 999.
96. *Id.* at 999–1001.

GE's asbestos-insulated turbines were located.[97] The policies defined an occurrence as "an accident, event, happening or continuous or repeated exposure to conditions which unintentionally results in injury or damage during the policy period."[98] Applying the "unfortunate event" test, the New York Court of Appeals concluded that "the asbestos exposure claims GE seeks to join as one occurrence (per policy period) represent multiple occurrences."[99] It did so based on the lack of any spatial or temporal relationship among the numerous exposure incidents, a factor that controlled "[e]ven if we were to assume that the [causal] continuum element was met."[100] The Court of Appeals distinguished the claims before it, which arose from numerous claimants' exposures to asbestos at different locations and times, from other situations in which multiple injuries could be considered one occurrence, such as a traffic accident in which multiple automobiles collided seconds apart or a mass tort situation in which an explosion or release of a toxic substance resulted in numerous injuries closely linked in time and space.[101]

Subsequently, in *International Flavors & Fragrances, Inc. v. Royal Insurance Co. of America*,[102] where the policies defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," the New York Appellate Division applied the "unfortunate event" test and held that numerous claims arising from factory workers' exposures to diacetyl, a butter flavoring, constituted multiple occurrences.[103] Consistent with the holdings in *Appalachian* and *IFF*, the Delaware Chancery Court, interpreting similar policy language, held in *Viking Pump* that each asbestos claimant's injury constituted a separate occurrence under New York law.[104]

At least two policyholders have recently argued that because the claims brought against them constituted multiple occurrences, the non-cumulation provisions in their policies could not be used to preclude them from accessing different policy periods and limits for separate claims or groups of claims. In each of these two cases, the court appeared to agree that the insured's ability to allocate its losses into multiple towers turned on whether the underlying claims constituted separate occurrences.

In *Liberty Mutual Insurance Co. v. Fairbanks Co.*,[105] which involved numerous asbestos claims, the insured, Fairbanks, argued that "the reduc-

97. *Id.* at 995–96.
98. *Id.* at 996.
99. *Id.* at 1000.
100. *Id.* at 1001.
101. *Id.*
102. 46 A.D.3d 224 (N.Y. App. Div. 2007) (*IFF*).
103. *Id.* at 227.
104. *Viking Pump* Phase 2 Opinion, 2 A.3d at 110–11.
105. 2016 WL 4203543 (S.D.N.Y. Aug. 8, 2016).

tion in limits under the [non-cumulation] clauses applies only in a single occurrence scenario."[106] Liberty Mutual, on the other hand, argued "that the non-cumulation clauses should limit the ability of Fairbanks to recover under multiple Liberty umbrella policies."[107] The court concluded that the number of occurrences was a threshold issue, the resolution of which would dictate whether Fairbanks could access policies in different policy periods, but one that could not be decided based on the record before it.[108] In rejecting Liberty Mutual's argument that the number of occurrences was irrelevant, the court noted that the cases cited by the New York Court of Appeals in *Viking Pump* did not support Liberty Mutual's interpretation of the non-cumulation clauses in its policies because, in each case, the Court of Appeals had concluded that there was only one loss or occurrence.[109] Thus, the court noted, these "cases show that ascertaining the number of occurrences or losses is necessary before deciding how a non-cumulation clause operates."[110]

Similar arguments were made and a similar outcome was reached in *Syngenta*. In that case, which involved numerous claims of water contamination in multiple states, the insured asserted that "the non-cumulation clauses do not preclude it from accessing multiple policy periods . . . because the underlying claims constitute multiple occurrences under New York law."[111] After holding that it could not determine the number of occurrences "on the record before it, and the issue will be resolved at trial," the court declared: "In the event that there is one occurrence, and in order to ensure that the dreaded stacking does not occur, if Syngenta is successful at trial, it may choose its preferable single tower."[112] The obvious inference to be drawn from this statement was that Syngenta would be able to access multiple towers in the event of a determination that the underlying claims constituted multiple occurrences.

Unlike *Fairbanks*, which addressed non-cumulation provisions that used the word "occurrence," *Syngenta* involved clauses using the word "loss." Although insureds with policies containing the latter type of clause can point out that courts have interchangeably used the terms "occurrence" and "loss" when discussing the intended purpose of non-cumulation clauses,[113] and

106. Reply Brief for Plaintiff at 2, *Fairbanks*, 2016 WL 4203543 (Nos. 13 Civ. 3755, 15 Civ. 01141), 2016 WL 7840223.

107. *Fairbanks*, 2016 WL 4203543, at *2.

