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COURT OF APPEALS

STATE OF NEW YORK

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VIKING PUMP, INC. AND WARREN PUMPS,  
LLC, INSURANCE APPEALS

No. 59

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20 Eagle Street  
Albany, New York 12207  
March 29, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.

2 First matter on this afternoon's calendar is  
3 number 59, Viking Pump v. TIG Insurance.

4 MS. COHEN: Good afternoon, Your Honors.

5 I will - - - my name is Robin Cohen and I  
6 represent Warren Pumps and I will be handling the  
7 allocation portion of the argument. Mr. Foradas will be  
8 handling horizontal exhaustion.

9 May I begin, Your Honors?

10 CHIEF JUDGE DIFIORE: Yes. Rebuttal time,  
11 counsel?

12 MS. COHEN: Yes. Five minutes total. And  
13 we'd ask that we be able to decide after the  
14 presentation.

15 CHIEF JUDGE DIFIORE: Certainly.

16 MS. COHEN: Thank you. Okay.

17 Your Honors, this insurance dispute is unique  
18 because both the drafters of the noncumulation provisions,  
19 Liberty Mutual Insurance Company, and the parties to the  
20 insurance contract for which these excess carriers follow  
21 form, are in fundamental agreement on how the  
22 noncumulation provisions impact the allocation.

23 It is undisputed that Liberty Mutual Insurance  
24 Company drafted the standard form noncumulation provisions  
25 in 1966. And it is also undisputed that in this case,

1 Liberty Mutual paid Viking and Warren in excess of 180  
2 million dollars on an all-sums basis. It's also  
3 undisputed that during that period of time, the excess  
4 carriers - - -

5 JUDGE ABDUS-SALAAM: So counsel, let me  
6 just ask; are you asking us to look at the contract  
7 and its provisions and then say that's what the  
8 contract says, or are you asking us to do something  
9 else?

10 MS. COHEN: Your Honor, we're asking you to  
11 look at the contract; we believe and we submit that  
12 the contract is clear and unambiguous. But, in the  
13 alternative, to the extent that the court finds that  
14 the provision is - - - is ambiguous, Liberty Mutual's  
15 conduct is certainly relevant to the reasonableness  
16 of the positions that Viking and Warren took. The  
17 drafter of the provision understood and paid 180  
18 million dollars based upon an all-sums basis.

19 And that payment, over a twenty-two-year  
20 period on an all-sums basis, is consistent with the  
21 position that the excess carriers took before the  
22 trial court. Their own expert testified at trial  
23 that the noncumulation provision was inconsistent  
24 with the pro-rata allocation. And if - - -

25 JUDGE STEIN: Is that - - - is that the - -

1 - essentially what your - - - what your argument is,  
2 rather than - - - or are you saying that the  
3 noncumulation provision in itself suggests one method  
4 of allocation over another?

5 MS. COHEN: Yes, we think it's one method,  
6 Your Honor, and we believe our interpretation is the  
7 only reasonable interpretation. But at least - - -  
8 at least it's a reasonable interpretation. And the  
9 best evidence of that is not only the Liberty's  
10 course of conduct over the last twenty-two years, but  
11 the excess carrier's position before the trial court.

12 Not only did their expert testify that the  
13 noncumulation provisions were inconsistent with the  
14 pro-rata allocation, the excess carriers, for seven  
15 years before the trial court, took the position that  
16 you cannot apply the noncumulation provision in a  
17 pro-rata allocation. And so whether you look at  
18 Liberty's course of conduct or you look at the  
19 admissions by the excess carriers, they all point to  
20 the fact that Liberty's pos - - - that Warren's  
21 position is reasonable.

22 JUDGE STEIN: What did the court do in  
23 Olin?

24 MS. COHEN: Olin, Your Honor - - - Olin III  
25 dealt with not the Liberty provision, but dealt with

1 the prior insurance provision. And in that case, the  
2 policyholder was arguing that you can aggregate and  
3 collapse twenty-two years of post-policy period  
4 damage into one year, and go up vertically, and hit  
5 an excess policy that was on top of thirty million  
6 dollars.

7 So what they were arguing, in essence, was  
8 an all-sums allocation, that you could collapse and  
9 you could aggregate it all in one year. Now, the  
10 carriers in that case were arguing the opposite, that  
11 you have to prorate. In fact, they had some  
12 ammunition. The prior two Olin decisions had said  
13 that, that you could - - - you have to prorate. But  
14 the court said in Olin III, it's different. And it's  
15 different because of the noncumulation provision.  
16 The court said, in this particular situation, in  
17 light of the noncumulation provision, the parties had  
18 agreed to not only have the policies pay within the  
19 policy period, but to pay outside the policy period.

20 So what they allowed the policyholder to do is  
21 to aggregate it all and hit that excess policy. That, in  
22 essence, is an all-sums allocation. That is what we are  
23 seeking here with respect to the post-policy damage. Now,  
24 what they rely on - - -

25 JUDGE FAHEY: Now, let's stay on Olin III

1 for a second. Is it your position that the Second  
2 Circuit correctly interpreted this court's holding in  
3 ConEd?

4 MS. COHEN: Well, Your Honor, in ConEd, the  
5 court did not have the noncumulation provision. So  
6 we didn't have to harmonize the during-the-policy  
7 period and the noncumulation provision. In fact, in  
8 ConEd - - -

9 JUDGE FAHEY: So there they said, in the  
10 absence of contractual language, but in point of  
11 fact, there was contractual language in ConEd that  
12 was being interpreted, so they might have gotten that  
13 part of it wrong.

14 MS. COHEN: Well, Your Honor, this court in  
15 ConEd said, in the absence of a noncumulation  
16 provision, you prorate for an indemnity. But in - -  
17 - in Olin III, there was a noncumulation provision.  
18 So in that case, in light of the noncumulation  
19 provision, Olin III aggregated and did an all-sums  
20 allocation for the post-policy period damage. What  
21 the defen - - -

22 JUDGE FAHEY: See, the way I read ConEd is  
23 that they said pro rata was consistent with the  
24 policy language.

25 MS. COHEN: Yes, in the absence of a

1 noncumulation provision. In fact, in ConEd, this  
2 court expressly distinguished its policies from the  
3 policies in the Hercules case, which had a  
4 noncumulation provision. So it recognized that there  
5 was a possibility that, in fact, it wouldn't be pro  
6 rata for indemnity if the language was different.

