In the matter of Viking Pump and Warren Pump, insurance appeals

Year: 2016
Court: New York Court of Appeals
Case Number: CTQ-2015-0003

Joined by co-amici the Asbestos PI Trust, ASARCO Asbestos Personal Injury Trust, Duro Dyne Corporation, John Crane Inc. and Alfa Laval Inc, UP urged the New York Court of Appeals to hold that comprehensive general liability insurance policies containing non-cumulation and prior insurance provisions must provide coverage in accordance with the "all sums" (joint and several liability) allocation method. The justification for this rule is simple: the insurance policies at issue, promise to "pay on behalf of the insured all sums … which the insured shall become legally obligated to pay … as damages, direct or consequential, because of: (a) personal injury … with respect to which this policy applies and caused by an occurrence. Thus, the insurance company shall pay for "all sums" arising out of an occurrence and should not, as they argue here and elsewhere, be allowed to allocate their liability on a "pro-rata" basis. The "all sums" rule serves the important public policy purposes of reducing litigation (among policyholders and multiple insurance carriers on the risk) and upholding a policyholder's reasonable expectations of coverage by not allowing the insurance company to invent exclusions and limitations or an interpretation of coverage not supported by the policy. UPdate – 5/3/16: In a huge win for policyholders, the New York Court of Appeals held as follows: "We reaffirm that, under New York law, the contract language of the applicable insurance policies controls each of these questions, and we answer the certified questions in accordance with the opinion herein, concluding that all sums allocation and vertical exhaustion apply based on the language in the policies before us…based on the policy language and the persuasive authority holding that pro rata allocation is inconsistent with non-cumulation/prior insurance provisions, we hold that all sums allocation is appropriate in policies containing such provisions." See decision below. From Law360: In Tuesday's decision, the high court emphasized that the Con Ed decision (283 A.D.2d 322, N.Y. App. Div. 2001) did not adopt a "blanket rule" favoring pro rata allocation. Instead, New York law requires courts to strictly enforce policies as written, it said. Anderson Kill PC managing shareholder Robert M. Horkovich, who

submitted an amicus brief in the case on behalf of the nonprofit United Policyholders, said that insurance carriers have long used the 2002 Con Ed decision (pro rata allocation for environmental contamination claims spanning multiple years and policies) as “a club to beat policyholders into submission” in coverage cases involving long-tail claims. “In many instances, insurance companies were affirmatively suing policyholders in New York under Con Ed, saying, ‘You have to divide the claim into 40 pieces, and you can never reach the excess layer,'” Horkovich said. With Tuesday’s opinion, though, policyholders no longer have to have their claims “sliced and diced” under a pro rata allocation scheme or exhaust many years of primary coverage to reach any excess coverage, according to Horkovich. See article below.

UP's brief was authored pro bono by Robert M. Horkovich, Esq. and Edward J. Stein, Esq. of Anderson KIll, P.C. Of counsel: Executive Director Amy Bach, Esq.