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Alert

Second Circuit Provides First Significant Application Of Viking Pump

By: Lorraine M. Armenti and Jason A. Pozner
July 20, 2017

On July 18, 2017, the United States Court of Appeals for the Second Circuit provided the first significant appellate application of Viking Pump's holding that allocation methodology is to be determined by policy language and permitting vertical exhaustion where indicated by policy language. See Olin Corp. v. OneBeacon America Ins. Co., 15-2047 (2d Cir. July 18, 2017). The Second Circuit held that vertical exhaustion for excess policies is appropriate even where underlying primary policies do not contain Condition C. The Second Circuit further held that a prior insurance provision in an excess policy is applicable to policies issued by other insurers at the same excess level.

In this protracted coverage dispute between Olin and its insurers, Olin sought coverage for numerous environmental claims at various sites. At issue on this appeal were policies issued by OneBeacon providing limits of $20 million excess of a $300,000 primary policy. The OneBeacon policies contain "Condition C", the same language at issue in Viking Pump. The underlying primary policy did not contain Condition C. Condition C contains two paragraphs. The first paragraph is the "prior insurance" provision, reducing the limits of the policy by the limits of any prior applicable policies. The second paragraph is the "continuing coverage" provision, providing for coverage after the termination of the policy.

On appeal from the district court's denial of summary judgment to OneBeacon, the Second Circuit held that, in the wake of Viking Pump, Condition C requires the application of vertical exhaustion. It concluded that, despite the absence of Condition C from the underlying primary policies, vertical exhaustion with regard to OneBeacon's policies was appropriate. It further concluded that the "prior insurance" provision must be given effect by reducing the limits of OneBeacon's policies by any payments made by any insurers, not just OneBeacon, at the same layer of excess coverage.

The Second Circuit's ruling is the first appellate opinion to address the issue of how to apply Viking Pump where all layers of coverage do not include Condition C. It also is the first appellate court to hold, in the wake of Viking Pump, that prior insurance non-cumulation clauses may apply to different insurers on the same excess layer.

If you have any questions about the decision, please feel free to contact Lorraine M Armenti, (973) 631-6008, larmenti@cmg.law or Jason A. Pozner, (973) 631-6065, jpozner@cmg.law.