7 JUDGE FAHEY: So we could give it the  
8 interpretation you want and still be consistent with  
9 Olin III, is what you're saying.

10 MS. COHEN: Yes. Yes.

11 JUDGE RIVERA: So - - - I'm sorry, so is  
12 your position that there is no conflicting language  
13 in the policies, or that there is mandatory language  
14 in the policies?

15 MS. COHEN: We bel - - -

16 JUDGE RIVERA: Or both?

17 MS. COHEN: Sure, sure.

18 We believe, Your Honor, that in - - - that  
19 in order to harmonize, during the policy period, in  
20 the coverage grant - - -

21 JUDGE RIVERA: Uh-huh.

22 MS. COHEN: - - - with the noncumulation  
23 provision, there's only one reasonable  
24 interpretation. And that interpretation is an all-  
25 sums allocation.

1                   And the reason is, if you go to the Liberty  
2                   provision - - - and I'm basing it on undisputed  
3                   facts; everyone agrees that the Liberty noncumulation  
4                   provision is designed to cover a situation where you  
5                   have multiple policies covering the same injury.  
6                   That cannot happen in a pro-rata allocation. And the  
7                   reason is, in a pro-rata allocation, if you have a  
8                   multi-year injury, what you do is you take that  
9                   indivisible injury, you cut it up into pieces, and  
10                  each policy only pays for the distinct injury during  
11                  the policy period. So once you prorate, you never  
12                  have multiple policies paying for the same injury.  
13                  And then - - -

14                   JUDGE PIGOTT: And how do you know what  
15                   injury applies to what year?

16                   MS. COHEN: Each policy pays, not only for  
17                   injury inside the policy period, but outside the  
18                   policy period. And that's why you have multiple  
19                   policies paying for the same injury, and then you  
20                   apply the noncumulation provision which provides a  
21                   cap. The problem with - - - I see my time is up, but  
22                   the - - - the - - - the most important point is that  
23                   the Liberty noncumulation clause is meaningless if  
24                   they are right that during-the-policy period means  
25                   that you only pay for injury during the policy

1 period. Because you would never have multiple  
2 policies paying for the same injury.

3 JUDGE FAHEY: But - - - but it's a legal  
4 fiction really, in long - - - because of long-tail  
5 claims. Because you've got asbestos claims, you have  
6 a ni - - - unique kind of claim that has to be spread  
7 out. So it's not in fact multiple occurrences, but  
8 it's a legal fiction that's engaged in for pro-rata  
9 payouts.

10 MS. COHEN: But, whether it's a legal  
11 fiction or not, Your Honor - - -

12 JUDGE FAHEY: Uh-huh.

13 MS. COHEN: - - - the underlying premise for a  
14 pro-rata allocation is, each policy only pays for injury  
15 during its policy period.

16 JUDGE FAHEY: Okay.

17 MS. COHEN: So you never have multiple  
18 policies - - -

19 JUDGE FAHEY: No, I agree with you on that.

20 MS. COHEN: Okay.

21 JUDGE FAHEY: Yeah.

22 MS. COHEN: And that's why you could never  
23 trigger this provision, the Liberty noncumulation  
24 provision, once you prorate, because the prerequisite  
25 isn't there.

1 JUDGE FAHEY: I see.

2 MS. COHEN: And that is why - - -

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MS. COHEN: - - - that the new methodology  
5 that they have - - - they have espoused, where you  
6 allocate both, which is inconsistent with their  
7 position below, doesn't make any sense. Because once  
8 you prorate, you cannot trigger the Liberty noncum  
9 clause.

10 CHIEF JUDGE DIFIORE: Thank you.

11 MS. COHEN: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MR. FORADAS: Good afternoon. May it  
14 please the court, my name is Michael Foradas and I'm  
15 handling the issue of vertical versus horizontal  
16 exhaustion.

17 The insurers in this case claim that Viking Pump  
18 is obligated to exhaust all of its underlying primary and  
19 umbrella policies in every year, both before and after a  
20 particular excess year, before it can access any excess  
21 insurance in any year. And that principle, which has been  
22 called "horizontal exhaustion", they urged was a matter of  
23 settled New York law in the Delaware courts.

24 And based on that premise, they have paid Viking  
25 Pump nothing under their policies, even while paying

1 Warren Pump claims, a situation that the Delaware court  
2 jury found was in breach of the obligation in fair dealing  
3 under the contracts.

4 The excess insurers now have conceded that there  
5 is no overriding principle of New York law at stake here.  
6 The only principle of New York law that matters is the one  
7 that enforces the plain meaning of the contract, the  
8 party's deal, as expressed in their contractual language.  
9 And that contractual language, we submit, compels the  
10 conclusion that these policies may be exhausted on a  
11 vertical basis.

12 Now that they are before this court, the  
13 insurers have minted three brand-new arguments that were  
14 never raised in the Delaware Courts, including in the  
15 Delaware Supreme Court, one based on the insuring  
16 agreements of their policies, one based on the other  
17 insurance provisions of their policies, and one based on  
18 the Liberty Mutual retained limit. None of those  
19 arguments establish plain meaning that favors horizontal  
20 exhaustion. Let me take each one briefly in turn.

21 The excess insurers have agreed, and have stated  
22 in their responsive brief in this court, that if losses  
23 are allocated on a pro-rata basis, if this court were to  
24 adopt a pro-rata scheme, that the policyholders here may  
25 seek coverage from a triggered excess policy once the

1 directly underlying policy in the same policy years have  
2 been exhausted. Now, they are loath to call that vertical  
3 exhaustion, but that is precisely what it is. And there  
4 is no reason for this court to construe those policies to  
5 permit vertical exhaustion in one allocation context, and  
6 require horizontal allocation in another context.

7 The Superior Court in Delaware agreed that there  
8 was policy language supporting the vertical-exhaustion  
9 conclusion. In fact, it was the only policy language that  
10 anybody pointed to on this issue. The excess carriers did  
11 not make a policy-based argument in the Delaware courts.  
12 Now for the first time, they try to sidestep that  
13 language. And that language is found in the underlying  
14 insurance provisions of their excess policies.

15 They argue one thing in principle with respect  
16 to those provisions. They point to the language of some  
17 of those underlying insurance provisions, and they say,  
18 well, they set up a necessary but not sufficient condition  
19 to exhaust vertically. That lang - - - that argument is  
20 inconsistent with the underlying insurance provisions.

