

COMPLICATIONS OF LONG-TAIL CLAIMS: EXCESS INSURERS’
ACCUMULATING EXPOSURE IN LIGHT OF *IN RE VIKING PUMP*

DAVID F. MASSULI*

TABLE OF CONTENTS

I. INTRODUCTION.....	468
II. BACKGROUND.....	469
III. BREAKING DOWN LONG-TAIL CLAIMS.....	471
A. <i>Triggers</i>	474
B. <i>Allocation</i>	476
1. Non-Cumulation Clauses.....	476
2. New York’s Departure from Pro Rata Allocation.....	478
C. <i>Exhaustion</i>	479
IV. POTENTIAL PROBLEMS DOWN THE ROAD.....	482
V. CONCLUSION.....	485

* David F. Massuli is a 2018 J.D. Candidate from Widener University Delaware Law School and an Articles Editor for Volume 43 of the Delaware Journal of Corporate Law. David is also an alumnus of the Legal Studies Program at Wilmington University. Thanks to the Board of the Delaware Journal of Corporate Law, Kevin Packer, Caneel Radinson-Blasucci, and Katelyn Tuoni, for their support and invaluable insight during the editorial process. Thank you to all of the Delaware Law School librarians for the help they provided me as I researched this topic. Thanks to my brothers, Michael and Paul, each of whom inspired me (in their own unique ways) to meet challenges with confidence. Thank you to my mother, Lynne, whose constant encouragement and unconditional optimism are attestations of her loving character that I strive to emulate. Very special thanks to my father, Frank, for our years of wonderful and spirited arguments that taught me to view the world with a healthy dose of skepticism and instilled the audacity in me to pursue a career in the law. Above all, I am incredibly grateful to my amazing wife and partner in everything, Stacey Byam. She has proven to possess an unending supply of patience with me as I chase my dreams and words cannot express what her support means to me.

I. INTRODUCTION

In *In re Viking Pump, Inc.*, the Delaware Supreme Court resolved a decade-long legal battle where two industrial pump manufacturers sought coverage under excess insurance policies inherited from the corporations' predecessor.¹ The manufacturers, Warren Pumps and Viking Pump, are the targets of thousands of asbestos-related injury suits.² At issue in the case was how to determine when the claimants' injuries triggered third-party liability coverage,³ apportionment of risk among numerous insurance carriers and policies (allocation),⁴ and the exhaustion method the policyholders would have to exercise in order to require triggered excess policies to respond.⁵ Claims which may apply to multiple policy periods are known as "long-tail" claims and commonly involve asbestos, environmental pollution, or other harmful exposures resulting in delayed illnesses.⁶ The case is important not only because of the substantial economic impact it will have on insurers, but also because it is indicative of the trend for courts to favor policyholders seeking coverage when insurers are placed on notice of long-tail claims.⁷

Here, the court partially overturned a 2013 decision from the Delaware Superior Court finding that "asbestos-related diseases result from gradual and continuous injurious processes."⁸ In the 2013 decision, a jury verdict in favor of the manufacturers' claim that the injury first occurs after "substantial exposure" to the harmful material was allowed to

¹ See *In re Viking Pump, Inc. (Viking Pump IX)*, 148 A.3d 633 (Del. 2016) (en banc); *In re Viking Pump, Inc. (Viking Pump VIII)*, 52 N.E.3d 1144 (N.Y. 2016); *In re Viking Pump, Inc. (Viking Pump VII)*, 146 A.3d 1046 (Del. 2015); *Viking Pump, Inc. v. Century Indem. Co. (Viking Pump VI)*, C.A. No. N10C-06 141 FSS [CCLD], 2014 Del. Super. LEXIS 2044 (Del. Super. June 9, 2014); *Viking Pump, Inc. v. Century Indem. Co. (Viking Pump V)*, C.A. No. 10C-06-141 FSS CCLD, 2014 Del. Super. LEXIS 707 (Del. Super. Feb. 28, 2014); *Viking Pump, Inc. v. Century Indem. Co. (Viking Pump IV)*, C.A. No. 10C-06-141 FSS CCLD, 2013 Del. Super. LEXIS 615 (Del. Super. Oct. 31, 2013); *Viking Pump, Inc. v. Century Indem. Co. (Viking Pump III)*, C.A. No. 1465-VCS, 2010 Del. Ch. LEXIS 301 (Del. Ch. June 11, 2010); *Viking Pump, Inc. v. Century Indem. Co. (Viking Pump II)*, 2 A.3d 76 (Del. Ch. 2009); *Viking Pump, Inc. v. Liberty Mut. Ins. Co. (Viking Pump I)*, C.A. No. 1465-VCS, 2007 Del. Ch. LEXIS 43 (Del. Ch. Apr. 2, 2007).

² *Viking Pump II*, 2A.3d at 85 (stating "[Viking Pump] alone has been the target of over 20,000 asbestos claims").

³ *Viking Pump IX*, 148 A.3d at 642.

⁴ *Id.*

⁵ *Id.*

⁶ Mitchell F. Dolin, *Excess Defense Coverage and Long-Tail Liabilities*, 32 TORT & INS. L.J. 875, 875 (1997).

⁷ See generally John Winsbro & Elizabeth Sherwin, *Rebuttal: NY Joins Everyone Else On Insurance Allocation*, LAW 360 (July 19, 2016).

⁸ *Viking Pump IX*, 148 A.3d at 686.

stand.⁹ This reversal meant that claimants in the pending personal injury actions would have a lower threshold to clear in order to trigger coverage.¹⁰ Consequently, the decision created a potential for high-value damage claims which the pump manufacturers would in turn seek to have their insurance policies respond to, and the insurers would fight hard to avoid assuming liability.¹¹

Long-tail claims involving multiple excess insurance carriers and policy periods spanning years, or even decades, are complicated. Determining which carriers are on the hook to indemnify and defend is a long, drawn out process, and, in this case, that process lasted for over a decade. Although unambiguous contract terms should dictate a clear path for courts adjudicating these matters to follow,¹² this comment explores many of the variables that different jurisdictions factor, often making the cases even more perplexing and convoluted.