108. *Id.* at *4–5.

109. *Id.* at *4.

110. *Id.*

111. *Syngenta*, No. UNN-L-3230-08, at 12.

112. *Id.* at 29.

113. *See, e.g.*, *Viking Pump*, 52 N.E.3d at 1154 (noting that a non-cumulation clause presupposes "that two policies may be called upon to indemnify the insured for the same loss or occurrence").

that insurers have traditionally taken the position that the non-cumulation clause and the first paragraph of the non-cumulation and prior insurance clause operate in the same way,[114] insurers might have a stronger argument with respect to clauses referring to "loss." Indeed, one court, applying California law to a non-cumulation clause containing the phrase "any loss covered hereunder" found that such language "should be afforded a broad meaning and is not applicable only upon a single occurrence."[115] Accordingly, the court rejected the insured's argument that the clause was "not even relevant because it applies only in the context of damages for a single occurrence."[116] This conclusion, however, appears to be in conflict with the Delaware Superior Court's holding in *Viking Pump* that, under New York law, the "Liberty 'Non-Cumulation of Liability' provision, as well as the 'Prior Insurance and Non-Cumulation of Liability' provision in certain Excess Policies, reduce only the policies' 'per occurrence' limits available to pay the same 'occurrence' (*i.e.*, asbestos claim)."[117]

F. *Can Non-Cumulation Clauses Be Used to Reduce Only Per-Occurrence Limits or Can They Also Be Used to Reduce Aggregate Limits?*

Intertwined with the issue discussed in the preceding section is the question of whether non-cumulation clauses may be used to reduce aggregate limits or may be used only to reduce per-occurrence limits. Insurers have argued that non-cumulation clauses apply to both kinds of limits. In *Fairbanks*, for instance, Liberty Mutual argued that payments it had made to the insured under its 1974 policy should be used to reduce both the per-occurrence and aggregate limits of its 1975–1981 policies.[118] The court did not reach this issue.

In *Viking Pump*, however, the Delaware Superior Court did address and decide this issue, rejecting the insurers' argument that "[u]nder New York law, a claim that triggers [prior insurance and non-cumulation clauses] reduces *both* the excess policies' per-occurrence and aggregate limits for that claim as well as all subsequent claims."[119] The court held:

114. *See, e.g.*, Sur-Reply Brief for Respondents at 9, *Viking Pump*, 52 N.E.3d 1144 (CTQ-2015-00003) ("The first paragraph—the 'Prior Insurance' provision—operates like the Non-Cumulation clause of the other policies in all respects relevant here.") (available at https://www.nycourts.gov/ctapps/courtpass/Public_search.aspx).

115. New England Reins. Corp. v. Ferguson Enters., Inc., 208 F. Supp. 3d 431, 436 (D. Conn. 2016).

116. *Id.*

117. *Viking Pump*, No. 10C-06 141, ¶ 25. As noted above, the two-paragraph Prior Insurance and Non-Cumulation of Liability provisions at issue in *Viking Pump* used the word "loss" rather than "occurrence."

118. *Fairbanks*, 2016 WL 4203543, at *2.

119. *Viking Pump*, 2013 WL 7098824, at *16 (alterations in original).

> Reducing the per-occurrence and aggregate limits based upon the policies' non-cumulation and prior insurance clauses breaks the law articulated in *Viking II*.[120]
>
> Accordingly, as *Viking II* explains, the non-cumulation and prior insurance clauses at issue reduce only the per-occurrence limits.[121]

Subsequently, as noted above, the Superior Court made clear that this ruling applied to both types of non-cumulation clauses at issue, stating that the "Liberty 'Non-Cumulation of Liability' provision, as well as the 'Prior Insurance and Non-Cumulation of Liability' provision in certain Excess Policies, reduce only the policies' 'per occurrence' limits available to pay the same 'occurrence' (*i.e.*, asbestos claim)."[122]

G. *Can a Policy's Limits Be Reduced by Payments Made Under Any Prior Policies, or Only Under Policies Issued by the Same Insurer and/or at the Same Level of Coverage?*

Another question that has been revisited in the wake of *Viking Pump* is whether a non-cumulation clause can be used to reduce a policy's limits to reflect payments made under *any* policy previously issued to the insured, or whether such a reduction may only reflect payments made under earlier policies issued by that same insurer and/or payments made under earlier policies at the same layer of coverage.