21 JUDGE FAHEY: So just - - - just to be  
22 clear, are we talking about '79 excess policies, are  
23 they the - - -

24 MR. FORADAS: It's actually - - -

25 JUDGE FAHEY: They're following form from

1 this policies, is that - - - tell me.

2 MR. FORADAS: It's actually all the excess  
3 - - - every one of the excess policies that are at  
4 issue in this case. I think the parties used the '79  
5 as an exemplar, Your Honor - - -

6 JUDGE FAHEY: Uh-huh.

7 MR. FORADAS: - - - but all of them have  
8 some underlying insurance provision. And the excess  
9 concede that the underlying insurance provision in  
10 every one of those policies, in every year, only  
11 references the underlying insurance in that  
12 particular policy.

13 JUDGE STEIN: What about the other  
14 insurance provision? That seems to be a bit more  
15 problematic.

16 MR. FORADAS: The other insurance  
17 provision, there are - - - there are really two main  
18 points to be made on the other insurance provision.  
19 First, this court, in Consolidated Edison, I think  
20 properly observed that those provisions are designed  
21 for the situation where you have concurrent insurance  
22 in the same year, but not consecutive insurance  
23 spanning multiple years. And in fact, the Fairbanks  
24 - - -

25 JUDGE STEIN: How do we know that?

1 MR. FORADAS: Pardon me?

2 JUDGE STEIN: How do we know that from the  
3 language of the policy?

4 MR. FORADAS: I think - - - I think in  
5 fairness, it's hard to say for sure from the language  
6 in the policies. And that means - - - I think it  
7 could be construed in either of two ways, and under  
8 those circumstances, two - - - two principles come  
9 into play. One, you should construe it such that all  
10 provisions have meaning and don't read out the  
11 underlying insurance provision, and two, to the  
12 extent that there is any ambiguity or doubt about the  
13 construction, that it be - - - it should be construed  
14 in favor of the policyholders in this case.

15 JUDGE FAHEY: Well, they - - - I thought  
16 the Delaware Court too - - - they relied on ConEd to  
17 say that in a consent - - - it wouldn't apply to  
18 consecutive, only a concurrent situation.

19 MR. FORADAS: They - - - they - - -

20 JUDGE FAHEY: That's the way I read it.

21 MR. FORADAS: They did that - - - they did  
22 that, actually, in - - - I think a part of the - - -  
23 a subsequent opinion, where they were looking at all  
24 the excess policies - - -

25 JUDGE FAHEY: Uh-huh.

1 MR. FORADAS: - - - and there, the court  
2 says, you can exhaust vertically, but for some  
3 reason, the court believed that when you were down at  
4 the umbrella layer, you know, at this very first  
5 layer, you can't. And I think those two parts of the  
6 opinion are frankly inconsistent - - -

7 JUDGE FAHEY: I see.

8 MR. FORADAS: - - - with one another.

9 The other observation I'll make about - - -

10 JUDGE ABDUS-SALAAM: Wait, before - - -

11 MR. FORADAS: - - - about the other  
12 insurance - - -

13 JUDGE ABDUS-SALAAM: Counsel, before you  
14 leave that observation - - -

15 MR. FORADAS: Yes.

16 JUDGE ABDUS-SALAAM: - - - are - - - are  
17 you - - - are both sides in agreement now that it can  
18 be vertical or horizontal? Because I think below,  
19 the excess carriers argued that it would - - - could  
20 only be horizontal.

21 JUDGE FAHEY: The excess carriers argued  
22 only horizontal below - - -

23 JUDGE ABDUS-SALAAM: But - - - but they are  
24 not arguing that now.

25 MR. FORADAS: Now, they appear to argue

1           that if it's in a pro-rata allocation scheme, it can  
2           be a vertical exhaustion, but not if there is an all-  
3           sums scheme. So I think they're taking somewhat  
4           different positions.

5                         I was going to simply observe that the  
6           other thing to say about the other insurance  
7           provisions is - - - is that other courts have picked  
8           up on Consolidated Edison's distinction, both - - -  
9           including courts in New York and said, that really is  
10          a provision designed for the concurrent coverage  
11          situation, including the Fairbanks opinion that the  
12          excess recently cited to in this - - - by this court.

13                         And I'll note, we took a look at the excess  
14          briefs in the Fairbanks decision - - - in the Fairbanks  
15          case, and the excess briefs in that case actually make  
16          precisely the argument we're making here, that the other  
17          insurance provisions only apply in the concurrent coverage  
18          circumstance.

19                         CHIEF JUDGE DIFIORE: Thank you, counsel.

20                         MR. FORADAS: Thank you, Your Honor.

21                         MS. SULLIVAN: Good afternoon, Your Honors,  
22          and may it please the court. Kathleen Sullivan for  
23          the excess insurers.

24                         I'd like to bring us back to what is  
25          actually before the court, which is a narrow

1 certified question of law. And the certified  
2 question of law on the allocation question is simply,  
3 under New York Law, is the proper method of  
4 allocation to be used all-sums or pro rata, when  
5 there are noncumulation and prior-insurance  
6 provisions. And the answer - - -

7 JUDGE STEIN: We never answered that  
8 before?

9 MS. SULLIVAN: You have not answered it  
10 before. You should answer it - - -

11 JUDGE STEIN: The ConEd didn't answer that.

12 MS. SULLIVAN: That's correct, Your Honor.

13 JUDGE STEIN: Okay.

14 MS. SULLIVAN: You should answer it now,  
15 pro rata, absolutely. And the way you should get  
16 there, is you should go back to the method of ConEd.  
17 Judge - - - Chief Judge Kaye's unanimous opinion for  
18 this court in 2002 set forth pro-rata allocation as  
19 the proper interpretation of a policy that has an  
20 insuring agreement that measures injury or occurrence  
21 during the policy period.

22 Now, Judge Fahey - - -

23 JUDGE ABDUS-SALAAM: But did ConEd - - -  
24 Ms. Sullivan, did ConEd involve a noncumulation  
25 clause or other insurance provision clause?

