

PRIOR INSURANCE AND NON-CUMULATION
OF LIABILITY CONDITIONS DON'T WIPE AWAY
BILLIONS IN PRODUCT LIABILITY COVERAGE

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I. INTRODUCTION: THE IMPACT OF *VIKING PUMP* AND THE NON-CUMULATION CONDITION ARGUMENTS INSURERS SUBSEQUENTLY ADVANCED TO CONTAIN THEIR EXPOSURE

The New York Court of Appeals' watershed *Viking Pump*¹ decision profoundly altered insurers' assessment of their potential exposure to the long-tail liabilities of their insureds, most notably liability arising from the historic manufacture and sale of asbestos-containing products. Prior to *Viking Pump*, the conventional assumption by insurers and many policyholders was that the purported New York rule² dictated that losses arising from continuous injury were to be apportioned evenly across the continuum of injury with the policyholder shouldering responsibility for periods in which it lacked coverage, whether due to insurer insolvency or because the policyholder had failed, or was unable, to purchase sufficient insurance.³ This "pro rata" spreading of losses meant a particular insurer that

1. *In re Viking Pump, Inc.*, 52 N.E.3d 1144, 1150–51 (N.Y. 2016).

2. That insurers and other observers have referred to a New York rule on allocation is at odds with the New York Court of Appeals' emphatic disapproval of any default allocation "rule" divorced from policy language. The court stressed that its 2002 "pro rata" allocation decision in *Consolidated Edison* was based on the discrete "policy language" at issue, admonishing that "different policy language" might compel "all sums" allocation. *See* *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 693–94 (N.Y. 2002); *see also Viking Pump*, 52 N.E.3d at 1150–51 ("Significantly, we did not reach our conclusion in *Consolidated Edison* by adopting a blanket rule, based on policy concerns, that pro rata allocation was always the appropriate method of dividing indemnity among successive insurance policies. Rather, we relied on our general principles of contract interpretation and made clear that the contract language controls the question of allocation."). For a critique of insurer pronouncements of "rules" that govern allocation versus the application of policy language to the losses at issue, including the "default pro rata rule" adopted by the ALI in its first *Restatement of the Law of Liability Insurance*, see David Cox & Gerald Konkel, *ALI Restatement Misstates Law on Long-Tail Harm Claims*, Law360 (Mar. 29, 2018), <https://www.morganlewis.com/pubs/ali-restatement-misstates-law-on-long-tail-harm-claims> [hereinafter Cox & Konkel].

3. Prior to the 2018 decision in New York Court of Appeals' *Keyspan Gas East Corporation v. Munich Reinsurance America, Inc.*, 96 N.E.3d 209 (N.Y. 2018), many courts applying pro rata allocation under New York law limited the time over which the policyholder's loss was to be allocated to those periods in which insurance for such a loss was "generally available." *See, e.g., Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 325–27 (2d Cir. 2000); *Stonewall Ins.*

issued a handful of policies in a historic insurance program would face a significantly more manageable exposure, if any, to their insured's continuous loss liabilities than if the alternative "all sums" method applied.⁴

Viking Pump held that policies that contain or incorporate standardized prior insurance and non-cumulation of liability conditions ("non-cumulation conditions") cover not just a "pro rata" share of a loss for a claim against an insured where only a part of the claimant's injury takes place during the policy period, but "all sums" of such a loss up to the policy's limit. Such policy language "negates" the pro rata allocation premise that the policy indemnifies only losses and occurrences during the policy period because it plainly "contemplate[s]" that the same loss arising from a continuous injury could be covered by policies covering different periods during which injury took place.⁵ The *Viking Pump* court further

Co. v. Asbestos Claims Mgmt. Corp., 73 F.3d 1178, 1192 (2d Cir. 1995), *modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). *Keyspan* eliminated this so-called "availability" exception to pro rata allocation.

4. Under an "all sums" recovery, the policyholder may choose which one or more of its triggered policies pays the entire loss (up to policy limits), leaving the selected insurer(s) to seek contribution from other insurers that are also responsible for "all sums" of loss, but that were not selected to pay.

5. *Viking Pump*, 52 N.E.3d at 1153. Other standard language in most general liability policies—such as the terms "damages" and "bodily injury," defined as including "death at any time resulting" from bodily injury—also "negate" the pro rata allocation premise, at least for asbestos-related bodily injury claims. See Cox & Konkel, *supra* note 2; Cannon Elec. Inc. v. ACE Prop. & Cas. Co. (ITT I), No. BC 290354, 2017 WL 10992340 (Cal. Super. Ct. Aug. 17, 2017); Polar-Mohr Maschinenvertriebsgesellschaft GmbH, Co. KG. v. Zurich Am. Ins. Co., 2018 WL 1335880 (N.D. Cal. Mar. 15, 2018); see also Joshua L. Blosser, *The Fate of Pro Rata Allocation in Long Tail Claims Governed by New York Law in the Wake of Viking Pump: Hold a Viking Funeral or Pump the Brakes?*, 53 TORT TRIAL & INS. PRAC. L.J. 741-743, 752-53, 757 (2018) (discussing *ITT I* and *Polar-Mohr*). Although it is beyond the scope of this article, it has always been the intent for a liability insurance policy to cover "all sums" of consequential "damages" of a covered claim, even such damages taking place after the policy period, that flow from "bodily injury" taking place during the policy period, including for "death at any time resulting therefrom." Damages for injury extending outside the policy period have been covered ever since damages for "death," including for loss of consortium, services, and other harms, began to be more widely recoverable by plaintiffs in underlying liability claims after the Parliament of the United Kingdom passed the Fatal Accidents Act of 1846 (also known as Lord Campbell's Act), and by employees in employers liability claims after the Employers Liability Act of 1880. Beginning at least as early as employers' liability policies issued in the 1880s, standardized liability policies have included within the definition of "bodily injury" or "personal injury," "death at any time resulting therefrom" or functionally equivalent language (the 1966 standard form CGL policy dropped the phrase but utilized other language, chiefly a "damages" definition, to express the same intent). See Cox & Konkel, *supra* note 2.

There *always* has been a "tail" to many bodily injury claims since the mid-nineteenth century and, before certain courts' invention of pro rata allocation in coverage for continuous injury cases, that "tail" of damages (including for deaths, even those taking place after the policy period when a claimant's injury initiated) has been covered, "all sums" of it, under the policy when injury took place. Liability policies were understood to cover "all sums" of damages flowing from injury during the policy period even for consequent injury and death taking place after the policy period. See, e.g., *Casualty Actuarial Society*, WEEKLY UNDERWRITER, Feb. 27, 1915, at 256 (discussing a Casualty Actuarial and Statistical Society meeting's discussion of

held that vertical, rather than horizontal, exhaustion applied for purposes of accessing excess coverage, meaning that the insured could access such coverage “once the immediately underlying policies’ limits are depleted, even if other lower-level policies during different policy periods remain unexhausted.”⁶ Given the historic ubiquity of non-cumulation conditions in standard occurrence-based umbrella and excess follow-form liability policies, the *Viking Pump* holdings instantaneously amplified the potential exposure of every insurer that issued historic umbrella or excess coverage to a New York insured⁷ with asbestos-related product liability exposure.