Whether an insurer's limits can be reduced to account for payments made by other insurers will likely turn on whether the insurer's policies have a non-cumulation clause like the one contained in the umbrella policies at issue in *Viking Pump* or the type of prior insurance and non-cumulation provision commonly referred to as Condition C. With respect to the former, because it is expressly limited to "each payment made by the company,"[123] it would appear clear that the clause does not reduce an insurer's policy limits to reflect payments made by any other insurer.

On the other hand, over the course of two decisions in *Olin*, the Second Circuit has held that the Condition C provision, which refers more broadly to "any other excess Policy," can reduce an insurer's liability to account for payments made under a prior insurance policy, even if the prior policy was issued by a different insurer,[124] but only if the prior policy was at the same

120. "*Viking II*" was the Delaware Chancery Court's October 14, 2009, *Viking Pump* Phase 2 Opinion. *See* note 16. As noted above, the Chancery Court explained in that opinion that the non-cumulation clause was designed to "prevent an insured from submitting claims under several different policies so that it can evade the per occurrence limits in its insurance policies." *Viking Pump* Phase 2 Opinion, 2 A.3d at 122.

121. *Viking Pump*, 2013 WL 7098824, at *17.

122. *Viking Pump*, No. 10C-06 141, ¶ 25.

123. *See, e.g.*, *Fairbanks*, 2016 WL 4203543, at *3.

124. *Olin IV*, 864 F.3d at 148.

level of coverage.[125] In *Olin III*, the Second Circuit reasoned that "the prior insurance provision does not apply to prior insurance policies at a lower level of excess coverage" because "[a]n excess insurance policy . . . is not triggered unless the coverage limits of lower-level policies have first been exhausted."[126] However, the Second Circuit did not address the question of "how a prior insurance provision applies when the prior policy was underwritten by a different insurer" in *Olin III* "[b]ecause both of the policies at issue in *Olin III* were issued by the same insurer."[127] In addressing that question in *Olin IV*, the Second Circuit pointed out that "the language of the prior insurance provision, on its face, applies to 'any other excess policy,' and is not limited to prior policies issued by the same insurer" and that "there is no language in Condition C that might imply that the prior insurance provision is limited in application to any other excess policy issued only by the *same* provider."[128] Reasoning that "[t]his construction is consistent . . . with the design of noncumulation clauses,"[129] the court held that Condition C "is designed to apply whenever both earlier and later polices cover the same loss . . . unaffected by the identity of the insurer."[130]

Left unanswered by the Second Circuit was the question of whether a primary or umbrella policy's non-cumulation clause referring to "each payment made by the company" can be used to reduce an insurer's policy limits to account for payments made by the insurer under one or more earlier policies issued at a different layer, although *Olin III* could be read to suggest that such a clause would not apply to reduce the limits of an insurer's umbrella policy or policies based on payments made by the insurer under an earlier primary policy.

H. *How Are Reductions to Policy Limits to Be Calculated When Prior Settlement Agreements Do Not Specify the Amount of the Settlement Relating to the Loss or Occurrence at Issue?*

Assuming that a court has found that a policy's limits may be reduced to reflect payments made under one or more earlier policies for a loss or occurrence, a determination will need to be made as to the amount of the reduction. This calculation will be difficult in complex cases where settle-

125. *See* Olin Corp. v. Am. Home Assurance Co., 704 F.3d 89, 104 (2d Cir. 2012) (*Olin III*).
126. *Id.*
127. *Olin IV*, 864 F.3d at 139–40 (citing *Olin III*, 704 F.3d at 105 n.21).
128. *Olin IV*, 864 F.3d at 148.
129. *Id.*
130. *Id.*; *but see Ferguson Enters.*, 208 F. Supp. 3d at 437 (holding, under California law, that non-cumulation clause was "enforceable as ensuring coverage if the phrase 'any other excess policy' is construed to include only other prior excess policies issued by the same insurer").

ment agreements involving one or more prior insurance policies relate to multiple losses or occurrences, some of which might not be covered by the later-in-time policy.