1 MS. SULLIVAN: Your Honor, it did not  
2 discuss those provisions, but as we point out in  
3 respondent's brief, at page 13, note 5, the ConEd  
4 policies had noncumulation clause - - - they had  
5 noncumulation clauses. So the parties to the ConEd  
6 policies bargained for during the policy period - - -

7 JUDGE STEIN: But nobody argued - - -

8 MS. SULLIVAN: That is correct, Your Honor.

9 JUDGE STEIN: - - - what we argued here,  
10 right?

11 MS. SULLIVAN: That's correct. So we - - -

12 JUDGE STEIN: So that - - - so was that  
13 issue - - -

14 MS. SULLIVAN: It was not raised - - -

15 JUDGE STEIN: - - - raised?

16 MS. SULLIVAN: - - - briefed, or decided,  
17 Your Honor.

18 The only reason I point it out, is it shows that  
19 the parties to the agreement thought that pro rata, which  
20 is derived from the language during the policy period, is  
21 compatible with and consistent with, from the party's  
22 standpoint, the noncumulation clauses.

23 So Your Honor, the narrow question before you on  
24 allocation is, now that we are looking at the  
25 noncumulation causes, which this court did not decide in

1 ConEd, can they be harmonized with the during the policy  
2 period clause, which is where the pro-rata allocation came  
3 from.

4 And the answer is, the contracts unambiguously  
5 can be harmonized. The language of "during the policy  
6 period" can unambiguously be harmonized with the language  
7 of noncumulation.

8 Now, in - - - Judge Stein, in answer to your  
9 question, what happened in Olin III is, the Second Circuit  
10 - - - the three judges of the Second Circuit in Olin III  
11 did exactly that. They followed ConEd, and they  
12 harmonized.

13 JUDGE STEIN: I find it hard to look at  
14 that decision and say that they did a clear pro-rata  
15 allocation.

16 MS. SULLIVAN: They did, Your Honor; they  
17 absolutely did. Let - - - let me - - - if I could,  
18 could I just say that I'd like to simplify the  
19 contract interpretation issue by pointing out that  
20 there are three clauses at issue. The first clause  
21 is during the policy period. That's exactly the  
22 clause in ConEd that led you to decide unanimously  
23 that pro-rata allocation applies.

24 JUDGE STEIN: But if you have provisions  
25 that talk about covering something beyond the

1           termination of the policy or before or - - - how - -  
2           - how can you - - - how can that be just during the  
3           policy period?

4                       MS. SULLIVAN: Your Honor, let's go to that  
5           language. And that language appears in - - - all - -  
6           - all of the policies in one form or another. If I  
7           could just ask you, when you look at all of this, to  
8           look back at the three key pieces of language.  
9           "During the policy period" is in all of the policies  
10          here; a good place to find it is on pages A517 and  
11          A519. That shows you that we are in ConEd world.  
12          Because every one of the policies here has "during  
13          the policy" language.

14                       Now, Judge Stein, you say, well, let's look to  
15          the partly before, partly after language, the  
16          noncumulation provision. When you look at that, twenty-  
17          three of the policies have it on page A518, eleven of the  
18          policies have it in materially identical form; a great  
19          example is on page 1176. That set does not, Your Honor,  
20          say that coverage applies before and during the policy  
21          period; it simply says that when there is a single-  
22          occurrence policy limit - - - I've paid you my premium, I  
23          may have ten million dollars of damage, but I only get a  
24          per-occurrence limit of up to five million dollars - - -  
25          that per-occurrence limit will apply if there has been a

1 payment in a prior policy period.

2 Now, Your Honor, let's go back to Olin III.  
3 Let's do this in three steps. Olin III says step one,  
4 pro-rata allocation. And Your Honor, what they did there  
5 is they took thirty-one years.

6 JUDGE RIVERA: Doesn't what ConEd say it's  
7 the injury and the occurrence in the policy period,  
8 and that's what's missing here?

9 MS. SULLIVAN: It's not, Your Honor.

10 JUDGE RIVERA: It's not - - - it's not,  
11 that's not what ConEd says, or that's not what's  
12 missing here?

13 MS. SULLIVAN: I'm sorry - - - nothing is  
14 missing here.

15 JUDGE RIVERA: Okay.

16 MS. SULLIVAN: Everything that was in ConEd  
17 is still here, injury during the policy period. So  
18 at step one - - -

19 JUDGE RIVERA: Occurrence during the policy  
20 period?

21 MS. SULLIVAN: Occurrence and in - - - this  
22 is injury during the policy period, ConEd was  
23 occurrence during the policy period; as the Fairbanks  
24 court, that we submitted the letter on says, there is  
25 no difference between injury during the policy period

1 or occurrence during the policy period. Under  
2 Appalachian v. GE, where it states in which one  
3 occurrence - - - single occurrence is identified by a  
4 single claimant's exposure.

5 JUDGE RIVERA: Well, then why have that  
6 language if you're saying injury and occurrence mean  
7 the same thing?

8 MS. SULLIVAN: Your Honor, for purpose - -  
9 - for our present purposes - - -

10 JUDGE RIVERA: Uh-huh.

11 MS. SULLIVAN: - - - one occurrence, one  
12 injury. Let me try to go back. Here, it is  
13 undisputed we have a single occurrence per claimant.  
14 Long-tail exposure to asbestos, single occurrence,  
15 multiple policies. This is not like Diocese; it's  
16 not a multiple-occurrence case, it's a single-  
17 occurrence case.

18 JUDGE RIVERA: I understand that.

19 MS. SULLIVAN: Single-occurrence case,  
20 multiple policies.

21 JUDGE RIVERA: But continued exposure over  
22 time.

23 MS. SULLIVAN: That's right, Your Honor.  
24 So the question here is, the noncumulation provision  
25 - - -

1 JUDGE RIVERA: Which is defined as a single  
2 occurrence.

3 MS. SULLIVAN: That's right, Your Honor.  
4 There is no dispute here; same occurrence. And if  
5 you look at page A15 - - - sorry, A518, the language  
6 of the noncumulation policy, Your Honor, is  
7 noncumulation of liability, same occurrence.

8 And Judge - - - as Judge Fahey pointed out, pro  
9 rata is a kind of legal fiction. We have the same  
10 occurrence over multiple policy periods. And the key  
11 language we are looking at now, that you didn't look at in  
12 ConEd, is the language that says, where the injury occurs  
13 partly before and partly within the period. And Your  
14 Honor, it doesn't say, coverage attaches outside the  
15 policy period; we know from pro rata the coverage is in  
16 the policy period - - - during the policy period. It says  
17 the single-occurrence limit - - - the per-occurrence limit  
18 applies in reduced shares.

19 JUDGE RIVERA: Well, I - - - if the injury  
20 is an occurrence, how do you get an injury in one  
21 part - - - one policy and an injury in another  
22 policy.