After the *Viking Pump* decision, insurers—faced with this dramatic potential expansion of exposure—have increasingly advanced arguments that attempt to nullify the “all sums” import of non-cumulation conditions, asserting that while such conditions may make “all sums” of coverage available in a given policy year, they operate to eviscerate coverage in *other* years of the insured’s insurance program for subsequent losses.⁸ While the argument has gained some traction with some federal trial courts, it is contrary to (1) standard policy language, (2) the purpose of non-cumulation conditions, and (3) the reasonable policyholder and insurer expectations and understandings of what liability risk was being transferred in exchange for premiums when policyholders bought and insurers sold annualized towers of product liability coverage in the 1960s, 1970s, and 1980s.

II. HISTORIC ORIGINS AND PURPOSE OF NON-CUMULATION CONDITIONS

To better understand the insurers’ arguments (and the shortcomings of these arguments), it is helpful to summarize briefly the history of the relevant policy language. In 1960, three London Market Insurer underwriters and a broker developed, and then London Market Insurers sold,

how to set compensation loss reserves under insurance covering claims involving “‘suspended mortality’ or death losses occurring some time after injury”).

6. *Viking Pump*, 52 N.E.3d at 1156.

7. Many manufacturers that have asbestos-related or environmental-related long-tail liabilities were headquartered in New York or had other New York contacts. Additionally, given the influence decisions by the New York Court of Appeals can have on other courts, the decision may potentially impact insurers’ exposure under other states’ law under which courts previously have ruled either that pro rata allocation applies or have not yet weighed in on the “pro rata” versus “all sums” allocation issue.

8. Prior to *Viking Pump*, insurers occasionally advanced non-cumulation condition-related coverage-limiting arguments, particularly in jurisdictions that treat all underlying claims against an insured as arising out of the manufacture, sale, or distribution of an allegedly defective product as one “occurrence.” In the wake of *Viking Pump*, certain insurers and their coverage counsel have announced publicly that they would advance non-cumulation condition arguments directed at reducing the amount of aggregate limits available for asbestos-related product liability claims, and they have, in fact, attempted to advance such arguments. *See, e.g., infra* note 79.

a pioneering standardized occurrence-based umbrella liability form, the LRD 60 umbrella form.⁹ The LRD 60 umbrella form was the first policy form to include a standardized non-cumulation condition. That provision, identified as “Condition C,” provided:

C. PRIOR INSURANCE AND NON CUMULATION OF LIABILITY

It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in item 2 of the Declarations [which identifies a “[l]imit in all in respect of each occurrence” and a “[l]imit in the aggregate for each annual period where applicable”] shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.

Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy Underwriters will continue to protect the Assured for liability in respect of such personal injury or property damage without payment of additional premium.¹⁰

The first paragraph of the LRD 60 umbrella form’s non-cumulation condition describes a circumstance in which the limits of liability of the instant policy are reduced by “any amounts due” on account of a “loss” that is “covered” by both the instant policy and a prior-issued policy. As discussed *infra*, this language was intended to prevent the insured from “stacking”—or “add[ing] together the maximum limits”—of successive policies to increase the total limits applicable to one “loss.”¹¹ In doing so, the first paragraph reflects that policies issued for different policy periods may nonetheless “cover” the same “loss” resulting from continuing bodily injury or property damage that spans each policy period.¹² Consistent with that premise, the second paragraph of this non-cumulation condition confirms that the instant policy’s coverage will “continue” to apply to loss

9. The LRD 60 umbrella form’s name derives from the initials of one of its drafters, Leslie R. Dew, then chief underwriter for the Merrett Syndicate, and the year that the form was introduced. Senior underwriter Henry S. Weavers, also of the Merrett Syndicate, underwriter Henry Jearey, and Victor Hanaford of Price Forbes and Company assisted in the drafting. See Transcript of Deposition of Peter S. Wilson at 51:22–52:12, Cannon Elec., Inc. v. ACE Prop. & Cas. Co., No. BC 290354 (Cal Super. Ct. Jan. 24, 2017) [hereinafter Wilson ITT Deposition] (a copy of this transcript is on file with the authors).

10. LRD 60 umbrella form, Condition C.

11. *Viking Pump*, 52 N.E.3d at 1152 (quoting 12 COUCH ON INSURANCE 3d § 169:5); see also *id.* at 1147–48 (identifying LRD 60 umbrella form’s non-cumulation condition as an “anti-stacking” provision).

12. The *Viking Pump* court held that this paragraph’s language “negates” the pro rata allocation premise because it plainly “contemplate[s]” that the same loss arising from a continuous injury could be covered by policies covering different periods during which injury took place. *Id.* at 1153.

arising out of injury or damage that takes place during, and extends beyond, the policy period.¹³ As discussed *infra*, insurers increasingly are advancing arguments taking the language of this non-cumulation condition in isolation to advance arguments that the terms “loss,” “amounts due,” and “covered” should be construed in a broad manner to truncate significantly the amount of coverage available to an insured for its asbestos-related bodily injury claim liabilities from its historic insurance programs.

The LRD 60 umbrella form was in use until 1971 when it was replaced by the Umbrella Policy (London 1971) form (the “London 1971 umbrella form”). The London 1971 umbrella form was primarily developed “to bring the policy language in line with certain language that was being used at the time in comprehensive general liability policies that were being issued as the schedule[d] primary policies”¹⁴ The London 1971 umbrella form had a non-cumulation condition that was identical to the LRD 60 version, except that it struck the second paragraph (the “continuing coverage clause”). The drafters did so because the continuing coverage clause was “redundant” of the “whole intent” of the policy to cover “all” the “damage” for an injury that takes place during the policy period and continues beyond it.¹⁵

In the 1960s and 1970s, the standardized umbrella and excess policy forms of many domestic insurers adopted, with modest edits,¹⁶ the word-

13. See *id.* at 1154 (describing the second paragraph of the LRD 60 umbrella form’s non-cumulation condition as a “continuing coverage clause” and holding that it “reinforce[ed]” the court’s conclusion “that all sums—not pro rata—allocation was intended in such policies” as it “expressly extends a policy’s protections beyond the policy period for continuing injuries”).

14. Wilson ITT Deposition, *supra* note 9, at 71:10–72:2; see also Transcript of Deposition of Peter S. Wilson at 11:5–19, *Interlake Corp. v. Certain Underwriters Lloyd’s, London, No. 2-97-0277* (Ill. Cir. Ct. Sept. 29, 1998) (a copy of this transcript is on file with the authors). The “cross-pollination” of standardized terms and shared understanding of the intent behind the common terms adopted by the London Market Insurers and the domestic insurance rating agencies that drafted the standardized CGL policy forms in the 1960s and early 1970s is apparent from just a cursory review of the LRD 60, 1966 CGL, 1971 London umbrella, and 1973 CGL policy forms. The London Market was the initiator and driver of umbrella general liability coverage. The whole marketing “point” of umbrella and excess coverage, in part, was to provide additional coverage as part of a seamless coverage program that is intended to pick up where the underlying CGL coverage leaves off. With that purpose in mind, it is not surprising that the drafters of umbrella policy forms studied and adopted the wordings of the drafters of CGL policy forms and vice versa.

15. Wilson ITT Deposition, *supra* note 9, at 96:15–98:2. From Wilson’s perspective as a drafter of the standardized London 1971 umbrella form who subsequently became a prominent underwriter of policies utilizing that form, “all” standardized occurrence-based general liability policies were intended essentially to respond on an “all sums” basis for injury arising from the same occurrence that took place during the policy period and continued beyond it. See *id.* at 98:5–11.