II. BACKGROUND

Houdaille Industries, Inc. was “a large industrial conglomerate”¹³ that acquired Viking Pump in 1968¹⁴ and Warren Pumps in 1972.¹⁵ During Houdaille’s ownership of the companies it maintained one year Comprehensive General Liability (“CGL”) insurance policies.¹⁶ These policies included primary and umbrella insurance coverage provided by Liberty Mutual Insurance Company (“Liberty Mutual”) amounting to

⁹ *Viking Pump IV*, C.A. No.: 10C-06-141 FSS CCLD, 2013 Del. Super. LEXIS 615, at *30–31 (Del. Super. Oct. 31, 2013).

¹⁰ *See id.*

¹¹ *See Viking Pump IX*, 148 A.3d at 640 (“Viking and Warren now seek to fund the liabilities arising from the Houdaille-Era Claims using the comprehensive insurance program originally purchased by Houdaille. The insurance companies that issued the Excess Policies (the ‘Excess Insurers’) contend that Viking and Warren are not entitled to use the Excess Policies to respond to the Houdaille-Era Claims. The Excess Insurers also dispute the extent of any coverage available, particularly with respect to defense costs.”).

¹² *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1183 (3d Cir. 1991) (stating “[i]f the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.”), *rev’d on other grounds*, 970 F.2d 1267 (1992).

¹³ *Viking Pump I*, C.A. No. 1465-VCSS, 2007 Del. Ch. LEXIS 43, at *4 (Del. Ch. Apr. 2, 2007).

¹⁴ *History*, VIKING PUMP, <http://www.vikingpump.com/about-us/history> [<https://web.archive.org/web/20170926181428/http://www.vikingpump.com/about-us/history>].

¹⁵ *Viking Pump I*, 2007 Del. Ch. LEXIS 43, at *4.

¹⁶ *Id.* at *10. CGL policies are routinely purchased by businesses in order to protect the company from various forms of liability by funding defense costs and assuming risk through indemnification. *See Dolin, supra* note 6, at 876.

\$59.5 million.¹⁷ Excess coverage was purchased by Houdaille through twenty different carriers in the form of thirty-five excess insurance policies during the fourteen year period relevant to when the underlying asbestos injuries are alleged to have occurred.¹⁸ The core of the *Viking Pump* litigation was determining the exposure of these excess policies, which amounted to \$427.5 million in coverage above the primary and umbrella policies.¹⁹

The specific terms of Houdaille's primary policies included very high per-occurrence deductibles in the amount of \$100,000.²⁰ The policies also entitled Liberty Mutual "to bill Houdaille for a retroactive premium measured by a percentage of the total claims paid out under the policy."²¹ Houdaille's excess policies did not place such a burden on the insured.²² Therefore, in the event of an unexpected onslaught of litigation, it made sense that the insured would want any and all available excess insurance policies to respond.²³

Houdaille divested itself in 1985 and Viking Pump and Warren Pumps became independent entities, no longer affiliated with their former

¹⁷ *Viking Pump IX*, 148 A.3d 633, 640 (Del. 2016) (en banc). Primary insurance is the first form of liability insurance to respond and attaches immediately (subject to a deductible or self-insured retention to be paid by the insured) in the event of a covered occurrence. Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 TORT & INS. L.J. 653, 654–55 (1997) (absent excess insurance, an insured is liable for obligations, e.g., settlements or judgments, excess applicable coverage limits).

¹⁸ *Viking Pump IX*, 148 A.3d at 640. "'Excess coverage' is a term of art meaning that the applicable insurance policy will 'provide an insured with only secondary (or excess) protection when coverage from another policy is available.'" Allstate Ins. Co. v. 65 Sec. Plan, 879 F.2d 90, 92 n.2 (3d Cir. 1989) (quoting Ne. Dep't ILGWU v. Teamsters Local Union No. 229, 764 F.2d 147, 160 (3d Cir. 1985)).

¹⁹ *Viking Pump IX*, 148 A.3d at 640. Multiple layers of excess insurance are common among major corporate insureds in order to protect against "losses potentially aggregating in the hundreds of millions of dollars." Seaman & Kittredge, *supra* note 17, at 657–58. Liability coverage at the excess level is generally a much better value because of the requirement that any requisite primary policies respond before excess layers of an insurance tower are reached, and are therefore proportionally less expensive. *See id.*

²⁰ *Viking Pump I*, C.A. No. 1465-VCS, 2007 Del. Ch. LEXIS 43, at *14 (Del. Ch. Apr. 2, 2007). "The term 'deductible' usually refers to a specific sum that is subtracted from the insurer's obligation to pay a loss under the policy." Mark W. Flory & Angela Lui Walsh, *Know Thy Self-Insurance (And Thy Primary And Excess Insurance)*, 36 TORT & INS. L.J. 1005, 1007 (2001) (citing Int'l Bankers Ins. Co. v. Arnone, 552 So. 2d 908 (Fla. 1989) ("Generally, the functional purpose of a deductible, which is frequently referred to as 'self-insurance,' is to alter the point at which an insurance company's obligation to pay will ripen.")).

²¹ *Viking Pump I*, 2007 Del. Ch. LEXIS 43, at *14.

²² *Id.*

²³ *See id.* at 14–15 (stating "[t]he result is that every time a claim is made against one of Houdaille's primary policies, it costs Houdaille a substantial amount of money").

parent company.²⁴ In 1987, Warren Pumps placed Liberty Mutual on notice regarding the first of a long line of claims stemming from allegations that their industrial pumps contained asbestos and led to cases of mesothelioma.²⁵

Over the next two decades, the companies would see a sharp increase in the number of lawsuits against them alleging latent injuries caused when they were both owned by Houdaille.²⁶ The genesis of the litigation this comment focuses on stems from Viking Pump's perception that Warren Pumps was using up a greater amount of the liability coverage from policies that were available to them from the Houdaille era.²⁷ Viking Pump feared the insurance buckets would be drained by its former sister-company, thus leaving a deficiency of funds available for its own indemnification and defense costs. Accordingly, Viking Pump filed suit in the Court of Chancery and sought to apportion the available coverage between itself and Warren Pumps.²⁸

III. BREAKING DOWN LONG-TAIL CLAIMS

Cases arising from environmental pollution or other activities that result in long-term bodily injury are often complex and tedious to settle because diseases, such as mesothelioma, have a delayed onset.²⁹ These situations are further complicated by the possibility of injury from a single occurrence in which a claimant was exposed to the harmful substance. But most cases involve prolonged exposure producing an injury not immediately apparent; rather, symptoms exhibited by claimants are often delayed, indicative of progressive deterioration.³⁰ As mentioned herein, companies that may cause pollution or create products that could contribute to long-tail injuries often maintain complex insurance programs

²⁴ *Viking Pump IV*, C.A. No. 10C-06-141 FSS CCLD, 2013 Del. Super. LEXIS 615, at *7 (Del. Super. Oct. 31, 2013).