23 MS. SULLIVAN: Your Honor - - -

24 JUDGE RIVERA: It looks to me like you're  
25 conflating injury with an occurrence that's about

1 multiple exposures.

2 MS. SULLIVAN: No, Your Honor. We got mul  
3 - - - we got long-term exposure, we got one injury,  
4 one occurrence. What we got is multiple-policy  
5 periods because of pro rata. So what I'm asking you  
6 to do is see that - - -

7 JUDGE ABDUS-SALAAM: You're saying that the  
8 coverage is - - - has to - - - it has to be coverage  
9 within the policy period?

10 MS. SULLIVAN: Yes.

11 JUDGE ABDUS-SALAAM: Not outside of the  
12 policy period.

13 MS. SULLIVAN: Your Honor, let's - - - lets  
14 walk through a simple example, and let's do what Olin  
15 III did but let's simplify it. Let's say we have ten  
16 million dollars in losses. We've got an exposed  
17 worker, ten years of losses, the company that's  
18 paying is - - - and let's say we have annual policy  
19 periods to make it easy.

20 Proration is step one. It's step one, we  
21 know from ConEd, what we do is we divide the ten-year  
22 period into ten annual policy periods, and there  
23 would be one million dollars of loss - - - we divide  
24 the loss - - - that's what proration does at step  
25 one, we divide the loss over ten periods. Now, why

1 did we do that? We did that because, as Chief Judge  
2 Kaye wrote for this court, that's how you interpret  
3 the language "during the policy period" that's here.  
4 And Your Honor, that language is identical here, it's  
5 undisputed.

6 At step one, we have now divided the loss.  
7 Now comes in the noncumulation provision. And it  
8 says, oh, well, hello, you only bargained - - - you  
9 only paid a premium for five million dollars per  
10 occurrence; it's the same occurrence. So now, we've  
11 got ten-million dollars of loss, one million dollars  
12 a year, how does the noncumulation provision work?  
13 It says, okay, let me pay you for year one. I pay  
14 you one million dollars in year one, that means in  
15 year two, there's - - - we reduce the limits. That's  
16 what the noncumulation clause says.

17 Now there is four million dollars left; in  
18 year two, we pay you a million dollars, now there is  
19 three million dollars left out of the single-  
20 occurrence limit.

21 In year three, we now pay you another  
22 million dollars, now there is two million left.

23 In year four, we pay you another million,  
24 now there is one million dollar left. And by year  
25 five, the horiz - - - the per-occurrence limit has

1           been reached.

2                         JUDGE STEIN: Now, are you talking about  
3           the highest per-occurrence limit on any of the  
4           policies?

5                         MS. SULLIVAN: That's right, Your Honor.  
6           In my simple example, it's all the same. But what  
7           the noncumulation provision does, is say, for a  
8           premium that has paid for one per-occurrence limit  
9           for the same occurrence - - - and it's undisputed  
10          here we have one occurrence; it's not a multiple  
11          occurrence case, it's one occurrence. If you've paid  
12          for one per-occurrence limit, the noncumulation  
13          clause says, the insured can't stack the per-  
14          occurrence limit for multiple policies and get more  
15          than the five million dollars.

16                        Now, Your Honor, that's exactly what  
17          happened in Olin III. Olin III gets to the end of  
18          its analysis, and says, first prorate thirty-one  
19          years, a hundred-plus million dollars of loss, 3.3  
20          million dollars of loss a year.

21                        Then it looked at two particular policies  
22          that were triggered in the case, and it said, oh, but  
23          those policies had a one-million dollar per-  
24          occurrence limit. So even though Olin III said,  
25          well, there might have been sixty-two or seventy - -

1 - sixty-seven or seventy-two million dollars of loss  
2 in each of these periods, the h - - - the  
3 noncumulation clause comes in, harmoniously with pro-  
4 rata allocation, and it limits the amount that can be  
5 paid.

6 And the key language in Olin III says, we  
7 are harmonizing noncumulation with proration. We are  
8 harmonizing them. And it - - - if you want to look  
9 at 794F.3d at pages 104 to 105, that's where  
10 noncumulation is harmonized with pro rata. And the  
11 Second Circuit says, in so many words, we are  
12 harmonizing noncumulation with pro rata. And the  
13 insured there, Olin, received the policy limit of  
14 only one policy or one million dollars.

15 So Your Honor, allocation and noncumulation are  
16 doing two entirely different things, and that's why they  
17 can be harmonized. Pro rata - - -

18 JUDGE FAHEY: You don't - - - you don't  
19 have that much time and there are three major points  
20 that both you and counsel that succeeds you, I'd like  
21 you to address, if you can.

22 The first is the inconsistency between your  
23 position in front of the Delaware Courts and your position  
24 here. The second point is the problem of double  
25 crediting, which - - - which everyone - - - it's kind of

1 the underlying policy argument that we are dealing with  
2 ourselves, and if you could address that. And of course -  
3 - - and the third point is, is that we would be - - -  
4 there is no court in the country that - - - I think - - -  
5 that has adopted your interpretation of these policy  
6 provisions in conjunction with pro-rata allocation.

7 And so - - - those are the three points that  
8 stick in my mind, those of the kind of things that are in  
9 the back of my head that - - - and you don't have too much  
10 time. I'd like you to really address those. If we spend  
11 too much time on Olin, we're never going to get to what's  
12 really behind this.

13 MS. SULLIVAN: Your Honor, let me start  
14 with the last one first. Every single court to  
15 interpret New York Law, looking at pro rata plus a  
16 noncumulation provision, has interpreted our way,  
17 except for - - - for Viking. Every single court  
18 that's interpreted a noncumulation New York Law - - -

19 JUDGE FAHEY: So I'm glad I asked this  
20 question, because now they can come up and disagree  
21 with you - - -

22 MS. SULLIVAN: Well, Your Honor, I'll - - -

23 JUDGE FAHEY: - - - so it's good that we  
24 got this set up here - - -

25 MS. SULLIVAN: - - - I'll cover both.

1 Your Honor, Olin III - - - I promise you, look at  
2 Olin III; it harmonizes noncumulation with pro rata  
3 under Con Edison; so that's exhibit 1.

4 Second one is Fairbanks. We sent you Judge  
5 Koeltl's decision for the Southern District of New  
6 York, it harmonizes pro rata with noncumulation  
7 exactly the way we do. Say that they do different  
8 things, and they could be harmonized.

