NY Allocation Ruling Speeds Policyholders' Road To Recovery

Law 360

The New York high court's Tuesday ruling that each excess insurance policy covering Viking Pump Inc. and Warren Pumps LLC can be held liable for an entire loss resulting from asbestos claims gives policyholders a faster, cost-efficient path to coverage for multiyear claims by allowing them to target carriers in a single year, experts say.
Ruling on certified questions from the Delaware Supreme Court in Viking Pump and Warren Pumps' insurance coverage dispute with a slew of excess insurance carriers, the New York Court of Appeals unanimously decided that the "all-sums" allocation method, under which each policy can be held liable for an entire loss, should apply in the case.
The state high court rejected the excess carriers' arguments for the "pro rata" allocation method, which spreads out liability proportionally among all triggered policies.

The unanimous decision in favor of all-sums allocation was based on the presence of "noncumulation" and "prior insurance" provisions in the policies at issue. A noncumulation clause provides that only a single policy limit is available for a loss covered under multiple policy periods, while a prior insurance provision reduces policy limits by the amount of coverage available to a policyholder under other, earlier insurance policies.

According to the state high court, noncumulation and prior insurance provisions are incompatible with a pro rata allocation scheme.

The New York high court's ruling will help policyholders seeking coverage for asbestos, environmental pollution and other so-called long-tail claims implicating multiple policy periods by allowing them to take the fight to insurers in one policy period, experts say.

"In all-sums, the policyholder can choose a single year, and fight with just one insurer or a small group of

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insurers in that policy year," said Pillsbury Winthrop Shaw Pittman LLP partner David Klein. "In a pro rata allocation, you may have 30 years of coverage and dozens of insurers to fight with. It is a much longer and more costly endeavor."

In May 2015, the Delaware Supreme Court — which is considering appeals in Viking Pump and Warren Pumps' long-running asbestos coverage dispute with more than a dozen excess insurers — sought the New York high court's help in determining the proper allocation and exhaustion methods under the Empire State's law.

Lower courts in Delaware had ruled that the excess policies mandated all-sums allocation and that the pump companies had to exhaust all of their primary and umbrella policies in every policy period implicated by the asbestos claims before being able to tap excess layers, in what is known as horizontal exhaustion.

A key issue in the case was whether the Court of Appeals' 2002 ruling in Consolidated Edison v. Allstate Insurance — in which the court adopted pro rata allocation for environmental contamination claims spanning multiple years and policies — clearly required a pro rata approach to allocating coverage for similar multiyear claims.

In Tuesday's decision, the high court emphasized that the Con Ed decision did not adopt a "blanket rule" favoring pro rata allocation. Instead, New York law requires courts to strictly enforce policies as written, it said.

The language of Viking Pump's and Warren Pumps' excess policies, with their noncumulation and prior insurance provisions, is substantially different from that at issue in Con Ed, and pro rata allocation is inconsistent with those provisions, the high court found.

Under a pro rata approach, no two policies would indemnify the same loss or occurrence, unless there are overlapping or concurrent policy provisions, the court said. A noncumulation clause, however, "negates that premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence," it said.

The court further determined that vertical, not horizontal, exhaustion is appropriate in this case. With vertical exhaustion, Viking Pump and Warren Pumps can reach excess coverage for certain years even if

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their primary policies for other years haven't been drained.

Both prongs of the high court's ruling will make it easier for policyholders whose policies include noncumulation or prior insurance provisions to pursue coverage for hefty long-term liabilities, according to experts.

"Under all-sums, policyholders can seek to recover all amounts owed from one insurer, which will make things much easier for them to recover for a particular loss," said Hunton & Williams LLP partner Syed Ahmad. "Vertical exhaustion provides additional pathways to recovery. Instead of requiring the policyholder to exhaust all primary coverage first, they can select particular policies and go up vertically."

By freeing policyholders of the need to battle many insurers simultaneously, all-sums allocation provides a number of strategic advantages, experts say. A policyholder can target policies within a single period that have high limits, and avoid periods in which insurers have become insolvent since issuing their policies.

"Policyholders will have an opportunity to view the matter strategically," Klein said. "If there are good limits available from solvent insurers whose policies have noncumulation clauses, policyholders will likely target that coverage."

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 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.

Even with the high court's policyholder-friendly holdings, attorneys who represent insurance companies

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said the decision has silver linings for insurers.
Insurer-side attorneys pointed out that the ruling did not disturb its Con Ed decision and placed a strong emphasis on the importance of policy language.

“Although the result in this case was not what the insurers sought and strong arguments support the insurers’ position, the court’s stated approach of placing primary reliance on policy language to resolve coverage disputes — rather than applying blanket rules — is an approach that often will accrue to the benefit of insurers,” said Hinshaw & Culbertson LLP partner Scott Seaman.

Furthermore, the court “made clear” that the pro rata method remains the preferred method of allocation for long-tail claims in the absence of specific policy language requiring a different result, Seaman said.

Laura Foggan, leader of Wiley Rein LLP’s insurance appellate group, said the decision indicates that there are still emerging, unresolved legal issues “at the intersection of allocation of loss and noncumulation clauses.”

“Here, a court that decidedly favors pro rata came up with a different result on these facts, but this suggests that there are still some unsettled areas where we probably will have to look to the law to develop more over time,” Foggan said.

–Editing by Katherine Rautenberg and Brian Baresch.

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