16. See Transcript of Trial Testimony of Peter S. Wilson at 175:7–22, *Cannon Elec., Inc. v. ACE Prop. & Cas. Co.*, Case No. BC 290354 (Cal. Super. Ct. Nov. 13, 2018 (afternoon)) [hereinafter Wilson ITT Trial Testimony (Afternoon)] (testifying that many domestic insurers copied the terms of the London umbrella forms, including the non-cumulation conditions,

ing from the LRD 60 or London 1971 umbrella forms, including their non-cumulation conditions. In the same period, Liberty Mutual Insurance Company (“Liberty Mutual”) developed and incorporated into its policies its own non-cumulation condition which provided:

Non-Cumulation of Liability—Same Occurrence—If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within an annual period of this policy, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.

While employing somewhat different language than the LRD 60 and London 1971 umbrella forms’ non-cumulation conditions, the Liberty Mutual non-cumulation condition similarly was intended to prevent the insured from “stacking” (or “cumulating”) the total limits of liability that apply when policies issued for different policy periods are triggered by bodily injury or property damage that continues across multiple policy periods.¹⁷ Rather than referring to “loss” that is covered by multiple policies, as the London non-cumulation conditions do, the Liberty Mutual non-cumulation condition refers and applies to a single underlying “occurrence” that results in continuing bodily injury or property damage for which successive policies may pay.

III. RECENT INSURER ARGUMENTS THAT NON-CUMULATION CONDITIONS DRASTICALLY REDUCE AGGREGATE LIMITS AVAILABLE UNDER INSURANCE PROGRAMS FOR ASBESTOS-RELATED PRODUCT LIABILITY SUITS

Some insurers recently have argued that the references to the reduction of aggregate limits in all of these forms of non-cumulation conditions means that when an insurer for an earlier policy pays a settlement for a particular

changing only a handful of words such as “Underwriters” to “Company” and “Assured” to “Insured”) (a copy of this transcript is on file with the authors).

17. See *Viking Pump*, 52 N.E.3d at 1147, 1152–53; see also Transcript of Trial Testimony of Carl P. Brigada (Liberty Mutual) at 35:16–38:3, 40:18–41:2, *Viking Pump, Inc. v. Century Indem. Co.*, C.A. No. N10C-04-141FSS [CCLD] (Del. Super. Ct. Oct. 25, 2012 (afternoon)) (testifying that the purpose of the Liberty Mutual non-cumulation condition is to limit the insurer’s obligations when the same “claim crosses multiple [consecutive] policies,” and testifying that, in his 36 years of experience at the company, Liberty Mutual’s consistent position has been that applying the non-cumulation condition “for one claim does not eliminate coverage for other claims”) (a copy of this transcript is on file with the authors); accord *Viking Pump, Inc. v. Century Indem. Co.*, C.A. No. 10C-06-141 FSS [CCLD], 2013 WL 7098824, at *12 (Del. Super. Ct. Oct., 31, 2013) (citing Brigada testimony), *aff’d in part and rev’d in part*, 148 A.3d 633 (Del. 2016).

asbestos-related product liability claim, the payment reduces the aggregate limit available for *future* asbestos-related product liability claims under *later* policies by the amount paid under the earlier policy. Courts have rejected that argument with respect to the Liberty Mutual non-cumulation condition language, holding that it explicitly limits its application to the “same occurrence” and not additional different occurrences.¹⁸ Under New York law, where *each* asbestos claimant’s “continuous or repeated exposure” to asbestos typically is considered a separate occurrence,¹⁹ this means that the condition is not even implicated if the insured seeks recovery for each asbestos settlement claim that it pays from only one policy year. Put another way, if the insured does not seek coverage for the same “occurrence” in two different policy years, then it cannot possibly “stack” or “cumulate” the limits of liability of two or more policies issued for different policy periods—the sole circumstance that non-cumulation conditions were intended to address.²⁰

Insurers of policies that adopt the London form of the non-cumulation condition have pointed out that, unlike Liberty Mutual’s condition, the London non-cumulation condition makes no reference to “occurrence” at all, only “loss.” They argue that “loss” is a broader concept than an “occurrence” and that “loss” should be construed expansively to encompass the universe of asbestos-related product liability bodily injury claims against the insured, not simply an individual “loss” paid to a particular asbestos claimant, or paid for the defense of a particular asbestos suit, arising out

18. See *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 2016 WL 4203543, at *4–5 (S.D.N.Y. Aug. 8, 2016). In denying Liberty Mutual’s summary judgment arguments, the *Fairbanks* court held that Fairbanks reasonably argued that the non-cumulation condition applies to “the same occurrence” and not a different occurrence; thus the number of occurrences involved in the underlying asbestos claims *had* to be resolved before the non-cumulation condition could be applied. *Id.* at *5; see also *Hopeman Bros., Inc. v. Cont’l Cas. Co.*, 307 F. Supp. 3d 433, 455 (E.D. Va. 2018) (granting Hopeman’s summary judgment motion that “the language . . . has an unambiguous meaning” and finding that the language “limits its application to recoveries involving the same ‘occurrence,’ and that each individual alleging bodily injury from exposure to Hopeman asbestos containing material presents a separate ‘occurrence’”).

19. Under New York law, for asbestos claims, “the incident that [gives] rise to liability [is] each individual plaintiff’s ‘continuous or repeated exposure’ to asbestos.” *Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994, 999–1000 (N.Y. 2007). Such separate “incidents” are considered separate occurrences under New York law (at least under how the standardized London umbrella forms and the 1966 CGL form define “occurrence”) unless it can be shown that multiple claimants’ alleged exposures to asbestos were at essentially the same time and place. *Id.* at 1001.

20. While non-cumulation conditions were originally devised over half a century ago to prevent an insured from recovering for the same accident under both an “event” and an “occurrence” policy (as described *infra*), they have more recently been considered only when two or more occurrence-based liability policies are triggered by the same long-tail claim (*i.e.*, a claim involving injury or damage that spans multiple policy periods), and thus the insured could potentially recover up to the limits of liability for a claim from each such occurrence-based policy.

of a particular occurrence. At least one court, insurers argue, has accepted this argument.²¹ Relying on decisions such as *Hopeman* to assert that “loss” as referenced in a policy encompasses a whole category of harm (*i.e.*, all asbestos claims) and not a discrete amount paid to defend or for a settlement or judgment of a claim, insurers have argued that payments for any asbestos claims under one or more earlier policies constitute “amounts due” for the insured’s *singular* “covered” asbestos “loss” under prior insurance, which reduces the aggregate limits in later policies available to pay settlements, judgments, and/or defense costs for *different* asbestos claims.²² Consequently, according to this argument, the aggregate limits of liability available for fully unreimbursed asbestos claims may be reduced to *zero*, even if that policy has not paid a dollar of coverage to date for *any* claim.²³

This argument, if widely accepted by courts, would reduce dramatically coverage limits for most product manufacturers with asbestos liabilities, potentially wiping out decades of painstakingly constructed annual towers of coverage²⁴ from an insurance program and leaving the insured with only the amount of one year’s aggregate limits of coverage for its asbestos liabilities. This result is contrary to the policy language, the purpose of non-cumulation conditions, and the reasonable expectations of insureds *and* insurers when these programs of ever-increasing annual towers of

21. See *Hopeman*, 307 F. Supp. 3d at 458 (accepting insurer argument that undefined term “loss” “is inherently broad and would include an insured’s total liability arising from a particular category of harm”); *cf.* California Ins. Co. v. Stimson Lumber Co., No. Civ. 01-514-HA, 2004 WL 1173185, at *11 (D. Or. May 26, 2004) (applying Oregon law and interpreting “loss” in a non-cumulation condition to “apply to the gross amount Stimson is seeking in its claim under the policy,” which the court called the “broadest meaning” possible). By adopting an admittedly “broad” interpretation of “loss,” *Hopeman* is in tension with the black-letter insurance principle abided by most states that restrictions on coverage are to be construed “narrowly.” See, *e.g.*, Pepper v. Allstate Ins. Co., 20 A.D.3d 633, 635 (N.Y. App. Div. 2005). Further, to the extent the term “loss” is susceptible to multiple reasonable interpretations—though the interpretation of “loss” adopted in *Hopeman* does not reasonably comport with standard occurrence-based policy language, as described herein—a narrower reasonable interpretation advocated by the insured controls. See, *e.g.*, Dean v. Tower Ins. Co. of N.Y., 979 N.E.2d 1143, 1145 (N.Y. 2012) (“[A]mbiguities in an insurance policy are to be construed against the insurer.”) (citation omitted).