9 Third exhibit is Mt. McKinley, Judge Bransten's  
10 decision in Supreme Court, in which she said that, well,  
11 Viking, the just - - - the Delaware Chancery Court was  
12 being derisive toward ConEd, it wasn't reading ConEd; I'm  
13 reading ConEd - - - I'm reading ConEd with a non-cum  
14 clause, and I come out the same way we do. And Liberty  
15 Mutual v. J&S Supply, Judge Broderick's decision on the  
16 Southern District.

17 So three Judges of the Second - - - Second  
18 Circuit, two Judges of the Southern District, and one  
19 Judge of Supreme Court have all said exactly what we have  
20 said, referring to exactly the same policy clauses, under  
21 exactly the same ConEd law - - - law of New York.

22 Now my friend, will hop up and no doubt point to  
23 other states that are all-sum states, or that are pro-rata  
24 states that arrived at pro rata, not - - -

25 JUDGE STEIN: Also, some of those decisions

1           were operating under the assumption that we are a  
2           pro-rata state, period. Right, isn't that correct?

3                   MS. SULLIVAN: Well, Your Honor, some other  
4           states are pro-rata states, period.

5                   JUDGE STEIN: No, no, no, I know, I'm just  
6           - - - just the cases you are referring to.

7                   MS. SULLIVAN: Yes, Your Honor. But, the  
8           key question for you is New York law. And we  
9           strenuously urge you that ConEd has been the settled  
10          law of New York since 2002. Pro rata has been the -  
11          - -

12                   JUDGE FAHEY: Yeah, I agree with you. The  
13          question is, is it settled that we look to the policy  
14          language, or is it settled that it is pro rata; I  
15          guess that is the question.

16                   MS. SULLIVAN: Your Honor, it's two things.  
17          It is settled that you look to the policy language,  
18          and we agree that if the policy language required a  
19          different outcome here, you could deviate. But the  
20          policy language does not require a different outcome  
21          here because these are identical to the ConEd  
22          policies, plus non-cum - - - non-cum can be  
23          harmonized, because non-cum is doing a different  
24          function. Let me turn to double credit, Your Honor.

25                   There is no double credit because pro rata

1 doesn't give a credit. Pro rata doesn't give any credit.  
2 Back in my ten-million dollar over ten years example, the  
3 insurer isn't getting a credit by proration; he still has  
4 to pay up to his policy limit for every policy period  
5 there was a policy issued. He is not getting any credit  
6 from proration, he still owes ten million dollars unless  
7 you hit a limit. The limit is five million dollars, he is  
8 getting a credit from the non-cum limit, Your Honor - - -

9 JUDGE STEIN: Let me ask you a related  
10 question.

11 MS. SULLIVAN: - - - but that's a single  
12 credit, not a double credit.

13 JUDGE STEIN: Let me ask you a related  
14 question, and that is the relationship between  
15 horizontal exhaustion and a noncumulation clause.  
16 Would it ever be possible for an insurer to cover - -  
17 - to exhaust the primary insurance if they can't  
18 stack them, in order to get to the excess?

19 MS. SULLIVAN: Your Honor, the answer to  
20 the exhaustion question depends first on your answer  
21 to the allocation question. We say, this contract  
22 requires pro rata.

23 JUDGE STEIN: Right.

24 MS. SULLIVAN: If pro rata, you never get  
25 to the exhaustion question. Why is that? Because

1 pro rata spreads the losses across all policies. So  
2 it's a de facto horizontal exhaustion.

3 JUDGE STEIN: So - - - but let's say we  
4 think it should be all sums. Let's - - -

5 MS. SULLIVAN: Your Honor, if you - - -

6 JUDGE STEIN: You don't - - - you don't  
7 agree, but if we did.

8 MS. SULLIVAN: Then, if you get there, Your  
9 Honor, then we win because of the other insurance  
10 clauses that you pointed out. If you go with all-  
11 sums, the proper interpretation of the exhaustion  
12 question and the answer to the second question is  
13 horizontal exhaustion.

14 JUDGE STEIN: Okay. I - - - I know. My  
15 question is, would it ever be possible, under a  
16 horizontal exhaustion and a noncumulation clause, to  
17 exhaust the primary insurance and reach the excess.

18 MS. SULLIVAN: Absolutely, Your Honor,  
19 depending on the terms of the contract, which are not  
20 before you. All these hypotheticals and the  
21 hypotheticals my friends posed can be answered  
22 according to the terms of the different policy.

23 JUDGE STEIN: Well, based on the - - -  
24 based on the policies here, would it ever be possible  
25 for that to happen?

1 MS. SULLIVAN: Absolutely, Your Honor.

2 JUDGE STEIN: How - - -

3 MS. SULLIVAN: Depending on the terms of  
4 the policies. That is, let's say that you're - - -  
5 we're in - - - we think that you should adopt pro-  
6 rata allocation that's spread - - - I'm sorry, am I  
7 missing the question, Your Honor?

8 JUDGE STEIN: Well, I - - - what terms are  
9 you talking about? We're dealing here with certain  
10 policies and I'm asking you, under these policies  
11 whether this would be possible, and you say, well, it  
12 depends on the terms. What are the terms that it  
13 depends on?

14 MS. SULLIVAN: Your Honor, I need to  
15 respectfully ask if you could just repeat the exact  
16 questions you would like me to answer.

17 JUDGE STEIN: The question is, is whether  
18 it's possible, assuming an all-sums allocation, and -  
19 - - to have horizontal exhaustion with a  
20 noncumulation clause, and ever reach the excess  
21 policies.

22 MS. SULLIVAN: Yes. Absolutely, under - -  
23 - depending on the policy. It is absolutely - - -  
24 Your Honor - - -

25 JUDGE STEIN: Depending upon what in the

1 policy?

2 MS. SULLIVAN: Depending on the amount of  
3 the non-cum - - - of the per-occurrence limit. So it  
4 depends on the amount of the per-occurrence limit in  
5 the policies, it depends on the amount of the  
6 aggregate limits in the policies, and from our  
7 perspective, it depends on the terms of the excess  
8 insurance policies and - - - and it is absolutely  
9 possible pursuant to its terms; that's why the  
10 Delaware Chancery Court was quite wrong that on our  
11 theory there could never be payment by the excess  
12 insurers; that's simply not true, it's possible.