The Second Circuit faced this very situation in *Olin IV*, explaining:

> While we agree with OneBeacon that its limits of liability should be reduced by amounts paid to settle claims with respect to the five manufacturing sites at issue here, there is no basis in the record from which we might calculate that amount. Indeed, if, as Olin suggests, Olin entered into a global settlement with the London Market Insurers releasing claims under those policies as to all sites potentially at issue—and not just those that were the subject of adjudication at trial in this matter—there is no easy way to determine the amount of this settlement that is properly associated with claims arising from the five manufacturing sites that are the focus of this appeal.[131]

"In light of this deficiency in the record," the Second Circuit found that remand was "appropriate in order for the district court to be able to enhance the record and issue a decision in the first instance as to the effect of Olin's prior global settlement with the London Market Insurers."[132] Explaining that "it would generally be the burden of the insurer to prove its entitlement under this contractual provision," the Second Circuit held that "[i]f, after, appropriate discovery, OneBeacon is able to do so, then the limits of liability on the policies it issued to Olin should be reduced accordingly."[133]

On remand, the district court adopted a multi-step approach proposed by Olin, explaining that it found this proposal to be "the best method for approximating how much the settled insurers paid in exchange for releases from any potential indemnification claims relating to the Five Sites."[134] Using this approach, the court held that Olin's recovery should be reduced by approximately $2.7 million.[135] In reaching its decision, the court rejected the insurer's argument that Olin's recovery should be reduced by the pro rata shares of the settled insurers, finding that this approach was "contrary to *Olin IV*," because in that decision "the Second Circuit directed this Court to apply what is known as a *pro tanto* setoff, which permits non-settling insurers to receive, at most, a credit in the amount that the policyholder actually obtained from the settled insurers for the pertinent claims."[136]

Because non-cumulation clauses on their face only permit the reduction of limits to reflect payments made under prior insurance policies, an-

131. *Olin IV*, 864 F.3d at 150.
132. *Id.* at 151.
133. *Id.*
134. *Olin Corp.*, 2018 WL 1901634, at *12.
135. *Id.* at *13.
136. *Id.* at *9.

other potential complication will arise where an insurer seeks to reduce its policy limits to reflect payments under a settlement agreement that resolved long-tail claims under policies issued both prior to and after the issuance of the insurer's policy. Even assuming there is no controversy regarding the scope of the release, it will be difficult to calculate the reduction amount unless the settlement agreement apportions the settlement payments among the various policies. Following *Olin IV*, courts in the Second Circuit applying New York law are likely to place on insurers the burden of establishing the reduction amount in such circumstances.

I. *When and How Are Settlement Credits to Be Applied in an All Sums Allocation?*

In addition to seeking the reduction of policy limits through non-cumulation clauses, insurers facing all sums allocation may take a second bite at the apple by arguing that an insured's total recovery should be reduced by the pro rata share of any insurer that settled with the insured. This argument was made unsuccessfully in the *Syngenta* action.

In that case, certain non-settling insurers asserted that they were "entitled to a credit from Syngenta for amounts allocable to Syngenta's settlements and claims-made insurers"[137] and, citing the Second Circuit's 2001 opinion in *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*,[138] further asserted that such credits "should be applied on a *pro rata* basis."[139] Syngenta argued, on the other hand, that "settlement credits are not permitted unless and until the insurers can demonstrate that Syngenta will otherwise receive a windfall"; that "[a]ny settlement credit or setoff to which the insurers might prove they are entitled must be limited to a credit or setoff for amounts received with respect to the claims at issue in this litigation"; and that, to prevent a windfall, Syngenta's recovery could be reduced on a *pro tanto* (i.e., dollar-for-dollar) basis rather than a pro rata basis "because (1) under *Viking Pump*, the allocation of loss in this case will be all sums, not *pro rata*, and (2) the weight of the authority rejects the *pro rata* application of settlement credits in favor of a *pro tanto* application."[140]

The court largely sided with Syngenta, holding:

> The Court agrees with the Moving Insurers that some of the payments to date are potential credits. The ultimate determination, however, cannot be made until there is a favorable liability verdict and a tower selection. . . .

137. *Syngenta*, No. UNN-L-3230-08, at 33.
138. 241 F.3d 154 (2d Cir. 2001).
139. *Syngenta*, No. UNN-L-3230-08, at 36.
140. *Id.* at 14–15.