²⁵ *See Viking Pump V*, C.A. No. 10C-06-141 FSS CCLD, 2014 Del. Super. LEXIS 707, at *5 (Del. Super. Feb. 28, 2014).

²⁶ *See Viking Pump I*, 2007 Del. Ch. LEXIS 43, at *5-6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See* James M. Fischer, *Insurance Coverage For Mass Exposure Tort Claims: The Debate Over The Appropriate Trigger Rule*, 45 *DRAKE L. REV.* 625, 694 (1997) (stating “[a]pplication of an indemnity continuous trigger to access liability coverage complicates coverage determinations and does not encourage early excess carrier involvement . . .”).

³⁰ “In asbestos litigation, this fact pertains to the apportionment of damages, where the court must determine how much of the plaintiff’s lung cancer or other pulmonary condition was attributable to smoking (non-recoverable), and how much to attribute to asbestos exposure.” Gerald Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and The Regulatory Experience*, 18 *COLUM. J. ENVTL. L.* 181, 300 (1993). “In reality, an individual will rarely be exposed only to a single toxic substance.” *Id.* at 301.

with multiple layers of excess insurance overlying primary policies in case unexpected high-value or high-volume claims are levied against them.³¹ When placing its liability carrier on notice, the policyholder company must determine a point in time or specific occurrence which triggered a certain CGL policy it held.³² Predictably, policyholders are inclined to argue that the liabilities they face are broad and trigger as many policies as possible; insurers naturally take a much narrower approach with the goal of minimizing exposure.³³

Once it has been determined which policies are required to respond, the next question is how liability is to be apportioned, or allocated, among the triggered policies, and whether there are any contractual limitations on “stacking” the policy limits.³⁴ In large loss claims, especially those involving extremely large insurance towers with numerous layers of excess coverage, the final wrinkle is the order in which a policyholder must exhaust the policies.³⁵

Before proceeding, it is important to note that insurance agreements fall under a category of contracts that courts have traditionally interpreted in favor of policyholders’ reasonable expectations in the event of ambiguities or disputes regarding how certain language of a policy should be construed.³⁶ This principle, known as interpretation *contra proferentem* (“against the profferer”), is a burden that insurers must overcome from the outset in long-tail cases.³⁷ The principle is commonly applied to adhesion contracts where terms are presented as take-it-or-leave-it propositions as opposed to being the result of equally weighted negotiations between the insurer and policyholder.³⁸ Interpretation *contra proferentem* is favored

³¹ See Seaman & Kittredge, *supra* note 17, at 654–55.

³² See *id.*

³³ While these biased goals of the parties to the insurance contract are common sense, it’s worth noting that a “recurring theme is many courts’ desire to maximize the coverage available to policyholders.” Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 VILL. ENVTL. L.J. 25, 27 (1999). The outcome of the case this comment focuses on supports the proposition that the trend in long-tail cases favors policyholders and presents an unpredictable, if not dim, forecast for insurers.

³⁴ Leo P. Martinez, *The Allocation of Costs in Multi-Insurer Cases Spanning Multiple Years: The Deceptively Simple Problem of Defense Costs*, 2012 EMERGING ISSUES 6742, 6 (2012).

³⁵ See Fischer, *supra* note 29, at 687–88.

³⁶ *Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062, 1070 (Del. 2012) (en banc) (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)); *Hartol Prods. Corp. v. Prudential Ins. Co.*, 47 N.E.2d 687, 690 (N.Y. 1943) (stating “[i]t is well-settled that if a policy of insurance is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the policyholder and against the company”).

³⁷ See *Viking Pump II*, 2 A.3d 76, 90 (Del. Ch. 2009).

³⁸ This also provides the underlying premise for courts seeking to interpret an insurance policy to “fulfill the dominant purpose of providing indemnification” and “maximize coverage”

because the party in control of drafting the agreement had the most opportunity to avoid a dispute.³⁹ Insurance contracts are particularly subject to this rationale,⁴⁰ requiring the principle of interpretation *contra proferentum* to be considered at each stage of evaluating long-tail insurance claims.⁴¹

when ambiguities lead to controversies. See *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 576 F. Supp. 936, 939–40 (E.D. Pa. 1983); see also *Hallowell*, 443 A.2d at 926 (Del. 1982) (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 400 (Del. 1978); *Novellino v. Life Ins. Co. of N. Am.*, 216 A.2d 420, 422 (Del. 1966)):

Because an insurance policy is an adhesion contract and is not generally the result of arms-length negotiation, courts have developed rules of construction which differ from those applied to most other contracts. As a general rule, for example, an insurance contract is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the language that is interpreted.

³⁹ Cf. *Dardovitch v. Haltzman*, 190 F.3d 125 (3d Cir. 1999) (rejecting the contention that interpretation *contra proferentum* creates no favoritism and instead presuming that the party drafting a contract is likely to provide more favorably for his own interests).

⁴⁰ *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149–50 (Del. 1997):

The starting point is the approach to interpreting insurance contracts. They must be interpreted in a common sense manner, giving effect to all provisions so that a reasonable policyholder can understand the scope and limitation of coverage. It is the obligation of the insurer to state clearly the terms of the policy, just as it is the obligation of the issuer of securities to make the terms of the operative document understandable to a reasonable investor whose rights are affected by the document. Thus, if the contract in such a setting is ambiguous, the principle of *contra proferentem* dictates that the contract must be construed against the drafter. The policy behind this principle is that the insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear. Convolved or confusing terms are the problem of the insurer or issuer—not the insured or investor.