22. See LRD 60 umbrella form, Condition C (“[I]f any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon [including aggregate limit] shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.”) (emphasis added).

23. Some insurers even argue that the non-cumulation condition’s reference to “amounts due” under prior insurance does not require either (1) a claim by the insured for reimbursement of costs or (2) a payment of such costs by that prior insurer. Rather, they assert that “amounts” are “due” under the prior insurance so long as the asbestos claim “triggers” that policy because bodily injury or property damage took place during its policy period, notwithstanding other conditions to coverage. See *infra* Section IV.B.

24. See *infra* Sections IV.D and IV.E (describing historic underwriting and placement of liability policies in layered annual towers of coverage to meet increasing liability insurance needs each year).

product liability coverage were placed for product manufacturers in the 1960s through the 1980s, driven by the adoption of enterprise liability in tort law.

IV. INSURERS' NON-CUMULATION CONDITION ARGUMENTS
IGNORE THE INTERRELATIONSHIP OF POLICY TERMS, THE
PURPOSE OF HISTORIC POLICY CONDITIONS, AND THE
CONTEXT OF POLICIES WITHIN AN INSURANCE PROGRAM

A. *Policy Language: "Loss" Isn't Broader Than an "Occurrence"; Losses Flow from an Occurrence Under Occurrence-Based Policies*

The LRD 60 and London 1971 umbrella form non-cumulation conditions only apply, by their terms, if "loss" is "covered" under a policy and "amounts" are "covered" and "due" for the *same* "loss" under prior insurance. For insurers to contend that these non-cumulation conditions eviscerate coverage due to a "loss" covered by a prior policy, they have argued that "loss" means something much broader than the damages that an insured pays to a particular claimant or the defense costs that the insured pays for a particular suit. Otherwise, if the meaning of "loss" is tied to a particular underlying claimant or suit, and the insured only seeks recovery for that loss under one policy year, the non-cumulation condition is not implicated. Similarly, where New York law applies, insurers are incentivized to argue that "loss" in these policies means something broader than an "occurrence," not something that flows from an occurrence, because (typically) under New York law *each* asbestos claimant's exposure to asbestos is treated as arising from a separate occurrence. With these considerations in mind, insurers argue for the broadest construction of "loss" possible, arguing in the context of asbestos-related coverage claims that all of the insured's asbestos-related liabilities constitute a single "loss." With this understanding of a massive singular asbestos liability "loss," insurers argue that an insured seeking a recovery from an early-in-the-program policy for a "John Smith" asbestos suit settlement implicates the non-cumulation condition in a later-in-the-program policy when the insured seeks recovery for a "Jane Doe" asbestos suit settlement. This insurer argument for a broad construction of "loss" cannot withstand scrutiny of the basic nature of occurrence-based policies and the plain meaning of their terms and conditions.

Under an occurrence-based policy, coverage is centered on, and flows from, the happening of an "occurrence." Policies based on the London umbrella form language do not directly define "loss," but they do define the term "Ultimate Net Loss" as the "total sum" of the amounts the "Assured" and the scheduled Underlying Insurers in a tower of coverage are obligated to pay by reason of personal injury claims (for settlements or adjudications,

or as defense costs) that “are paid as a consequence of any occurrence.”²⁵ As a primary drafter of the London 1971 umbrella form has testified, the “Ultimate Net Loss” definition is “all tethered” to sums “being paid as a consequence of any occurrence”²⁶ The term “loss” under the policies is not treated as a single “category of harm” applicable as one monolithic category of risk under an entire insurance program, but rather is repeatedly referred to within a policy as arising out of an occurrence. Therefore, a “loss” can be *no larger than* an occurrence, and (along with other “losses”) is a constituent part of, and therefore smaller than, “ultimate net loss.”²⁷

The decomposition of “ultimate net loss” to “losses” arising out of occurrences—some of which are covered under underlying insurance subject to underlying limits, and some of which are covered under the policy up to its occurrence and aggregate limits—is apparent when one examines multiple parts of the London 1971 umbrella policy form. Pursuant to the form’s Insuring Agreement II (labeled “II. Limit of Liability” under “Insuring Agreements”), part of that “ultimate net loss” has to be paid before the coverage under the policy can attach (*i.e.*, the “total sum” of “losses” in the amount of underlying limits); and another part of “ultimate net loss” is recoverable under the policy (*i.e.*, the “total sum” of “losses” in excess of the amount of underlying limits), subject to its occurrence and aggregate limits.²⁸ The fact that “ultimate net loss” is composed of “losses” recoverable under a policy once the underlying limits have been paid is also plain from the “continuing in force” provision in the same Insuring Agreement

25. See London 1971 umbrella form, Ultimate Net Loss definition (“7. ULTIMATE NET LOSS - The term ‘Ultimate Net Loss’ shall mean the total sum which the Assured, or his Underlying Insurers as scheduled, or both, become obligated to pay by reason of personal injuries, property damage or advertising liability claims, either through adjudication or compromise, and shall also include . . . all sums paid as . . . expenses for . . . lawyers . . . for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder . . .”). In a London 1971 umbrella form policy, “Underlying Insurers as scheduled” refers to the insurers that issued underlying coverage in the amount of the specified underlying limit for the same policy period. They are usually identified, or “scheduled,” in the policy’s Declarations page. Accordingly, “ultimate net loss” is composed of the losses these Underlying Insurers and/or the “Assured” pays that fall within the scope of coverage for that annual tower of policies. As is made clear by examining how the term “ultimate net loss” is applied in the Insuring Agreement II. Limit of Liability (discussed *infra*), it is that insuring agreement provision that “nets” that part of “ultimate net loss” that is payable under the London umbrella form policy from that amount of “ultimate net loss” that has to be paid (the “underlying limit”) by the “Underlying Insurers” and/or the “Assured.”

26. Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 186:8–19.

27. A “loss” may also be “smaller” than an “occurrence,” as the policies reference the fact that multiple “losses” can flow from the same “occurrence.” See, e.g., London 1971 umbrella form, Loss Payable condition, discussed *infra*.

28. See London 1971 umbrella form, Insuring Agreement II. Limit of Liability (“II. LIMIT OF LIABILITY – Underwriters hereon shall be only liable for the *ultimate net loss the excess of* . . . the limits of the underlying insurances as set out in the attached schedule *in respect of each occurrence* covered by said underlying insurances . . .”) (emphasis added); see also Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 186:8–26.

