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Mediation Is the Best Method To Resolve Long-Tail Coverage Disputes

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When the New York Court of Appeals issued its decision in *In re Viking Pump*, some may have hoped for more settlements in light of new clarity in the law. Policyholders viewed the decision favorably. On balance, the decision does lean towards policyholders, and in many cases it may provide some significant leverage for policyholders. But given the process courts must follow in deciding allocation and exhaustion issues in New York, long-tail insurance claims will continue to strain court resources, and in certain cases, may even harm policyholders. We may even see policyholders arguing for pro rata allocation and horizontal exhaustion and insurers arguing for joint and several allocation and vertical exhaustion in some cases. Focused mediation early in these disputes may provide more cost-effective resolutions than litigation under *Viking Pump*, and may avoid unexpected results. At a minimum, mediation can provide a confidential forum for the parties to have a thorough conversation about a range of possible outcomes, hear the strengths and weaknesses of those arguments and then make a forward-looking evaluation of the costs and benefits of the litigation.

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Let's see how these cases may look in practice. Imagine a policyholder who faces liability for a slow leak of toxic chemicals from its factory into surrounding groundwater over a period of 10 years. The leak stopped 25 years ago, but the pollution is still migrating in an underground plume. The EPA is directing a cleanup that has already cost millions of dollars and will likely cost millions more. There are 10 years of relevant insurance policies, including primary ($1 million per year), umbrella ($4 million per year) and excess ($15 million per year) for a total of $200 million in coverage ($20 million per year for 10 years). Perhaps there are only 10 years of policies because subsequent policies had absolute pollution exclusions, or the policyholder chose not to purchase insurance for those years.

Now let's get even more granular. Say the cleanup will cost $200 million or more, and the policyholder needs every single policy to pay to get full coverage for the loss. But let's also assume the policyholder had a single insurer at each layer, and each policy in that layer was identical. Also, each policy in each layer had a noncumulation clause of the type seen in

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Viking Pump. That clause limits payments based on prior payments under prior policies for the same occurrence. The insurers will forcefully argue that under *Viking Pump*, the policyholder is entitled to collect only a single year of coverage, $20 million, leaving the policyholder effectively uninsured for the other $180 million of cleanup costs. That best-case scenario for the insurers, which would logically follow from *Viking Pump*, would give effect to all of the relevant policy language.

Now let's assume the exact same coverage chart, but with one very significant change: no non-cumulation clauses or any other language that drives us into the *Viking Pump* ruling. In these cases, pro rata allocation and horizontal exhaustion will apply under *Consolidated Edison v. Allstate*, 98 N.Y.2d 208 (2002). The policyholder will argue forcefully that it should collect all $200 million in coverage.

In reality, both of these situations are unlikely. Due to the way insurance is purchased and placed, there are likely to be a variety of carriers in each layer and a variety of different policy forms. There will be bankrupt insurers, settled insurers, insurers with limits that are impaired or exhausted by other unrelated claims, and even possibly gaps in coverage for years when the policyholder chose not to buy insurance. In these situations, *Viking Pump* may provide maximum benefit to the policyholder. Since all years are triggered, and each year is jointly and severally liable, the policyholder can pick the year with the most available coverage and exhaust it. The policyholder may then choose other years until fully compensated and will choose other years where there are no non-cumulation clauses. But if there are years and/or layers that lack non-cumulation clauses, those may be more difficult for the policyholder to access and may require a completely different calculation.

Can *Viking Pump* really be calling for different rules to apply to different parts of the coverage chart in the same case? Maybe. How would that look?

Let's try another scenario for our coverage block. Assume the first five years are without non-cumulation clauses, and assume the last five years have effective non-cumulation clauses at every layer, and there is only one insurer at each layer. In the first five years, arguably the full $100 million in limits is available. In the second five years, only the first year would likely pay its $20 million, and the insured would be short $80 million. In this situation, the policyholder is likely to argue around *Viking Pump*. Perhaps the argument will be that in a mixed case—where there are some policies with non-cumulation clauses and some without—judicial economy, fairness, reasonable expectations, or the principle of maximizing coverage should come into play. But given joint and several liability and vertical exhaustion, any Insurer impacted will have a right to seek reallocation, and a New York court is unlikely to ignore how the non-cumulation clauses were intended to work.

Let's try another example. The cleanup is only $50 million. There are some non-cumulation clauses and some policies with no such language. There are bankrupt carriers and carriers that have already settled for less than their limit. Here the policyholder would seem to have a clear advantage. It can pick a year, collect all the proceeds, and then maybe even pick another year or two until fully reimbursed, assuming that it does not run into non-cumulation clauses in any of those years. The policyholder gets fully reimbursed for the cleanup costs.

One more scenario. Remember we have 10 years of coverage, but the pollution is still there, and the plume is moving. This may constitute ongoing property damage, which means it may trigger a longer period than the 10 years. Insurers will argue under a pro rata approach that the years up until this lawsuit is filed are all triggered, and the insured is responsible for the shares allocable to those years. If there are no policies with non-cumulation clauses in the block, this may work. If there are all non-cumulation clauses, this won't work. If there are some of each, could the trigger period used be different for different parts of the coverage block? Maybe.

The foregoing examples are highly simplified and don't mention the interplay with a lot of other potential issues that arise in these cases. The permutations are endless. And since the New York Court of Appeals approach emphasizes policy language in each and every policy, the parties will need to get a busy trial court to focus on all of that policy language along with all those other issues that will come up in the case, many of which end up being quite complicated in and of themselves. For example, lost or missing policies may require expert testimony from insurance archaeologists. There may be an issue as to whether the damage was at least expected, if not intended, that will require extensive document and deposition discovery. There may be a variety of pollution exclusions as well as choice of law issues. And one last wrinkle: What if there are non-cumulation clauses but the court deems them to be ambiguous and therefore ineffective? Will that cause the allocation and exhaustion method to change?

Given the complexity of these cases and the challenges around understanding the implications of *Viking Pump* for any specific set of facts and insurance policies, early mediation may be a preferred course. Mediation should be customized for the dispute. A core practice of mediation is the submission of statements to the mediator citing to relevant facts, policy language and law. With careful vetting, you should be able to find a mediator who understands policy language and the relevant law in New York and elsewhere if choice of law is an issue. The mediator should be able to work through the potential outcomes with each party and lead the parties in a conversation that challenges all sides. This can help parties refine their arguments, narrow the focus of the dispute and save costs, or possibly even settle the dispute in whole or in part.