⁴¹ Of course, *contra proferentem* has much broader applications than just insurance contracts. Though the fundamental tenets of the doctrine are well settled, when invoked by courts, questions regarding admissibility of extrinsic evidence and methods of contract construction are not uniformly resolved among various jurisdictions. For additional discussion regarding *contra proferentem* and an examination of how the two states at the heart of the *Viking Pump* saga diverge when the doctrine is applied, see Joshua M. Glasser, *New York and Delaware's Surprising Doctrinal Dissonance Concerning the Admissibility of Uncommunicated Contractual Intent*, 41 DEL. J. CORP. L. 859 (2017).

A. Triggers

The issue of whether a policy is triggered focuses on the threshold event, or occurrence, that creates liability for the insured.⁴² Language in CGL policies certainly require that the occurrence take place during the policy period. But in cases concerning latent diseases, such as asbestos-induced mesothelioma, different courts have developed varying, and often contradictory, theories of when a policy is considered triggered.⁴³ There are four generally recognized triggers in long-tail claims: (1) exposure,⁴⁴ (2) manifestation,⁴⁵ (3) injury-in-fact,⁴⁶ and (4) continuous trigger.⁴⁷ The choice of law clause in the acquisition contracts between Houdaille, Viking Pump, and Warren Pumps specified jurisdiction under New York state law, and so Delaware courts were charged with applying insurance law from that state.⁴⁸

The parties did not question throughout “the course of the lengthy proceedings that, under New York law, a policy is triggered if the claimant

⁴² *Hoechst Celanese Corp. v. Certain Underwriters at Lloyd's London*, 673 A.2d 164, 166 n.2 (Del. 1996) (stating “[w]hen the word ‘trigger’ is used in insurance, it is a term of art which means the event that activates coverage under the policy.”).

⁴³ *Guaranty Nat'l Ins. Co. v. Azrock Indus.*, 211 F.3d 239, 244 (5th Cir. 2000) (stating “construction of the exact terms [of CGL policies], under different sets of facts, against the backdrop of the *contra proferentem* doctrine, has resulted in irreconcilable holdings”).

⁴⁴ The exposure trigger is characterized by the focus on the earliest contact with the harmful product or substance and “allows recovery only from a policy that was in effect during some exposure to asbestos.” *Shook & Fletcher Asbestos Settlement Tr. v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 126 (Del. 2006).

⁴⁵ The manifestation trigger test focuses on “that point in time when appreciable damage occurs and is or should be known to the insured.” *Reese v. Travelers Ins. Co.*, 129 F.3d 1056, 1059 n.1 (9th Cir. 1997) (quoting *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1232 (Cal. 1990)). The manifestation trigger is favored by insurers because it “promotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy.” *Home Ins. Co. v. Landmark Ins. Co.*, 205 Cal. App. 3d 1388, 1395 (Cal. Ct. App. 1988).

⁴⁶ “[A]n ‘injury-in-fact’ test . . . rests on when the injury, sickness, disease or disability actually began.” *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993). To recover, an insured “must show that an injury occurred during the policy period and that it occurred as a result of an accident or injurious exposure.” *Cont'l Cas. Co. v. Emp'rs Ins. Co. of Wausau*, 60 A.D.3d 128, 144 (N.Y. App. Div. 2008).

⁴⁷ The broadest category of coverage, the continuous trigger, essentially incorporates the entire range of potential occurrence point—from initial exposure and subsequent manifestation of symptoms all the way through an ultimate diagnosis of bodily injury. *See Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981). Sometimes referred to as “triple-trigger,” this theory offers the most protection for insureds, yet creates unpredictability due to the potential for future claims under old policies.

⁴⁸ *Viking Pump I*, C.A. No. 1465-VCS, 2007 Del. Ch. LEXIS 43, at *47 (Del. Ch. Apr. 2, 2007).

suffered some ‘injury-in-fact’ during the policy period.”⁴⁹ The overlap between injury-in-fact theory and continuous trigger theory, however, becomes difficult when analyzing a delayed onset disease, such as asbestos-induced mesothelioma. Claimants need to prove bodily injury during the policy period, but are usually unable to do so because asbestos-related injuries “often do not manifest . . . until years after . . . exposure.”⁵⁰ If an insurance policy expires and an injury has not been diagnosed, or the injury occurred during a period when the policyholder failed to pay premiums, one could logically conclude that the insurer is not liable for an injury diagnosed at a later date.⁵¹ From a perspective of pure business prudence, it makes sense that an insurance company would want to accurately assess coverage costs and future risks. Continuous trigger theory throws a monkey wrench in this process if an insurer is potentially on the hook for claims which may have been triggered during a policy, but notification does not occur until substantial time has passed after termination of the policy.

The excess insurers in the *Viking Pump* cases attempted to persuade the Delaware Supreme Court that the policyholders were advocating for a continuous trigger standard as opposed to the required injury-in-fact trigger.⁵² Arguing that a finding of injury-in-fact at a certain point requires a presumption that asbestos-related injuries take place from exposure through manifestation, the excess insurers pushed the court to find that holding them liable for all claims over multiple policy periods *necessarily* imposes a continuous trigger standard.⁵³ Relying on the plaintiffs’ expert testimony at trial that “the cellular and molecular damage that leads to asbestos-related disease is a continuous process that is triggered after there is an injury-in-fact, i.e., the claimant’s first significant exposure to asbestos,” the Delaware Supreme Court ultimately rejected the excess insurers’ claim and concluded that the Delaware Superior Court erred regarding this trigger issue.⁵⁴ To this point of contention, however, the

⁴⁹ *Viking Pump IX*, 148 A.3d 633, 684 (Del. 2016) (en banc).

⁵⁰ *Viking Pump II*, 2 A.3d at 110 (citing Michael G. Doherty, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. CHI. L. REV. 257, 257 (1997)).

⁵¹ See *N. States Power Co. v. Fid. & Cas. Co.*, 523 N.W.2d 657, 662 (Minn. 1994) (“The essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period.”); see also *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988) (“A firm that fails to purchase insurance for a period is self-insuring for all the risk incurred in that period; otherwise it would be receiving coverage for a period for which it paid no premium. Self-insurance is called ‘going bare’ for a reason.”).

⁵² *Viking Pump IX*, 148 A.3d at 685.

⁵³ *Id.* at 685–86.