> The Court previously ruled that Syngenta need not disclose its settlement information. That information shall be revealed at the conclusion of the trial, at which time the Special [Allocation] Master will ensure that there is no windfall. The Court also recognizes Syngenta's argument that several of the prior settlements included releases broader than a release relating solely to the underlying claim. This, too, is something that the Special [Allocation] Master will take into consideration in determining what constitutes a credit and what does not. . . .[141]
>
> [A]s correctly argued by Syngenta, *Squibb* applied the *pro rata* allocation method to which all parties agreed and predated *Viking Pump*. The question of how to apply credits when the Court is applying an all sums allocation is another question that was unanswered by *Viking Pump*. This Court now considers what is fair and appropriate in such a situation. With no controlling case law cited by the parties, the Court concludes that the best way to apply possible credits is *pro tanto*, based on the actual amounts of the insured's settlement recoveries within the tower selected. Again, the Special Allocation Master will ensure that there is no "windfall" to Syngenta.[142]

The court did not place the burden of establishing a potential windfall (or absence thereof) on either side, although it "noted that Syngenta rests its opposition argument on the fact that the case law supports a finding that the Insurers are not entitled to a credit if and until they can prove Syngenta has received a windfall."[143]

The notion that, in an all sums allocation, all settlement credits should be applied on a *pro tanto* basis is further supported by the most recent district court decision in *Olin Corp.*, in which, as noted above, the court read *Olin IV* as having "directed [it] to apply what is known as a *pro tanto* setoff, which permits non-settling insurers to receive, at most, a credit in the amount that the policyholder actually obtained from the settled insurers for the pertinent claims."[144]

J. *Is the Unavailability Exception Still Available?*

Because for the previous fourteen years courts applying New York law had reflexively applied pro rata allocation in long-tail cases, the New York Court of Appeals' decision in *Viking Pump* was enthusiastically received by the policyholder bar. However, almost immediately, many observers recognized that the court's explicit reliance on the principle that policy language controls the question of allocation, while beneficial to

141. *Id.* at 33.
142. *Id.* at 36–37.
143. *Id.* at 33. The court noted that "[i]n *United Technologies Corp. v. American Home Assurance Co.*, the court concluded '[] [the insurer] appropriately bears the burden of establishing the existence of a double recovery.'" *Id.* (quoting *United Techs.*, 237 F. Supp. 2d 168, 173 (D. Conn. 2001) (internal citation omitted)).
144. *Olin Corp.*, 2018 WL 1901634, at *9 (citing *Olin IV*, 864 F.3d at 149–51).

the insureds in *Viking Pump*, could prove harmful to insureds in other circumstances. As demonstrated by *Keyspan Gas East Corp. v. Munich Reinsurance America, Inc.*,[145] *Viking Pump* appears to have placed insureds whose policies lack language compelling all sums in a worse position than they were prior to *Viking Pump* with respect to one allocation issue often critical in long-tail claims: whether proration for periods where insurance was not available in the marketplace—such as insurance for asbestos or environmental liabilities—should be borne by the insured as opposed to insurers already on the risk.

The *Keyspan* case presented an appeal of a trial court's 2014 determination that the insured's environmental-related losses would only be allocated to the period of time during which coverage for such liabilities was available.[146] When the trial court issued its decision, no New York appellate court had weighed in on this question, but the Second Circuit, applying New York law, had twice "determined that an exception to proration to the insured should be made in situations where insurance is not available."[147]

Nevertheless, in 2016, the Appellate Division reversed, explaining that the New York Court of Appeals' decisions in *Con Ed* and *Viking Pump* "make it abundantly clear that the predominant consideration in the Court's analysis of these issues is the language of the particular insurance policy,"[148] noting that the policies at issue were "substantially similar to those in *Con. Edison*" and did not "contain the anti-stacking provisions that were at issue in *Viking Pump*," and concluding that "the policy language supports a conclusion that the unavailability exception to proration to the insured does not apply."[149]

In March 2018, the Court of Appeals affirmed, holding that "the unavailability rule is inconsistent with the contract language that provides the foundation for the pro rata approach—namely, the 'during the policy period' limitation—and that to allocate risk to the insurer for years outside the policy period would be to ignore the very premise underlying pro rata allocation."[150] The court explained that imposing liability "on an insurer who issued insurance coverage for only a limited number of years" would "eviscerat[e] much

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145. — N.E.3d —, 2018 WL 1472635 (N.Y. Mar. 27, 2018).