II (“Limit of Liability”), which expressly provides that the umbrella policy will “continue” to pay “losses” in the same manner as did the underlying insurance:

In the event of reduction or exhaustion of the aggregate limits of liability under said underlying insurance by reason of *losses paid thereunder*, this Policy subject to all the terms, conditions and definitions hereof shall:

. . . in the event of exhaustion continue in force as underlying insurance.

The fact that “losses” under the policy are the constituent parts of “ultimate net loss” and that each “loss” arises out of an occurrence also is apparent when one studies the parallel construction of the policies’ “Ultimate Net Loss” definition and Insuring Agreement I. The “Ultimate Net Loss” definition equates the word “loss” with the word “sum” that is paid by the Assured and/or underlying insurers in the tower (“The term ‘Ultimate Net Loss’ shall mean the total sum . . .”). The definition also requires that the total sum be paid “by reason of personal injuries, property damage or advertising claims, either through adjudication or compromise” (including “fees” for “lawyers”) “as a consequence of *any* occurrence” falling within the scope of coverage under the policy. Insuring Agreement I, setting forth what the umbrella insurer is obligated to pay, breaks down that “total sum” of “ultimate net loss” to “all sums” (*i.e.* all *losses*) that the Assured is “obligated to by pay reason of . . . liability . . . for damages on account of . . . Personal Injuries . . . Property Damage . . . [or] Advertising Liability, caused by or arising out of *each* occurrence.”²⁹

Finally, the fact that one or more “losses” flow from an “occurrence,” and therefore a “loss” is no larger than an occurrence, is apparent when one considers the Loss Payable condition of the London umbrella form policies. These Loss Payable conditions govern when a policy “attaches” for the purpose of covering a single “loss” or—expressly—multiple “losses” that may arise from the “same occurrence.” This condition provides in pertinent part:

J. LOSS PAYABLE—

Liability under this policy *with respect to any occurrence* shall not attach unless and until the Assured, or the Assured’s underlying insurers, shall have paid the amount of the underlying limits *on account of such occurrence*. The Assured shall make a definite claim for *any loss* for which the Underwriters may be liable under this policy within twelve (12) months after the Assured shall have paid

29. London 1971 umbrella form, Ultimate Net Loss definition and Insuring Agreement I (emphasis added); *see also* Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 187:25–188:11 (testifying that the parallels in the Ultimate Net Loss definition’s reference to “total sum” and Insuring Agreement I’s reference to “all sums,” both tethered to occurrences, means that “losses” are the “all sums” that an Assured is obligated to pay for claims caused by or arising out of an occurrence).

an amount of ultimate net loss in excess of the amount borne by the Assured If any *subsequent payments* shall be made by the Assured on account of the *same occurrence*, additional claims shall be made similarly from time to time. *Such losses* shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.³⁰

This language makes plain that for liability to attach under the policy “with respect to [an] occurrence,” the underlying limits have to be paid “on account of such occurrence,” and then the Assured has to make a “definite claim” for a “loss” within a year of paying such “loss.” If the Assured makes “subsequent payments” for “losses” “on account of the same occurrence,” the Assured can make additional “definite claims” for reimbursement of such losses under the policy. “Loss” as referenced in these policies is not a singular category of risk under an entire insurance program;³¹ a “loss” is an amount the Assured pays a claimant or pays in costs to defend a claim that arises out of “an occurrence.” It flows from and is no larger than an “occurrence.”³²

B. Non-Cumulation Conditions Are Not Implicated for a Loss Unless Coverage Has Attached and the Insured Makes a Definite Claim for Reimbursement of the Same Loss Under More Than One Policy Year

A separate argument that insurers have advanced for a drastic coverage-limiting application of non-cumulation conditions is that a “loss” is “covered” and “amounts” are “due” for that loss under “prior insurance” simply by virtue of that loss triggering a prior policy that was not even selected for reimbursement for that loss. The non-cumulation conditions based on the London umbrella form language state that they apply if (1) “loss” is “covered” under the policy, (2) the same “loss” also is “covered in whole or in part under” prior insurance, and (3) “amounts” are “due” for that same loss under the “prior insurance.”³³ Insurers sometimes argue that, even if “loss” is an amount paid to a particular asbestos claimant, the non-cumulation condition is still implicated even if the insured only seeks recovery for that loss under one policy with the condition if the claim also would “trigger”

30. London 1971 umbrella form, Loss Payable condition (emphasis added).

31. It is unclear that even the *Hopeman* court construed “loss” so broadly as to include a category of risk insured by an entire insurance program; *Hopeman* ultimately held that “loss” under each policy “refers to the gross amount Hopeman is seeking under each policy.” See *Hopeman Bros., Inc. v. Cont’l Cas. Co.*, 307 F. Supp. 3d 433, 459 (E.D. Va. 2018).

32. New York case law recognizes that multiple “losses” can arise out of the same occurrence. See *Appalachian Ins. Co. v. Gen. Elec. Co.*, 863 N.E.2d 994, 1001 (N.Y. 2007) (holding that in a scenario where claimants are injured near the same time and place, “such as a series of explosions, [or] the accidental release of a hazardous substance or some other calamity, that . . . result in numerous injuries or *losses*,” claims for such losses may be caused by a single occurrence) (emphasis added).

33. See London 1971 umbrella form, Prior Insurance and Non Cumulation condition.

other earlier policy years, arguing that the mere fact that a loss could trigger multiple years means that it is “covered” under all those years. This construction waters down the plain meaning of the terms “covered” and “amounts due” under the policies.³⁴ Pursuant to Insuring Agreement I (“Coverage”), coverage for a loss is “subject to the . . . conditions” of the policy. Under the Loss Payable condition, a “loss” is “covered” only after the underlying limits have been paid such that coverage “attach[es],” *and* only if and when the insured makes a “definite claim” for reimbursement for that “loss” under the policy.³⁵ Similarly, no amounts can be “due” under a policy for that loss unless the same condition is met.³⁶ Consequently, if the assured makes a definite claim for reimbursement for a particular loss under only one policy year, the “loss” is neither “covered” under prior insurance nor are there any “amounts due” for that loss under such prior insurance. The condition in such a situation never is implicated.

C. Purpose of Non-Cumulation Conditions: Prevent Stacking of Years of Limits for a Particular Loss

That the non-cumulation condition is not implicated unless the policyholder tries to assert a claim for reimbursement under more than one policy year for the same loss arising out of an occurrence is the only interpretation that is consistent with the condition’s historic purpose. Prior to the LRD 60 umbrella form, standardized umbrella form policies contained a definition of “occurrence” known as the “event language.”³⁷ “[F]or a loss to trigger coverage under a policy using those wordings, the causative event had to be during the policy period.”³⁸ With the move to the LRD 60 occurrence wording, “for a loss to trigger coverage under a policy . . . the claimant’s personal injury or property damage has to be during the policy period,” but the event “can be before the inception of the policy.”³⁹ In a

34. As further addressed herein, this insurer argument also ignores the purpose of the non-cumulation condition, which is to limit the insured’s recovery for a particular loss to only one year’s limits of liability; a non-cumulation condition is an “anti-stacking” condition, not a mechanism to eviscerate coverage so that many years of policies never pay a claim. *See infra* Section IV.C.

35. *See* London 1971 umbrella form, Loss Payable condition; *see* Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 188:12–20.