13 What's before this court is a simple  
14 question of law. And we respectfully suggest that  
15 these issues about whether exhaustion has occurred or  
16 before the Delaware Supreme Court - - - they turn on  
17 facts from the Delaware Supreme Court's record and  
18 they're not before this court. What we would ask you  
19 to do is just do a simple act of contract  
20 interpretation, just the way the court did in ConEd,  
21 and simply line up the language next to each other.  
22 And what I've - - - the first thing I've tried to  
23 convince you of is that non-cum - - - noncumulation  
24 anti-stacking can be harmonized with proration. Olin  
25 III does it, and all of the judges I've mentioned

1 agree. All of the precedents on New York Law except  
2 for the Delaware Chancery Court see it our way.

3 There is another clause, and my friend referred  
4 to it, and it's also in Olin III - - - there is another  
5 clause about continuing coverage. That also can be  
6 harmonized with the policy here. So non - - -  
7 noncumulation says if you paid some of your limit in a  
8 prior period, you get a credit in the next period for what  
9 you have already paid.

10 JUDGE ABDUS-SALAAM: I - - - Ms. Sullivan,  
11 you're saying we should stack up the language and we  
12 would answer the question essentially the way, I  
13 presume you're saying, we answered it in Con Edison,  
14 or what people think we've said in Con Edison, which  
15 is, this is a pro rata state, right?

16 MS. SULLIVAN: No, Your Honor - - -

17 JUDGE ABDUS-SALAAM: No?

18 MS. SULLIVAN: Your Honor, I think everyone  
19 here agrees that ConEd decided on pro rata as a  
20 matter of contract interpretation, rather than as  
21 public policy.

22 What we are saying to you is, that's the settled  
23 Law of New York, and that contract interpretation here  
24 leads to an answer of pro rata, in answer to the  
25 allocation question, because noncumulation and continuing

1 coverage are harmonized - - - can be harmonized with pro  
2 rata.

3 JUDGE ABDUS-SALAAM: I'm - - - I'm just a  
4 bit confused then. If that's the way you are reading  
5 Con Edison, I'm a little confused why we had this  
6 certified question from the Delaware court - - -

7 MS. SULLIVAN: I understand, Your Honor. I  
8 understand, Your Honor - - -

9 JUDGE ABDUS-SALAAM: - - - who said, look  
10 at the language of the contract and - - -

11 MS. SULLIVAN: I understand, Your Honor.  
12 Well, with respect, we think the Delaware Chancery  
13 Court misinterpreted the contract under New York Law.  
14 He paid lip service to New York Law, but he didn't  
15 apply it.

16 I noticed that all the New York judges and one  
17 Connecticut judge did interpret New York correctly in this  
18 - - -

19 JUDGE RIVERA: But doesn't your  
20 interpretation devolve to a pro-rata state?

21 MS. SULLIVAN: Well, Your Honor, it means -  
22 - -

23 JUDGE RIVERA: And when would it not be pro  
24 rata - - -

25 MS. SULLIVAN: Well, Your Honor - - -

1 JUDGE RIVERA: - - - if you're saying with  
2 a noncumulation clause, it's still - - - you  
3 harmonize it as pro rata?

4 MS. SULLIVAN: Well, Your Honor, there  
5 could be other contracts that don't - - -

6 JUDGE RIVERA: Other than, of course,  
7 express language that says, this is not pro rata; I  
8 get that.

9 MS. SULLIVAN: So Your Honor, if the  
10 contract doesn't have "during the policy period",  
11 ConEd doesn't require that this be a pro-rata state.  
12 It might be a good idea for you to announce that we  
13 are a pro-rata state, pro rata is very good. It  
14 incentivizes insu - - - companies to get insurance  
15 from solvent insurers for every year; that's good for  
16 payouts to the people who depend on having their  
17 injuries reimbursed.

18 And it would unsettle insurance - - -  
19 settled Insurance Law for you to say pro rata goes  
20 away the minute there is these two other clauses that  
21 can be perfectly harmonized with pro rata. So you  
22 shouldn't unsettle that.

23 JUDGE RIVERA: The question now - - - but -  
24 - - so - - - so - - - but your response to me is that  
25 if we hold and adopt your analysis, that does not

1 mean that on a future date, this court is foreclosed  
2 from saying that a contract does not require pro  
3 rata.

4 MS. SULLIVAN: That is absolutely correct,  
5 Your Honor. We are being very nerdy here. We want  
6 to read the language of the contract. We want you to  
7 take - - - and, Your Honor, I want you to look at the  
8 other insurance clause and that's where you get  
9 horizontal exhaustion, if we are in in all-sums  
10 state.

11 I want you to look at non-cum and continuing  
12 coverage - - -

13 JUDGE STEIN: Unless other insurance only  
14 applies, as argued, to the same policy here.

15 MS. SULLIVAN: Let me address that, Your  
16 Honor, because that is referred to in ConEd. ConEd  
17 says, well, other insurance, that applies to two  
18 concurrent policies in the same period. But why did  
19 ConEd say that? Because it was assuming pro rata.

20 JUDGE ABDUS-SALAAM: Counsel - - -

21 MS. SULLIVAN: If you're in in all-sums  
22 regime, then the fiction of - - - I'm sorry, Your  
23 Honor, but - - -

24 JUDGE ABDUS-SALAAM: No, I'm just - - -  
25 sorry - - - your light is - - - I was just going to

1 say, your time is almost up and I would like you to,  
2 if you can, respond to your adversary's claim that  
3 for twenty-plus years, the excess insurers  
4 essentially interpreted this contract as an all-sums  
5 contract, and paid claims on it that way.

6 MS. SULLIVAN: So Your Honor, may I respond  
7 to the question even though the red light is on?

8 CHIEF JUDGE DIFIORE: Yes, please.

9 MS. SULLIVAN: So Your Honor, that is not  
10 true. Their claim is that there is extrinsic  
11 evidence that Liberty, the underlying insurer,  
12 assumed all-sums. But it's - - - Liberty's course of  
13 conduct cannot bind us, the excess insurers. The  
14 excess insurers never agreed to all-sums; we have  
15 consistently argued in this case for pro rata.

16 An answer to Your Honor, to any inconsistency in  
17 position, first, I'd respectfully suggest that waiver  
18 shouldn't matter here. We are on a certified question, a  
19 pure question of law.