146. Keyspan Gas E. Corp. v. Munich Reins. Am., Inc, 46 Misc. 3d 395, 398–99 (N.Y. Sup. Ct. 2014).

147. Keyspan Gas E. Corp. v. Munich Reins. Am., Inc., 143 A.D.3d 86, 93 (N.Y. App. Div. 2016) (citing Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178 (2d Cir. 1995), and Olin Corp. v. Ins. Co. of N. Am., 221 F.3d 307 (2d Cir. 2000) (*Olin I*)). The Seventh Circuit, applying New York law, had reached the opposite conclusion. *See* Sybron Transition Corp. v. Sec. Ins. of Hartford, 258 F.3d 595 (7th Cir. 2001).

148. *Keyspan*, 143 A.D.3d at 90.

149. *Id.* at 95.

150. *Keyspan*, 2018 WL 1472635, at *4.

of the distinction between pro rata and all sums."[151] The court further explained that "[i]n the context of continuous harms, where the contamination attributable to each policy period cannot be proven and we draw from the contract language to distribute the harm pro rata across the policy periods, it would be incongruous to include harm attributable to years of non-coverage within the policy periods."[152]

Although the Court of Appeals appeared to broadly reject the unavailability rule, insureds may point out that it did not explicitly discuss defense costs. Furthermore, insureds with losses relating to latent diseases (e.g., losses arising from asbestos exposure) may attempt to distinguish *Keyspan* by arguing that while the Court of Appeals did not expressly limit its decision to the facts of the case, the ruling is premised at least in part on the nature of continuous environmental contamination claims.

With respect to defense costs, the district court in *Olin*,[153] after recognizing that the New York Appellate Division's holding in *Keyspan* suggested that "New York permits allocation of costs relating to the *duty to indemnify* between the insurer and insured where the injuries occurred during covered and uncovered time periods,"[154] noted that "New York courts have not, however, opined on whether costs relating to the *duty to defend* may be allocated between an insured and insurer" in such circumstances.[155] The court explained that "assuming, arguendo, that New York law does permit such allotment, costs nonetheless may not be allocated if there is 'no reasonable means of prorating the costs between covered and non-covered items.'"[156] While *Keyspan* could be read as rejecting this notion, the decision related only to excess policies and thus did not implicate the duty to defend.

As noted above, *Keyspan* involved environmental liabilities. An insured whose coverage claims are for asbestos liabilities but whose policies lack language supporting all sums could argue that although it may be logical to make an insured responsible for the costs of remediating pollution that continued to spread during the non-insured period after the government requested the insured begin remediation (as in *Keyspan*), it does not make sense to have an insured be responsible for losses attributable to the alleged progression of asbestos-related injuries occurring after the claimants' exposure had ended—particularly if the exposure period ended upon the insured's removal of asbestos from its premises. Indeed, when applied in conjunction with the injury-in-fact trigger approach, such a

151. *Id.*
152. *Id.*
153. Olin Corp. v. Ins. Co. of N. Am., 218 F. Supp. 3d 212 (S.D.N.Y. 2016).
154. *Id.* at 218 (citing *Keyspan*, 143 A.D.3d at 96).
155. *Id.* (citing *Rapid-American Corp.*, 609 N.E.2d at 514, and Olin Corp. v. Century Indem. Co., 522 F. App'x 78, 80 (2d Cir. 2013)).
156. *Id.* (quoting *Olin*, 522 F. App'x at 80).

rule could have dire consequences for policyholders with asbestos-related liabilities, since asbestos-related diseases may not manifest in an individual for decades after his or her last exposure. Of course, an argument based on the distinction between asbestos claims and environmental claims would largely be premised on equitable arguments rather than on any specific policy language, which the Court of Appeals said was controlling in *Keyspan*.[157]

Alternatively, depending on the facts and circumstances involved, policyholders with claims for asbestos liabilities brought under policies lacking non-cumulation language or its equivalent may argue that the trigger period for a claimant should terminate upon the end of a claimant's exposure. Although some courts have noted that the New York Court of Appeals has "appeared to approve of injury-in-fact as a trigger for coverage,"[158] the Court of Appeals has never definitively held which trigger approach is to be used with respect to coverage claims arising from asbestos exposure. In *Viking Pump*, which involved asbestos claims, the Court of Appeals was "not asked to review the Delaware courts' rulings regarding which policies were triggered and upon what events such triggering occurred" and thus did "not pass on those issues" in its decision.[159]