36. *See* London 1971 umbrella form, Loss Payable condition; Wilson ITT Deposition, *supra* note 9, at 121:16–122:6, 122:24–124:9 (testifying that pursuant to loss payable condition, “amounts” are “due” under a London umbrella policy only if the underlying limits are paid and the assured makes a definite claim for reimbursement for such amounts under the policy).

37. Wilson ITT Deposition, *supra* note 9, at 131:1–15 (testifying that the first umbrella wording used by London Market Insurers was the Price Forbes 1948 wording which was subject to minor modifications in 1956, 1958 and 1959, all of which “contained a definition of occurrence known as the ‘event’ language”).

38. *Id.* at 131:16–21.

39. *Id.* at 132:21–133:10.

situation where an insured had earlier policies with “event language” and later policies with LRD 60 form language, “the insured could potentially obtain indemnity for the same loss under two policies.”⁴⁰ To “address this situation, the drafters of the LRD 1960 wording incorporated . . . Condition C, Prior Insurance and Non Cumulation of Liability.”⁴¹ The condition was intended to apply “*if* a policyholder tries to assert a claim for the same loss occurrence under more than one policy”⁴² The original purpose of the condition was “to prevent a policyholder from obtaining a double recovery in the limited circumstance that a policy using the LRD 60 occurrence-based form covered the claim and a prior-incepting policy using a standard ‘accident’ based Price Forbes umbrella form that had been used previously.”⁴³

The London Market Insurers kept using the London 1971 policy form with non-cumulation conditions long after the industry moved from “accident”- or “event”-based policy forms to occurrence-based policy forms because they knew that their policies were intended to respond on an “all sums” basis; and thus they knew it was possible courts could rule that when an occurrence causes continuous injury over many policy periods, each successive occurrence-based policy could be obligated to respond to that same loss on an “all sums” basis. Peter Wilson, one of the drafters of the London 1971 umbrella form, believed that for an occurrence resulting in loss spanning more than one policy year, the insuring agreement itself, without a non-cumulation condition, should have limited “the insured to a recovery of one year’s limits for that loss for that occurrence,” specifically, the *first* year of injury or damage.⁴⁴ Wilson had doubts, however, that courts might construe the policies to permit an insured to allocate a loss arising from an occurrence to multiple policy years and, consequently, London Market Insurers kept the condition in their policies to limit recovery for such a loss to one policy year’s limits.⁴⁵

40. *Id.* at 134:14–21.

41. *Id.* at 135:12–21.

42. *Id.* at 136:10–17 (emphasis added).

43. Cannon Elec. Inc. v. ACE Prop. & Cas. Co. (ITT II), No. BC 290354, 2019 WL 2157716, at *13 (Cal. Super. Ct. Jan. 9, 2019).

44. See Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 174:12–19.

45. See Transcript of Trial Testimony of Peter S. Wilson at 28:23–29:17, Cannon Elec., Inc. v. ACE Prop. & Cas. Co., No. BC 290354 (Cal. Super. Ct. Nov. 13, 2018 (morning)) (a copy of this transcript is on file with the authors); see also ITT II, 2019 WL 2157716, at *13 (“In 1971, insurers in the London market modified the LRD 60 policy for use in North America and designated the modified policy form as the London ’71 umbrella form. . . . The [non-cumulation] condition was intended to address the possibility that an occurrence could be construed to overlap multiple policy periods, and an insured could seek to collect ‘loss’ arising out of such occurrence in more than one policy year. . . . Peter Wilson believed that the Non Cumulation condition properly limited the insured to a recovery of one year’s limits for that loss or occurrence. It was [for] this limited purpose that London kept this condition in its policies.”). Non-cumulation conditions are not, as an author recently characterized them, “contractual

The drafting history and historic intended use of the non-cumulation condition make plain that, as the *Viking Pump* court put it, the condition's purpose is to "prevent stacking, the situation in which 'an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period . . . wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss.'"⁴⁶ Its purpose is not to eviscerate years of aggregate limits of coverage for policies that have not paid product liability losses. If the insured never asserts multiple claims for the same loss under different policy years to "add together the maximum limits of . . . consecutive policies" for that loss, the condition is never implicated.⁴⁷

Even when an insured does seek to recover for the same "loss" under more than one year's policies, the condition is intended only to apply to reduce limits (including aggregate limits) for that particular loss, and not for a different loss, to ensure that the policyholder only collects one year's limits per loss.⁴⁸ To construe the condition, which is ubiquitous in

black holes": "boilerplate language that is reused for decades and without reflection merely because it is part of a standard form package of terms, [that is thereby] emptied of *any* recoverable meaning." See Christopher C. French, *Insurance Policies: The Grandparents of Contractual Black Holes*, 67 DUKE L.J. 40, 40–41 (2011) (emphasis in original) (quoting Stephen J. Choi et al., *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017)); see also *id.* at 48–51. With their continued use in policies in the 1970s and 1980s, they were not intended solely to prevent a double recovery, but also were intended to prevent an insured from cumulating more than the amount of one policy year's limits of coverage for the same loss/occurrence. With the recent testimony of one of the drafters of the London 1971 umbrella form, non-cumulation conditions are more like "contractual grey holes[,] a meaningless variation of a boilerplate term that has been repeatedly reused over a long period of time such that it 'has lost much (but not necessarily all) meaning.'" See *id.* at 41 (quoting Choi, *supra*, at 4). They are conditions that "while on their way to becoming contractual black holes, were saved before their original meaning crossed the event horizon." See French, *supra*, at 43. For example, the meanings of the terms "covered" and "amounts due" in standardized policies with non-cumulation conditions are not lost to history. Compare French, *supra*, at 50–51, with *supra* at IV.B.

46. *In re Viking Pump, Inc.*, 52 N.E.3d 1144, 1152 (N.Y. 2016) (quoting 12 COUCH ON INSURANCE 3d § 169:5); see also *ITT II*, 2019 WL 2157716, at *13 ("As noted by Brian Hibbert, the London broker with whom Peter Wilson collaborated to write policies for ITT throughout this period, the reason for the language in the [non-cumulation condition] was to address stacking, a single occurrence or loss that could be claimed under more than one insurance policy. The underwriting focus was entirely on that year's coverage, not upon some supposition that prior insurance could eradicate later-in-time policies for which premium was then being charged and paid. If, and only if, a policyholder tried to 'stack' policies in that one year when it had already obtained indemnification for that specific loss from another earlier policy in the relevant coverage layer, would the later policy's [non-cumulation] condition be implicated.") (citing *Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 150–51 (2d Cir. 2017); *Viking Pump*, 27 N.Y.3d at 261).

47. *Viking Pump*, 52 N.E.3d at 1152 (quotation marks omitted).

48. See *ITT II*, 2019 WL 2157716, at *14 ("The purpose of the Non Cumulation condition is if a policy holder seeks to recover for the same loss under more than one year's policy, its recovery for that loss must be limited to the amount of one year's limits for that loss. Its

most umbrella and excess insurance programs, in any other way would contradict and override the policy's Insuring Agreement II and its Loss Payable conditions, which plainly provide that the only way to "reduce" underlying aggregate limits of policies for purposes of attaching coverage is the *payment* of losses under the underlying policies in the full amount of the underlying policy's or policies' aggregate limits.⁴⁹ The only way to construe the condition to give it meaning in accordance with its purpose without eviscerating the coverage provisions governing attachment—including the portion of the Insuring Agreements expressly promising *payment* of aggregate limits⁵⁰—is to recognize that it is intended to apply to reduce limits only for the loss or losses that the insured tries to collect under more than one policy year and not for other losses.

