

New York Court Rules On Allocation And Exhaustion In Asbestos Coverage Suit (Insurance Law Alert)

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A New York trial court addressed the allocation of losses across policy periods and exhaustion of primary policies in a recent asbestos coverage lawsuit. *Meissner v. Ridge Construction, Inc.*, 2022 N.Y. Misc. LEXIS 3106 (N.Y. Sup. Ct. Monroe Cnty. July 18, 2022).

In the underlying suit, a claimant was awarded \$8 million for asbestos-related injuries. Because the defendant construction company was dissolved, the claimant brought suit against its excess insurers to collect the verdict pursuant to New York Insurance Law §3420. Underwriters argued that its policies did not cover the underlying losses and asserted several coverage defenses.

Relying on the New York Court of Appeals' decision in *In re Viking Pump*, 27 N.Y.3d 244 (2016) (discussed in our [May 2016 Alert](#)), the court ruled that where, as here, policies contain prior insurance and non-cumulation provisions, all sums allocation and vertical exhaustion are appropriate.

With respect to exhaustion, the court ruled that a buy-back settlement agreement between a primary insurer and the policyholder established full and proper exhaustion of the primary policy so as to trigger coverage under the excess policy. The court held that the "actual payment" requirement of the excess policy was met because the claimants granted Underwriters a credit for the full amount of the primary policy. The court explained that if the dissolved policyholder had been financially viable, it could "fill the gap" in coverage for the primary policy limits. Since the claimants "stand in the shoes" of the policyholder in this action, they adequately filled the gap by issuing a credit against the excess policy so as to meet the exhaustion requirement.

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