

## California Federal Court Expands *Viking Pump's* Holding Beyond Condition C

By: Carolina A. Salazar, Elise A. Smith

May 18, 2018

Courts across the country are grappling with how to interpret the New York Court of Appeal's application of an all sums allocation for policies that include Prior Insurance and Non-Cumulation Clauses ("Condition C") following *In Re Viking Pump, Inc.* 27 N.Y.3d 244 (2016). The most recent court to consider the impact of *Viking Pump* is the United States District Court for the Northern District of California. In *Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Ins. Co.*, the court held that a single primary policy that did not contain Condition C was required to pay "all sums" due to an insured following an asbestos-wrongful death settlement based on the definition of "bodily injury" contained in that policy. No. 17-cv-01804-WHO, 2018 U.S. Dist. LEXIS 42955 (N.D. Cal. Mar. 15, 2018).

Polar-Mohr filed a lawsuit against Zurich American Insurance Company ("Zurich") seeking recovery of amounts Polar-Mohr paid in settlement of an underlying wrongful death claim brought by the estate of a former Polar-Mohr employee, Walter Huwe, as a result of his exposure to asbestos from 1964 to 1999. Huwe was diagnosed with mesothelioma in 2013 and died in 2014. Zurich and Polar-Mohr both moved for summary judgment regarding the method of allocating the settlement payment made in the underlying lawsuit. In pertinent part, Zurich argued that New York law applied, and further that, under New York law, Zurich should only be required to pay its pro rata share of the settlement amount under the single primary policy it issued to Polar-Mohr.

The court agreed in part, concluding that there was no conflict between New York and California law on the issue of allocation. In doing so, however, the court reached the conclusion that the Zurich policy mandated an all sums allocation, despite the fact that the policy did not contain Condition C. Rather, the court relied on the Zurich policy's definition of "bodily injury," which included "bodily injury, sickness or disease sustained by any person which occurs during the policy period, *including death at any time resulting therefrom.*" Based on the inclusion of the "at any time resulting therefrom" language, the court concluded that "the Zurich policy contemplates and promises indemnification to damages that arise outside of the policy period" and is "inconsistent with the pro rata method of allocation." Accordingly, the court held that Zurich was required to indemnify Polar-Mohr for the entire amount of the underlying settlement, as well as reimburse Polar-Mohr for all defense costs incurred in the defense of the underlying lawsuit.

The court's ruling in *Polar-Mohr* represents an extension of New York precedent, as no New York court has, to date, based an all sum allocation on a policy's definition of "bodily injury." Moreover, *Viking Pump*, on its face, did not address the allocation of defense costs. As such, prior New York case law mandating the pro rata allocation of defense costs may still represents binding precedent. Although policyholders will likely cite to *Polar-Mohr* as endorsing an expansion of *Viking Pump*, even when Condition C is not present, the *Polar-Mohr* decision represents an outlier of New York law. Only time will tell whether the rationale of *Polar-Mohr* will withstand the scrutiny of subsequent decisions by New York's courts.