D. Non-Cumulation Conditions Do Not Override the Policies' Insuring Agreement Promise to Pay Full Aggregate Limits for Definite Claims for Losses upon Underlying Limits Being Paid

The non-cumulation condition, like all conditions, "conditions" a policy's insuring agreement promise; it does not override it.⁵¹ The London 1971 umbrella form's Insuring Agreement II, echoed and further conditioned in the policy's Loss Payable condition, provides that upon the payment of losses in the full amount of underlying aggregate limits, the policy attaches and, if selected to respond, will pay losses up to its aggregate limits.⁵² This requirement reflects the insurance market's historic standard practice of

purpose is not to eradicate aggregate limits for losses no insurer has paid."); see also *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 2016 WL 4203543, at *4–5 (S.D.N.Y. Aug. 8, 2016) (ruling under New York law that application of non-cumulation condition "depends on the number of occurrences" at issue because of "the fact that the application of the non-cumulation clause is limited to 'the same occurrence'"); see also *Viking Pump, Inc. v. Century Indem. Co.*, 2013 WL 7098824, at *4, *12, *16–17 (Del. Super. Ct. Oct. 31, 2013) (ruling under New York law the non-cumulation conditions apply only on a "per occurrence" basis with no effect on the aggregate limits available for different claims), *aff'd in part and rev'd in part on other grounds*, 148 A.3d 633 (Del. 2016); see also *supra* note 17 (quoting *Viking Pump* trial testimony of Carl P. Brigada of Liberty Mutual that the company's consistent position for decades with respect to non-cumulation conditions had been "[t]hat payment for one claim does not eliminate coverage for other claims").

49. See London 1971 umbrella form, Insuring Agreement II & Loss Payable condition.

50. The London 1971 umbrella form's Insuring Agreement II ("Limit of Liability") provides that the "aggregate limits of liability" of underlying insurance may be "reduc[ed]" or "exhaust[ed]" "by reason of losses *paid* thereunder," at which time the London umbrella policy "shall" either "*pay* the excess of the reduced underlying limit" or "in the event of exhaustion[,] continue in force as underlying insurance." London 1971 umbrella form, Insuring Agreement II (emphasis added).

51. See *Cannon Elec. Inc. v. ACE Prop. & Cas. Co.* (ITT I), No. BC 290354, 2017 WL 10992340, at *8 (Cal. Super. Ct. Aug. 17, 2017) ("Conditions in insurance policies do not expand or restrict coverage; they operate as conditions on the company's promise to pay.").

52. See London 1971 umbrella form, Insuring Agreement II & Loss Payable condition.

constructing corporate general liability programs by annually placing policies into layers at fixed attachment points—beginning from the “ground” up at the primary layer, followed by the umbrella layer and additional excess layers.⁵³ Together, these layered policies formed “towers” of insurance intended to provide uniformity of coverage up to the total combined limits of liability in each policy year.⁵⁴ This practice served the interests of policyholders and insurers alike, by ensuring coverage up to the total limits desired by the policyholder for a given year, while simultaneously curtailing (and locking in) any one insurer’s risk of paying loss by dividing the total annual liability risk into layers at different attachment points in which each insurer has elected to participate.⁵⁵

The whole structure, pricing, and coherence of an occurrence-based general liability insurance program for product liability coverage thus rests on the premise that the excess policies within it provide a specified aggregate-limited layer of coverage at a fixed “attachment point” above underlying aggregate limits of coverage. This locks each of the annual tower’s layers into place. For an excess policy’s coverage to “attach,” the underlying limits of liability must be “paid”; and then, in turn, that excess policy’s aggregate limit must be paid for the next excess layer’s coverage to attach.⁵⁶ The premium pricing structure of umbrella and excess coverage in

53. For an illustration of annual layered towers of insurance within a product manufacturer’s corporate general liability insurance program, see the graphic below entitled “Typical Shape of Manufacturer’s Product Liability Insurance Program, 1960–1985.”

54. See *ITT I*, 2017 WL 10992340, at *2, *6–7, *18, *22 (describing the process by which insurers and brokers constructed annual towers of coverage by adding together fixed “layers” of “follow form” insurance policies “to operate as if a single insurer had issued a single policy” for one year; and relying on testimony of Peter Wilson and other underwriters to explain pricing and attachment points within annual towers, which all flowed from the risk assessment and pricing performed by the lead umbrella insurer each year: “the underwriting, terms and conditions and establishment of premiums for the entire umbrella and excess policy towers at issue . . . took place at the first layer umbrella level”); see also *Union Carbide Corp. v. Affiliated FM Ins. Co.*, 947 N.E.2d 111, 113 (N.Y. 2011) (recognizing purpose of achieving “uniform coverage” in layered annual towers of liability insurance for corporate policyholders like Union Carbide with “large and complicated . . . insurance program[s]”).

55. See *ITT I*, 2017 WL 10992340, at *2–3, *6–7 (describing testimony from the policyholder, broker, and underwriter perspective).

56. See London 1971 umbrella form, *Insuring Agreement II. The Declarations* page of umbrella and excess liability policies also typically identifies the total amount of limits of liability of underlying insurance policies issued for the same policy period, and either includes or references a separate “Schedule of Underlying Insurance” that identifies the policies and/or layer limits comprising the total underlying insurance limits.

Under certain circumstances with certain insurers, policyholders were able to negotiate or procure coverage with policy language that “softened” the attachment point requirement under certain circumstances. For example, under certain policy language and/or certain states’ law, in the event of underlying insurer insolvency, an excess policy’s coverage may be called on to respond to covered losses without requiring the insured to pay first an amount equal to the underlying insolvent insurer’s policy limit.

occurrence-based general liability insurance programs for product liability coverage is thus built around (1) the total amount of underlying aggregate limits that have to be paid *in that policy year* before the coverage can attach, and (2) the total aggregate limit of coverage provided by the policy.⁵⁷

The London 1971 umbrella form policy refers to the “reduction” of aggregate limits under certain circumstances in two provisions: (1) Insuring Agreement II, and (2) the non-cumulation condition. The non-cumulation condition refers to “reduction” of aggregate limits when the condition is implicated “on account of . . . loss” that is “covered” under both prior insurance and the instant policy.⁵⁸ The policy’s Insuring Agreement II requires the underlying aggregate limits to be *paid* “in full” for losses arising out of occurrences and then promises to pay, if called to respond after attachment, a full aggregate limit for covered product liability losses.⁵⁹ The

57. See Wilson ITT Deposition, *supra* note 9, at 107:11–108:4; see also Transcript of Deposition of George L. Priest at 54:22–55:1, Cannon Elec., Inc. v. ACE Prop. & Cas. Co., No. BC 290354 (Cal. Super. Ct. Sept. 27, 2018) [hereinafter Priest ITT Deposition] (a copy of this transcript is on file with the authors) (testifying that “the purpose of excess insurance, and it’s built into the premium pricing structure, is that the underlying policy has to pay its limits before it responds”).

58. See London 1971 umbrella form, Non-Cumulation condition.

59. See London 1971 umbrella form, Insuring Agreement II. The drafters of the London 1971 umbrella form also created an excess umbrella policy form for policies that would attach above the umbrella layer (the Excess Umbrella Policy (London 1971)). That excess umbrella form similarly requires the underlying aggregate limits to be paid and promises to pay a full aggregate limit once coverage has attached if called upon to do so. See Excess Umbrella Policy (London 1971), Insuring Agreement II (stating that after the Underlying Umbrella Insurers “have paid or been held liable to pay the full amount of their respective ultimate net loss liability” up to their policy limits, the London excess umbrella policy “shall then be liable to *pay* only the excess thereof up to . . . [the dollar amount ‘stated in Item 6 of the Declarations’] in the aggregate,” that is, the policy’s aggregate limit of liability) (emphasis added).