⁵⁴ *Id.* It’s also worth noting that Justice Valihura, author of the Delaware Supreme Court’s en banc opinion, highlighted the excess insurers’ inconsistent position on the issue of triggering over the past decade throughout these cases starting in the Court of Chancery, through

court did find that the jury instruction should have clarified that the disease occurs upon exposure “*and continues thereafter.*”⁵⁵

B. Allocation

Once it is established that the occurrence has adequately triggered excess policies to respond, the next question when there are multiple insurers and multiple policy periods affected is how liability will be apportioned.⁵⁶ Two approaches have emerged: (1) “pro rata,” where an individual insurer is allocated a portion of liability based on the share of risk assumed under the policy; or (2) “all sums,” where a policyholder has the option to essentially pick and choose which policies he would like to respond to a covered liability.⁵⁷

Pro rata allocation is generally favored by insurers because they can identify their “time on the risk,” precluding the insured from receiving a “windfall” of coverage benefits.⁵⁸ All sums allocation, on the other hand, sometimes referred to as “joint and several” allocation, places policyholders—whose goal is to maximize coverage—in a very desirable position. This is because there are substantially fewer restraints to coverage than the alternative of pro-rating the risks among triggered insurers.⁵⁹ In *Viking Pump IX*, The Delaware Supreme Court issued a certified question to the New York Court of Appeals asking, “[u]nder 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?”⁶⁰

1. Non-Cumulation Clauses

To limit exposure and prevent “stacking” of multiple policies from varying periods on a single triggering occurrence, insurance companies have adopted “non-cumulation” clauses as standard language in their CGL

the Superior Court trial to the present case. Included in the opinion is a graphic displaying how the insurers initially claimed the trigger period occurred after the coverage period (injury-in-fact) at trial to significant exposure occurring before the coverage period in the Supreme Court—each scenario conveniently separating the coverage period from the trigger period. *Id.* at 686.

⁵⁵ *Id.* at 686.

⁵⁶ Martinez, *supra* note 34, at 13.

⁵⁷ Jan M. Michaels et al., *The Avoidable Evils of “All Sums” Liability for Long-Tail Insurance Coverage Claims*, 64 KAN. L. REV. 467, 486–87 (2015).

⁵⁸ *See Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 493 (Del. 2001).

⁵⁹ *See id.* at 491 (citing *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30 (Del 1994)).

⁶⁰ *Viking Pump VII*, 146 A.3d 1046, 1050 (Del. 2015).

policies.⁶¹ The New York Court of Appeals recognized the “limiting impact that such clauses may have on an insured’s recovery and, by extension, that of an injured plaintiff,” and has interpreted non-cumulation clauses according to “their plain language.”⁶² The excess insurers in *Viking Pump VIII* argued that pro rata allocation was necessary in order to follow New York legal precedent and a plain reading of the non-cumulation clauses.⁶³ All of the potentially triggered policies contained the following non-cumulation clause or “substantively identical Prior Insurance Provisions”:

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, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [insurer] 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.⁶⁴

In their response to the Delaware Supreme Court’s certified question, the New York Court of Appeals focused on two previous decisions, *Olin Corp. v. American Home Assurance Co.*⁶⁵ and *Consolidated Edison Co. v. Allstate Insurance Co.*⁶⁶ Both cases promulgated the insurer-friendly pro rata approach⁶⁷ and caused many to believe New York was a solid pro rata state.⁶⁸ In *Olin*, the Second Circuit Court of Appeals found that a pro rata approach applied where a pesticide manufacturer was liable for groundwater pollution based partially on the underlying public policy concerns associated with industrial pollution.⁶⁹

⁶¹ *Viking Pump VIII*, 52 N.E.3d 1144, 1152 (N.Y. 2016).

⁶² *Id.* (citing *Nesmith v. Allstate Ins. Co.*, 25 N.E.3d 924 (N.Y. 2014); *Hiraldo v. Allstate Ins. Co.*, 840 N.E.2d 563 (N.Y. 2005)).

⁶³ *See id.* at 1150, 1154.

⁶⁴ *Viking Pump II*, 2 A.3d at 129–30.

⁶⁵ 704 F.3d 89 (2d Cir. 2012) (applying New York law).

⁶⁶ 774 N.E.2d 687 (N.Y. 2002).

⁶⁷ *See Viking Pump VIII*, 52 N.E.3d 1144, 1155–56 (N.Y. 2016).

⁶⁸ Joseph D. Jean et al., *Context and Impact of 'Viking Pump': Landmark Victory for Policyholders*, N.Y.L.J., May 23, 2016, at 4 (“New York has developed a reputation as an unfavorable jurisdiction for policyholders facing ‘long-tail’ claims It owes this reputation, in part, to unfavorable case law on the allocation of insurers’ coverage obligations for claims triggering coverage across multiple policy periods.”).

⁶⁹ *Viking Pump VIII*, 52 N.E.3d at 1155–56 (analyzing *Olin*, 704 F.3d 89 (2d Cir. 2012)). In *Olin*, the claimant sought to expose its CGL carrier for groundwater contamination which occurred primarily during periods adjacent to when coverage had been underwritten. *See Olin*,

More importantly, the anti-stacking provision of the policy's non-cumulation clause was unambiguous and explicitly limited the insurer's exposure.⁷⁰ In *Consolidated Edison*, the case that arguably established New York's reputation as an insurer-friendly state,⁷¹ the court found that "[p]roration of liability among the insurers acknowledges the fact that there is *uncertainty* as to what actually transpired during any particular policy period."⁷² It is likely that at the beginning of the *Viking Pump* saga the excess insurers felt confident New York law would favor them considering the uncertainty that, by nature, surrounds long-tail asbestos claims. But in *Viking Pump VIII*, the New York Court of Appeals, apparently aware of this reputation, was careful to specify that there was no "blanket rule" establishing that "pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies."⁷³

2. New York's Departure from Pro Rata Allocation

While the *Viking Pump* litigation was in front of the Delaware Court of Chancery, the interpretation of the policies was guided by an application of "New York principles of contract interpretation."⁷⁴ The New York Court of Appeals was not only careful, but exceptionally cautious to take note of the potential ambiguity created by the inclusion of the non-cumulation clauses alongside standard insurance language—at least in long-tail claims.⁷⁵ The New York court agreed with the Court of Chancery that *Viking Pump* was distinguished from *Consolidated Edison* due to the "surplusage" created by the apparent contradiction of terms in the

704 F.3d at 96-97. The Second Circuit Court of Appeals refused to allow the policyholder to subjectively select when triggering occurred, sending a message that the Court expected would-be polluters to maintain adequate insurance. *Id.*

⁷⁰ See *Olin*, 704 F.3d at 104-05.