20 JUDGE FAHEY: Well, you can see why I'd  
21 ask, though.

22 MS. SULLIVAN: Yes, Your Honor, and I say  
23 that we're - - - and one more point, Your Honor, is  
24 that the earlier arguments were prior to Olin III.  
25 I'd highly commend to the court, if nothing else, the

1 decision in Olin III, which harmonizes pro rata with  
2 both noncumulation and continuing coverage.

3 And Your Honor, I'd commend - - - if I  
4 could just finish one more sentence, Your Honor. The  
5 Olin amicus brief, the insured party in this case, is  
6 with the excess insurers here. Viking and Warren's  
7 counterpart in Olin filed an amicus brief on our side  
8 saying, pro rata is good for the insured; everything  
9 can be harmonized. If you read Olin III in that  
10 brief, we respectfully suggest that you will agree  
11 with us.

12 Pro rata is the allocation method at  
13 horizontal - - - you shouldn't reach if you go with  
14 pro rata, but if you go with all-sums, find  
15 horizontal based on the other insurance clauses.

16 Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: Thank you.

18 Ms. Cohen.

19 MS. COHEN: Thank you, Your Honors.

20 I'd like to start with Judge Fahey - - -

21 CHIEF JUDGE DIFIORE: Your time?

22 MS. COHEN: I'm sorry - - - four minutes,  
23 Your Honor.

24 CHIEF JUDGE DIFIORE: Four?

25 MS. COHEN: Yes, please.

1           I would like to start, Your Honor, with your  
2 question, which - - - whether any court in the country,  
3 including a New York court, has ever adopted their new  
4 methodology which simultaneously combines the  
5 noncumulation provision with a pro-rata allocation. No  
6 court in the country has ever done that - - - no New York  
7 court, no court outside the country. All courts have  
8 either adopted an all-sums or pro-rata allocation. And  
9 there is a split of authority.

10           In Con Edison, in the absence of a noncumulation  
11 clause, the court found a pro-rata allocation. Other  
12 courts have gone the other way. But when the  
13 noncumulation provision is inserted into the policy, every  
14 state court, including four state Supreme Courts have held  
15 that the noncumulation provision is inconsistent with the  
16 pro-rata allocation.

17           JUDGE STEIN: This may be an unfair  
18 question, but do you have an explanation for why Olin  
19 is arguing the other side of this?

20           MS. COHEN: Your Honor, it is somewhat  
21 suspicious. I have my theories; it's about money.  
22 But at the end of the day, that's - - - that's my - -  
23 - my theory. But the point is, when you insert the  
24 noncumulation clause into the contract, every state  
25 court has said that that turns it into an all-sums

1 allocation.

2 Their expert took that position below, and  
3 to Your Honor's point, they took that position below.  
4 They told the trial court, you cannot apply the  
5 noncumulation provision in a pro-rata allocation.  
6 Because once you prorate, you don't have multiple  
7 policies responding to the same injury so you don't  
8 trigger the noncumulation provision.

9 Let's take their example, and I'll do it  
10 very quickly. You've got a ten-million-dollar claim,  
11 right, and you got ten years. I'm sorry - - - there  
12 - - - it was a five-million-dollar claim. Right?

13 JUDGE FAHEY: Right.

14 MS. COHEN: Okay.

15 JUDGE RIVERA: That was the cap.

16 MS. COHEN: A five-million cap - - -

17 JUDGE FAHEY: Five-million-dollar cap.

18 MS. COHEN: - - - and a ten million.

19 You're right, Your Honor, you're right - - - right.

20 So the way it would work with pro rata is you  
21 would get a million in each year and you'd get full  
22 coverage. In an all-sums allocation, assuming that you  
23 have the 400 million dollars in excess, the policyholder  
24 gets to pick one year and just go up vertically.

25 What they are suggesting, with this double

1 credit, you only get five of the ten-million dollars. And  
2 by the way, the primary carrier pays the five million, and  
3 the policyholder can never get to the excess carriers.  
4 And in fact, the last five years, where it's indisputably  
5 - - - the policy has been triggered because there is  
6 injury during the policy period, they don't pay anything.  
7 No court has ever done that, Your Honor.

8 And the reason that they are suggesting this new  
9 methodology now is because what happened below is they  
10 said to the trial court, just ignore the noncumulation  
11 provisions and just prorate. And what Chancellor Strine  
12 found is, under the principles in Con Edison, you can't do  
13 that. You have to harmonize and give meaning to both the  
14 noncumulation provision and during the policy period.

15 JUDGE RIVERA: Is it one injury one  
16 occurrence? What about her first point?

17 MS. COHEN: Your Honor, it doesn't - - -  
18 the one injury one occurrence, the hypothetical that  
19 was given to them where they said you cannot apply  
20 the non-cum and the pro-rata allocation, it was only  
21 one claim. In fact, their own hypothetical, in the  
22 briefs to the court, it was one claim one occurrence.  
23 This whole issue of multiple occurrences, that's a  
24 red herring.

25 The fact of the matter is, when you have

1 one claim or multiple claims, it's the same. The way  
2 they've interpreted it is they get double credit that  
3 no court has ever done. The way we've done it is you  
4 harmonize the provisions. And we do it in a way that  
5 every Supreme Court has done it, and no New York  
6 court has done what they say should be done.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MS. COHEN: Thank you.

9 Mr. Foradas.

10 MR. FORADAS: Thank you, Your Honor.

11 My one minute, I just have two quick points to  
12 make with respect to the other insurance provision and the  
13 question of vertical versus horizontal exhaustion.

14 First, I'd like to observe that if the insurance  
15 companies wanted to make that provision apply in the  
16 successive policy situation, which they are urging here,  
17 they know how to do that. The non-cum provision is a  
18 perfect example of it. The non-cum provision expressly  
19 sweeps in other insurance in its - - - in its operation.  
20 Here, they don't - - - they didn't do that in the other  
21 insurance context.

22 And secondly, reading the other insurance  
23 provision, as counsel suggests in this case, would read  
24 out the underlying insurance provisions of these policies.  
25 Because the underlying insurance provisions, they agree,

1 expressly refer to only the specific years' underlying  
2 insurance that must be exhausted before their policies  
3 attach. And to now say, well, you also have to exhaust  
4 all the other insurance in other years, reads that  
5 provision out of the policies.

6 Thank you very much, Your Honors.

7 CHIEF JUDGE DIFIORE: Thank you. Thank  
8 you.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Viking Pump, Inc. and Warren Pumps, LLC v. TIG Insurance Company, No. 59 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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