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## Insurance Policyholders Score Victory on Critical Allocation Issue in Second Circuit *Olin* Decision

In an action seeking insurance coverage for environmental contamination, the United States Court of Appeals for the Second Circuit held that “all sums” allocation would apply to the policies at issue, and therefore the policyholder could choose which of the multiple triggered policy periods it preferred to cover the entire loss, up to the limits of the policies in that year. [\*Olin Corp. v. OneBeacon Am. Ins. Co.\*](#), No. 15-2047(L) (2d Cir. July 18, 2017).

The Second Circuit applied a recent New York Court of Appeals decision, *In re Viking Pump, Inc.*, 52 N.E.3d 1144 (N.Y. 2016), which involved coverage for asbestos bodily injury claims under liability insurance policies spanning the period 1972 to 1985. The New York court held that for insurance policies containing “noncumulation” and “prior insurance” provisions, all sums allocation, not “pro rata” allocation, is appropriate, reasoning that those provisions anticipate that policies in successive years could indemnify the same loss. Additionally, the *Viking Pump* court permitted “vertical exhaustion,” meaning that the policyholder could obtain excess coverage in the selected policy year without first exhausting all triggered primary policies horizontally across policy years.

In *Olin*, the Second Circuit considered an excess insurer’s argument that a different allocation approach was warranted because the underlying primary policies did not contain the noncumulation and prior insurance provisions that the *Viking Pump* court had relied on in reaching its decision. However, the Second Circuit was not swayed, relying on the language of only the excess policies at issue and permitting an all sums allocation.

The Second Circuit did leave open the possibility that the insurer could utilize the prior insurance provision to offset the policyholder’s recovery, deducting any settlements already paid to cover the loss by another insurer at the same level of coverage. The case was remanded to the district court for further proceedings, with the insurer bearing the burden of proving that any settlements applied to the same loss.

The *Olin* decision is a positive development for policyholders, as it reinforces the application of all sums allocation and vertical exhaustion under New York law for long-tail claims involving policies with noncumulation or prior insurance provisions. Moreover, it continues a broader trend allowing policyholders to

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select among a triggered set of jointly and severally liable insurance policies to respond to a loss. However, both policyholders and insurers will be watching the district court decision to determine whether discovery is permitted into confidential settlements the policyholder reached with other insurers, which could impact how insurer-policyholder settlements are negotiated in the future.

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