⁷¹ See Jean et al., *supra* note 68.

⁷² *Consol. Edison Co. v. Allstate Ins. Co.*, 774 N.E.2d 687, 695 (N.Y. 2002) (emphasis added).

⁷³ 52 N.E.3d at 1150.

⁷⁴ *Viking Pump II*, 2 A.3d 76, 107 (Del. Ch. 2009). The *New York Rule* of contract interpretation traditionally focuses on the content within the "four corners" of the agreement; i.e., the "plain meaning" of the contract. See *Frigalment Importing Co. v. B. N. S. Int'l Sales Corp.*, 190 F. Supp. 116, 121 (S.D.N.Y. 1960); see also Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 Santa Clara L. Rev. 73, 109-10 (2013) (characterizing the plain meaning rule as taking substantial care to exclude extrinsic evidence in the event of ambiguity and limiting resources to those commonly available to decipher language and grammar, e.g., use of a dictionary).

⁷⁵ *Viking Pump VIII*, 52 N.E.3d 1144, 1148, 1154-55 (N.Y. 2016).

insurance contracts.⁷⁶ The Delaware Supreme Court's first certified question was answered with instructions to judge the intent of the insurers to indemnify under an all sums scheme.⁷⁷ The non-cumulation clauses of contracts had been effectively deemed unenforceable.

Although *Olin* also invoked public policy considerations in light of the numerous lawsuits brought forward against the tortfeasor, the Second Circuit Court of Appeals relied on and adhered to traditional New York contract interpretation when it ruled on the non-cumulation clauses of the policies.⁷⁸ In *Viking Pump VIII*, the New York Court of Appeals diverted from this well-settled precedent and raised questions as to the interpretation of disputed insurance agreements in the future.⁷⁹ This shift negatively affects insurers and their actuarial departments' ability to predict assumed risks and potentially leads to an unnavigable field of speculation.⁸⁰ But, it is worth noting that New York's role in the *Viking Pump* litigation may indicate a significant advance in a trend towards all sums allocation.⁸¹

C. Exhaustion

Once it has been determined that excess policies have been triggered and which form of allocation shall be applied, the final piece of the puzzle is *how* a policyholder must exhaust its liability coverage.⁸² "The excess carrier's ultimate exposure for contributing . . . is completely dependent upon the determination reached by the courts concerning whether a

⁷⁶ *Id.* at 1148 (citing *Viking Pump II*, 2 A.3d at 124–26).

⁷⁷ *See id.* at 1155–56 ("The fact that the resulting allocation apportioning numerous years of liability outside the policy period to the relevant policies closely resembles an all sums allocation, the Excess Insurers' contention that [the Second Circuit's holding in *Olin*] supports a pro rata allocation here is unavailing."). The Court also seems to suggest that the progeny of *Olin* and *Consolidated Edison* has interpreted the application of a pro rata approach under New York law at the very least too narrowly by failing to reconcile the contradicting language and non-cumulation clause now deemed to be surplusage. *See id.* (citing *Liberty Mut. Ins. Co. v Fairbanks Co.*, 170 F. Supp. 3d 634 (S.D.N.Y. 2016); *Liberty Mut. Fire Ins. Co. v J.&S. Supply Corp.*, 13-CV-4784 (VSB), 2015 U.S. Dist. LEXIS 177124, at *24–25 (S.D.N.Y. 2015)).

⁷⁸ *See Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 104–05 (2d Cir. 2012).

⁷⁹ *See generally Viking Pump VIII.*

⁸⁰ One scholarly article has attempted to analyze this issue following the Massachusetts Supreme Judicial Court's adoption of pro rata allocation instead of all sums; the conclusion was that "disposing of long-tail indemnification cases where imperfect science could lead to further protracted litigation," and "[a]t the end of the day, the only guaranteed winners will be the court dockets whose burdens are lessened by reduction of litigation resulting from the lack of clarity and the insurance companies, whose liabilities will reduce drastically." Benjamin S. Reilly, Comment, *Pro-Rata Apportionment in "Long-Tail" Contamination Cases: Will Presumed Efficiencies Undercut Environmental Cleanups?*, 41 B.C. ENVTL. AFF. L. REV. 91, 102 (2014).

⁸¹ *See generally Winsbro & Sherwin, supra note 7.*

⁸² Fischer, *supra* note 29, at 687–88.

horizontal or vertical allocation formula will be applied at the primary layer.”⁸³

Under vertical exhaustion, only the limits of the underlying primary policies must be exhausted before the available excess policies from that period respond.⁸⁴ The vertical exhaustion method is favored by insureds, especially those with high primary policy deductibles (such as Viking Pump and Warren Pumps), because it allows insureds to gain access to the deeper buckets of excess insurance at a much earlier point.⁸⁵

Horizontal insurance, on the other hand, requires deductibles or self-insured retentions be paid on all responding primary policies from triggered periods before any excess carrier will be obligated to provide coverage.⁸⁶ This method is generally more favorable to insurers, especially in cases where an insured has enough primary insurance to cover the claims being levied against them or if the necessary deductibles or self-insured retentions cannot be satisfied.⁸⁷

The deductibles on the primary policies held by Viking Pump and Warren Pumps were \$100,000.⁸⁸ A quick calculation based on the sheer number of primary policies from all relevant periods which could potentially respond to the asbestos claims multiplied by \$100,000 illustrates the massive expense the policyholders could be liable for if horizontal exhaustion were imposed in this case. However, application of vertical exhaustion would demand only a single primary policy’s deductible or self-insured retention be paid before the deeper excess policies would respond to the claims now being asserted against the policyholders.

⁸³ H. Wesley Sunu et al., *Recent Developments in Excess, Surplus Lines, and Reinsurance*, 31 TORT & INS. L.J. 239 (1996).

⁸⁴ Joren S. Bass, *The Montrose Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 209, 214 (1999).