V. WILL OTHER STATES' HIGHEST COURTS BE INFLUENCED BY *VIKING PUMP*?

According to the New York Court of Appeals, as of the time it issued its decision in *Viking Pump* no court had "satisfactorily reconcil[ed] non-cumulation clauses with pro rata allocation."[160] Thus, with the exception of the Second Circuit in *Olin III*, whose reasoning the New York Court of Appeals expressly declined to follow, no court had enforced a non-cumulation clause against an insured in the context of a pro rata allocation.[161] Rather, as the Court of Appeals explained,[162] courts addressing

157. *Keyspan*, 2018 WL 1472635, at *5.

158. Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau, 60 A.D.3d 128, 147 (N.Y. App. Div. 2008) (citing *Rapid-American Corp.*, 609 N.E.2d 506).

159. *Viking Pump*, 52 N.E.3d at 1149.

160. *Id.* 1156. The court explained that the Second Circuit had attempted in *Olin III* to "harmoniz[e] the non-cumulation and prior insurance provision containing the continuing coverage clause with pro rata allocation"—reading the provision to require the insurer to indemnify the insured for damages continuing after the termination of the policy—only because it believed itself to be foreclosed by New York law (and its own earlier decision in *Olin I*) from interpreting the non-cumulation clauses as imposing all sums allocation. *See id.* at 1155 (citing *Olin III*, 704 F.3d at 102).

161. As discussed below, approximately eleven months later, a district court applying Iowa law would do just that. *See* Pella Corp. v. Liberty Mut. Ins. Co., 244 F. Supp. 3d 931 (S.D. Iowa 2017).

162. *Viking Pump*, 52 N.E.3d at 1153.

policies with non-cumulation provisions have traditionally either held that all sums applied[163] or refused to enforce such clauses.[164] In addition, some courts that have found pro rata allocation applicable have expressly noted the absence of non-cumulation language from the policies at issue and distinguished other cases involving policies with non-cumulation provisions.[165]

163. *See*, *e.g.*, Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 759 N.W.2d 613, 626 (Wis. 2009) (noting that policy obligated insurer "to pay for injury that occurs 'partly before and partly within the policy period'"); Chi. Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, 797 N.E.2d 434, 441 (Mass. App. Ct. 2003) (noting that prior insurance and non-cumulation provision "would be superfluous had the drafter intended that damages would be allocated among insurers based on their respective time on the risk"); Dow Corning Corp. v. Cont'l Cas. Co., 1999 WL 33435067, at *7 (Mich. Ct. App. Oct. 12, 1999) (holding, on the basis of non-cumulation clause, that "the trial court properly concluded that defendants were liable for 'all sums' relating to each 'continuous exposure,' regardless of the fact that each exposure may have extended temporally outside of the policy period"); *cf*. Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 491–94 (Del. 2001) (noting that while its "holding is based on the 'all sums' provision," policies' non-cumulation clause further "undercuts the rationale for pro rata allocation because it provides continuing insurance for post-[policy period] damage arising out of a continuing occurrence"); Plantation Pipeline Co. v. Cont'l Cas. Co., 2008 WL 10884027, at *5–6 (N.D. Ga. July 9, 2008) (noting that "enforcement of a non-cumulation clause is not consistent with the continuous trigger/pro-rata allocation doctrines" and declining to impose, "in the absence of multiple insurers among which to apportion liability, . . . pro-rata allocation in a manner that renders the non-cumulation clause unenforceable").

164. *See*, *e.g.*, Spaulding Composites Co. v. Aetna Cas. & Sur. Co., 819 A.2d 410, 422 (N.J. 2003) ("[E]ven if the non-cumulation clause was not facially inapplicable, we would not enforce it because it would thwart the . . . pro-rata allocation modality. Once the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy."); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 670 N.E.2d 740, 750 (Ill. 1996) (holding that "trial court correctly concluded that a *pro rata*, time-on-the-risk allocation of damages should be applied" but refusing to enforce prior insurance and non-cumulation clauses because to apply such "clauses would give the insurers a double credit and would deprive the insured of the full value of its premium").