⁸⁵ The Viking Pump case is a prime example of how important exhaustion methods are to a policyholder. “Much of the complexity in this case stems from certain ‘loss-sensitive’ features of Houdaille’s primary policies. The primary policies from at least 1976 on carried both high deductibles and retroactive premiums.” *Viking Pump I*, C.A. No. 1465-VCS, 2007 Del. Ch. LEXIS 43, at *14 (Del. Ch. Apr. 2, 2007).

⁸⁶ *See id.*

⁸⁷ The New York Court of Appeals noted that this is not an absolute firm rule and “neither method necessarily militates in favor of insurers or insureds, with much depending on the specifics of the underlying policies and their limits.” *Viking Pump VIII*, 52 N.E.3d 1144, 1156 n.7 (N.Y. 2016); *but see* Jones and Hurwitz, *supra* note 33, at 33 (stating “[e]xcess carriers often argue for application of this ‘exhaustion by layers’ approach, which triggers their policies only after the limits of all triggered primary policies have been exhausted”).

⁸⁸ *Viking Pump I*, 2007 Del. Ch. LEXIS 43, at *14.

The Delaware Supreme Court's second certified question to the New York Court of Appeals asked:

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?⁸⁹

The only argument advanced by the excess insurers deemed to have any merit by the New York Court of Appeals dealt with the “‘other insurance’ clauses in the . . . umbrella policies . . . provid[ing] that the insurer ‘will pay all sums in excess of the retained limit,’ which is defined as the relevant limit of liability of underlying policies, ‘plus all amounts payable under other insurance, if any.’”⁹⁰ Again relying on its previous decision in *Consolidated Edison*, the court ruled that these “other insurance” clauses are effective only in cases of successive triggered insurance policies—not policies which overlap concurrently.⁹¹

The ruling from the New York Court of Appeals “conclude[d] that the excess policies are triggered by vertical exhaustion of the underlying available coverage”⁹² This is an unequivocal home run for policyholders, and, by extension, plaintiffs seeking relief in the pending asbestos-related personal injury claims. The court attributed significant emphasis on the attachment mechanisms of the policies, which “‘primarily hinge . . . on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy.’”⁹³ This decision, in essence, created an assumed link between long-tail claims allocated via an all sums approach and policyholders’ ability to exhaust their insurance towers vertically instead of exhausting each of any number of triggered primary policies.⁹⁴ For better or for worse, this decision is likely to have significant effects for decades to come.

⁸⁹ *Viking Pump VII*, 146 A.3d 1046, 1050 (Del. 2015).

⁹⁰ *Viking Pump VIII*, 52 N.E.3d at 1156–57.

⁹¹ *Id.* at 1157 (citing *Consol. Edison Co. v. Allstate Ins. Co.*, 774 N.E.2d 687 (N.Y. 2002)).

⁹² *Id.* at 1157–58.

⁹³ *Id.* at 1156.

⁹⁴ It is probably a safe bet that the Court was aware of the trend toward all sums allocation and vertical exhaustion in this case; however, it’s difficult not to raise an eyebrow at the near definiteness of this assertion compared to the Court’s emphasis on contract variations and reviewing each claim on a case by case basis elsewhere in the opinion. *Compare id.* at 1156 (“In our view, vertical exhaustion is more consistent than horizontal exhaustion with this language tying attachment of the excess policies specifically to identified policies that span the

IV. POTENTIAL PROBLEMS DOWN THE ROAD

Armed with clear instructions from the New York Court of Appeals on issues of New York law, the Delaware Supreme Court affirmed the lower decisions in favor of asbestos injury-in-fact triggers, all sums allocation, and vertical exhaustion.⁹⁵ The excess insurers are exposed and will be obligated to defend Viking Pump and Warren Pumps in the numerous pending tort claims arising from plaintiffs' contact with asbestos while using the manufacturers' pumps.⁹⁶ Liabilities incurred must be indemnified by the excess insurers up to the policy limits.⁹⁷ However, the *Viking Pump* saga is unlikely to signal the end of questions surrounding the issues raised by long-tail claim injuries and the claims that inevitably follow.

Black's Law Dictionary defines legal fiction as "[a]n assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates."⁹⁸ The New York Court of Appeals addressed the allocation issue by characterizing the pro rata approach as 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."⁹⁹ If this is true, similar criticism of all sums allocation is surely deserved as well.

By way of example, if a person suffers an injury that cannot be confined to a specific time period, all sums allocation grants a policyholder to access numerous different insurance policies with little regard to which insurance company contracted to assume that risk. Does this mean that the "during the policy period" limitation is rendered meaningless in the context of long-tail claims? Assumptions of legal fictions are often

same policy period. Further, 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." (citing *Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 919 (Wis. Ct. App. 2010); *Cadet Mfg. Co. v. Am. Ins. Co.*, 391 F. Supp. 2d 884, 892 (W.D. Wash. 2005); J. Stephen Berry and Jerry B. McNally, *Allocation of Insurance Coverage: Prevailing Theories and Practical Applications*, 42 TORT TRIAL & INS. PRAC. L.J. 999, 1015–16 (2007)) with *Viking Pump VIII*, 52 N.E.3d at 1151 (stating "insurance contracts, like other agreements, should 'be enforced as written,' and 'parties to an insurance arrangement may generally 'contract as they wish and the courts will enforce their agreements without passing on the substance of them'" (citing *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 992 N.E.2d 1076 (N.Y. 2013)) (quoting *New England Mut Life Ins. Co. v. Caruso*, 535 N.E.2d 270 (N.Y. 1989)).

⁹⁵ See generally *Viking Pump IX*, 148 A.3d 633 (Del. 2016) (en banc).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Legal Fiction*, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁹⁹ *Viking Pump VIII*, 52 N.E.3d 1144, 1153–54 (N.Y. 2016).

necessary to serve as gap fillers in our knowledge of the facts relevant to a controversy.¹⁰⁰

Delaware courts are willing to accept the “continuous process” of asbestos related injuries as satisfaction of the injury-in-fact trigger standard based on a jury’s finding of fact. In 2013, the Delaware Superior Court found the insured’s expert witness on the matter to be credible and refused to overrule the jury’s decision.¹⁰¹ This was reasonable because the difficult nature of the asbestos-related injuries demands some assumptions be made, even if they are in the form of legal fictions. But in this context, it is striking that the necessity of such a finding is based on the inability to confine the injury to a specific time—exactly the reason that the all sums allocation approach prevailed.

The trend away from pro rata allocation toward all sums in long-tail cases is a puzzling situation because there are such fundamental differences between the two approaches. The nature of long-tail injuries presents a problem that pro rata allocation serves to address. Initial contacts with harmful substances that contribute to mesothelioma and other latent injuries are difficult to identify. Pro rata allocation distributes risk based on the cumulative evidence in the claim, even when the best scientific methods are insufficient and gap fillers, such as the legal fictions discussed above, must be invoked. This is necessarily fair to the insurer and policyholder who assented to a bargain for some defined risk to be assumed in case of a triggering occurrence. The greatest weakness of pro rata allocation is the potential of creating situations where claimant policyholders are incentivized to tailor their claims to fall squarely within defined liability limits. However, this problem can be addressed by normal litigation procedures such as discovery and cross examination.

All sums, on the other hand, necessarily ignores the “during the policy” clauses in which insurers sought to define and limit the periods in which they agree to assume risk. This approach is counter to the fundamental tenet of insurance policy construction that “when the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and

¹⁰⁰ Hope M. Babcock, *Sovereignty’s Seductions: Reconciling Claims to Govern: The Stories We Tell, And Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 *VILL. L. REV.* 803, 818 (2010) (stating “[l]egal fictions are frequently ‘used to ground and justify legal doctrine,’ regardless of the accuracy of the underlying explanation.”).

¹⁰¹ See *Viking Pump IV*, C.A. No. 10C-06-141 FSS CCLD, 2013 Del. Super. LEXIS 615, at *31 (Del. Super. Oct. 31, 2013) (“The jury was left with a tree-falling-in-the-forest conundrum. It decided injury occurs before manifesting itself as diagnosable illness.”).

duties to which the parties had not assented.”¹⁰² The end result to this scenario is a windfall for policyholders who acted on an incentive to purchase less coverage than their counterparts.¹⁰³ Granting license to policyholders to “pick and choose” from insurers deemed jointly and severally exposed “creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage.”¹⁰⁴

Savvy policyholders may recognize these flaws and strategically game the system by setting up their CGLs alongside high-limit excess policies in certain years and having woefully inadequate coverage in adjacent years. By way of example, imagine the owner of a facility that manufactures products using chemicals known to be highly toxic. The injuries caused by the chemicals are delayed significantly between exposure and injury and the relevant triggering threshold can generally be pinpointed to no better than plus or minus two years. This owner takes reasonable steps to avoid polluting his environment, however these particular chemicals pose a higher than normal risk of seeping into the groundwater. Based on accepted metrics of risk and liability, the owner should structure a complex insurance program with \$50 million of coverage. If that owner purchases \$50 million of total liability coverage two years into operation, then drops that coverage to a minimum for the next four years, and later raises it to \$50 million again, repeating this process of buying high-level insurance only every four years, the high-level insurance policy would likely need to respond no matter what. All sums dictates that the owner will be able to pick which policy period must respond, and, provided medical science does not improve enough to pinpoint exposure more precisely, the insurer will be obligated to defend and indemnify. This example also illustrates the public policy problem with all sums allocation since the owner who games the system is placed

¹⁰² *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982); *see also Morlee Sales Corp. v. Mfrs. Trust Co.*, 172 N.E.2d 280, 282 (N.Y. 1960) (stating “[i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.”).

¹⁰³ The hope is that this wouldn’t happen or at least that pre-trial discovery would shed light on such a practice and justify the insurer’s denial of coverage. *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1202-04, 1219 (2d Cir. 1995). In *Stonewall*, the Second Circuit effectively denied the insured’s claim in part by allocating damages based on insufficient coverage which should have predictably led to premature exhaustion of the policy. *Id.* Just because circumstances in a case *may* lead to this result, adjusters and actuaries certainly can’t rely on the hope that a nefarious policyholder would not get away with pulling a fast one on the carrier.

¹⁰⁴ *Pub. Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 939-40 (Colo. 1990).

on an equal footing with other defendants who purchased adequate insurance during every policy period.

V. CONCLUSION

The outcome of the *Viking Pump* cases is likely to have significant influence and consequences as other states revisit their long-tail claim jurisprudence and look to the persuasive authority of the Delaware courts and New York insurance law. The effect of this in the long run is going to boil down to insurance companies losing the ability to predict risk. Adjusting will accordingly become less precise, which “in turn would ‘reduce the available assets to manage the risk.’”¹⁰⁵ Such an imposition on the insurance industry is economically irrational and will surely result in premium increases across the board.

Reasonable minds may differ when it comes to addressing the inherent problems of long-tail claims. However, the shift from pro rata to all sums allocation and horizontal to vertical exhaustion seems to place an unreasonably low priority on enforcing unambiguous contract terms. Policyholders should be held accountable for not only the management of liabilities, but also the consequences of buying inadequate insurance coverage during periods which substantial liability may be incurred. “*Viking Pump* is a game-changer, finally allowing policyholders to avoid multiple deductibles, retentions, insolvent insurers and other coverage gaps.”¹⁰⁶

There is little doubt that policyholders across the country will benefit greatly from *Viking Pump* and the inevitable progeny that comes. With greater liability assumed by insurance companies that would have otherwise been able to avoid stepping into the shoes of their insureds, it will be interesting to see what changes come in the form of additional settlements for higher amounts. The language of the cases discussed, however, still places an emphasis on reliance upon unambiguous contract terms (though the courts’ adherence to that is arguably subject to greater debate now more than ever). You can be certain right now, somewhere, there are attorneys laboring over and tweaking non-cumulation and anti-stacking clauses that will satisfy the jurisdictions abandoning pro rata allocation.

¹⁰⁵ *Bos. Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 311 (Mass. 2009) (quoting *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 992 (N.J. 1994)).

¹⁰⁶ Paul E. Breene & Ann V. Kramer, ‘*Keyspan*,’ ‘*Viking Pump*’ Throw N.Y. Allocation Law Into State of Confusion, N.Y.L.J., Oct. 24, 2016.