165. *See*, *e.g.*, *Con Ed*, 774 N.E.2d at 694 (stating that insureds' proffered authorities were "largely distinguishable, either because of different policy language or because of different choices by the insured regarding whether to self-insure," citing *Hercules* as an example); Cont'l Cas. Co. v. Indian Head Indus., Inc., 666 F. App'x 456, 465–66 (6th Cir. 2016) (finding pro rata allocation appropriate under Michigan law and distinguishing *Dow Corning* on the grounds that the policy in that case had "express coverage of injuries that continued after the end of the policy," while the language in the policy before it "limited coverage to injuries occurring during the policy period and precluded coverage of those after the policies ended"); Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co., 2017 WL 2495417, at *19–20 (Del. Super. Ct. June 8, 2017) (same); Decker Mfg. Corp. v. Travelers Indem. Co., 2015 WL 438229, at *14 (W.D. Mich. Feb. 3, 2015) (same); Bos. Gas Co. v. Century Indem. Co., 910 N.E.2d 290, 309 (Mass. 2009) (finding pro rata allocation appropriate under Massachusetts law and explaining that policies at issue "do not contain clauses that expressly provide for continuing coverage beyond the policy period," noting that courts in cases such as *Chicago Bridge* and *Hercules* "have recognized that such a provision is inconsistent with pro rata allocation because it expressly provides for coverage outside the policy period"); New England Insulation Co. v. Liberty Mut. Ins. Co., 988 N.E.2d 450, 455 n.13 (Mass. App. Ct. 2013) (same).

While the New York Court of Appeals was not the first highest state court to hold that a policy's non-cumulation language compels all sums allocation, its comprehensive explanation for its determination provided other courts with a roadmap by which they may reach the same conclusion. Whether the highest courts of other states—and courts trying to "predict" the law of such states—will follow the conclusions and/or reasoning of *Viking Pump* remains to be seen.

In a March 2017 decision, the court in *Pella*, predicting how the Iowa Supreme Court would rule, found that the non-cumulation provisions at issue were not incompatible with pro rata allocation. Rejecting the insured's argument that non-cumulation clauses similar to those at issue in *Viking Pump* compelled the allocation of indemnity on an all sums basis, the court held that while "application of both pro rata allocation and a non-cumulation provision in the same contract might make that policy unduly stingy . . . [,] if the contract is otherwise clear, this alone cannot push the policy back into the realm of ambiguity."[166] Curiously, the court discussed and declined to follow the reasoning of the Delaware Chancery Court's 2009 opinion in *Viking Pump*,[167] but did not mention—much less discuss—the New York Court of Appeals' 2016 decision despite its having been issued nearly eleven months earlier.[168]

VI. CONCLUSION

For as long as courts continue to face coverage claims arising from decades of environmental pollution and exposure to harmful substances, they will be required to address many of the issues discussed in this article. For those courts applying New York law, whether the policies at issue contain non-cumulation language or its equivalent will undoubtedly be outcome-determinative as to certain allocation matters. While *Viking Pump* made clear that such language will compel all sums allocation and vertical exhaustion, it left open a number of issues that courts applying New York law have

166. *Pella*, 244 F. Supp. 3d at 947.

167. *Id.* at 948–49 (holding that "[t]his Court declines to follow *Viking Pump*" and "does not interpret the Non-Cumulation Provisions to grant a right on the part of the insured to apply joint and several recovery to damages caused by occurrences that trigger multiple policies").

168. The court subsequently held that defense costs should be allocated on an all sums basis, even though the policies "explicitly disavow a duty to defend on the part" of the insurer, because the insured's interpretation of the policy provision relating to defense costs was "reasonable, and any ambiguity should be resolved in its favor." *Id.* at 949–50 (noting that the "duty to reimburse defense costs and the duty to defend are different but similar in result" and that the provision at issue contained "neutral language . . . , which neither categorically specifies joint and several coverage of defense costs nor includes a temporal limitation as the Policies do regarding indemnity coverage") (internal citations and quotation marks omitted).

only begun to address. As discussed herein, while many of the rulings on these issues so far have been decided in favor of insureds, *Viking Pump* also may cause some decidedly negative consequences for some policyholders—particularly for those seeking coverage for long-tail claims under policies without non-cumulation clauses or equivalent language. In any event, it will no doubt take many years before the book on *Viking Pump*'s legacy has been fully written.

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