The Excess Umbrella Policy (London 1971) policy form includes a “maintenance of underlying umbrella insurance condition” which provides, in pertinent part, that:

This Policy is subject to the same terms, definitions, exclusions and conditions (except as regards the premium, the amount and limits of liability and except as otherwise provided herein) as are contained in or as may be added to the Underlying Umbrella Policies stated in Item 2 of the Declarations prior to the happening of an occurrence for which claim is made hereunder. . . .

It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the Policy period without reduction of coverage or limits *except for any reduction of the aggregate limits contained therein* solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy or *by operation of Condition C. of the Underlying Umbrella Policies*

Excess Umbrella Policy (London 1971), Condition 2. Excess insurers with this policy language have argued that this condition’s reference to reduction of aggregate limits in an underlying policy by operation of that underlying policy’s “Condition C” (the standardized non-cumulation condition) is a recognition that aggregate limits in policies with non-cumulation conditions can be exhausted for all product liability claims without paying claims

non-cumulation condition, which is ubiquitous in historic insurance programs, cannot be construed in a manner that would negate Insuring Agreement II, which requires the underlying aggregate limits in an annual tower to be *paid* “in full” and, in turn, promises to pay its aggregate limit. Consequently, these policies only can be construed to reduce aggregate limits in two ways to fulfill the purpose of the non-cumulation condition and avoid not only overriding the insuring agreement but eviscerating it:

1. Pursuant to Policies’ Insuring Agreement II:

Payment of covered product liability losses in the full amount of the excess policy’s aggregate limit upon the payment in full of the underlying aggregate limits.

2. Pursuant to Non-Cumulation Condition:

If the insured makes a definite claim for reimbursement for the same loss under more than one policy year, then the aggregate limits in the later policy year will be reduced *for that loss* but *not for different* losses.

To reduce the aggregate limit by operation of the non-cumulation condition for different losses than the loss for which amounts are due under prior insurance would override the insuring agreement promise and do violence to the integrity of the product liability coverage towers. This construction is supported by the weight of authority that the application of non-cumulation conditions is limited to “loss” arising from “the same

under that policy by operation of the non-cumulation condition. However, these excess insurers with such maintenance of underlying coverage conditions cannot square that argument without overriding their policy’s Insuring Agreement II and incorporated loss payable requirement that the underlying aggregate limits have to be *paid* before coverage under their policy can “attach.” The only way to resolve the tension in language regarding reduction of aggregate limits is to recognize that the “maintenance of underlying umbrella insurance” condition has nothing to do with “attachment” or what has to happen to exhaust underlying limits before the excess policy’s coverage attaches, but rather has a different purpose. Given that the excess policies follow the terms of underlying insurance, the condition was utilized so that the policyholder would not change the terms of underlying insurance during the currency of the policy’s policy period. *See* Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 196:2–8. It is Insuring Agreement II and any incorporated loss payable condition, not the maintenance of underlying umbrella condition, that governs when and how the policy’s coverage will “attach.” *See id.* at 196:9–13. Those terms require the underlying aggregate limit to be paid in whole before coverage under the excess policy attaches.

occurrence,” and not for a different loss.⁶⁰ This construction is consistent with the purpose of the non-cumulation condition.⁶¹

E. Insurers’ New Arguments Do Not Reflect Reasonable Expectations of Policyholders and Insurers When Historic General Liability Insurance Programs Were Placed

“When construing insurance policies, the language of the ‘contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured.’”⁶² An insurance policy is to be interpreted in light of its and the policyholder’s “general objects and purposes.”⁶³ Insurers’ arguments of recent mint would result in non-cumulation conditions that are ubiquitous in historic insurance programs eviscerating annual towers of coverage throughout the program for asbestos-related product liability claims.⁶⁴ These insurers’ recent

60. See *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 2016 WL 4203543, at *4–5 (S.D.N.Y. Aug. 8, 2016); *Viking Pump, Inc. v. Century Indem. Co.*, 2013 WL 7098824, at *4, *12, *16–17 (Del. Super. Ct. Oct. 31, 2013) (ruling under New York law that non-cumulation conditions apply only on a “per occurrence” basis with no effect on the aggregate limits available for different claims), *aff’d in part and rev’d in part on other grounds*, 148 A.3d 633 (Del. 2016); see also *Carrier Corp. v. Travelers Indem. Co.*, Index No. 2005-EF-7032, RJI No. 33-06-4408, 2018 WL 7137965, at *7 (N.Y. Sup. Ct. Nov. 21, 2018) (rejecting insurer non-cumulation condition argument based on broad definition of loss, finding that *Olin* court “confirmed a narrow definition of ‘loss’; whereby the term refers to each underlying claim, not to the cumulative amount of the policyholder’s liability for all claims of a similar type. The term ‘loss’ does not mean, as urged by [the insurer], all liability incurred by the policyholder for all claims of a similar type (which would implicate tens of thousands of asbestos-related injury lawsuits); see also *Luk Clutch Sys., LLC v. Century Indem. Co.*, 805 F. Supp. 2d 370, 377 & n.5 (N.D. Ohio 2011) (holding that due “to finding of multiple occurrences” the court “does not need to resolve the noncumulation of liability provision” as insurer counsel recognized that provision “only applies as to a single occurrence”).

61. See *Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 147, 150–51 (2d Cir. 2017) (“[T]he overarching approach dictated by Condition C [the non-cumulation condition is] to prevent the insured from stacking policies once it has already obtained indemnification for that specific loss from another policy in the relevant coverage layer. . . . This provision allows the insurer to offset its indemnification obligations by amounts already paid to cover the loss by another insurer in the same coverage tier.”) (emphasis omitted and added).

62. *In re Viking Pump, Inc.*, 52 N.E.3d 1144, 1151 (N.Y. 2016) (citations omitted).

63. *Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 457 N.E.2d 761, 764 (N.Y. 1983) (“The tests to be applied in construing an insurance policy are common speech . . . and the reasonable expectation and purpose of the ordinary business[person].”); see also *Beal Sav. Bank v. Summers*, 865 N.E.2d 1210, 1213–24 (N.Y. 2007) (a contract should be interpreted “to give effect to its general purposes.”); see also *Am. Alternative Ins. Corp. v. Superior Court*, 37 Cal. Rptr. 918, 922 (Ct. App. 2006) (noting that insurance policies must be interpreted in “consider[ation of] the circumstances under which the contract was made and the matter to which it relates” and “mindful of the basic rule that in interpreting policies of insurance, [t]he policy will be viewed in light of its general objects and purposes”).

64. Given the ubiquity of the condition and the fact that the product manufacturers confronting asbestos liabilities of any sizeable degree today *each* typically placed historic insurance

construction of non-cumulation conditions to wipe away aggregate limits for product liability losses that no insurer has paid ignores (1) the non-cumulation conditions' intended purpose of simply limiting an insured's recovery for a particular loss to one year's limits, (2) manufacturer insureds' and insurers' understanding of the risks transferred from insureds to insurers at the time the policies were issued, and (3) the purpose of the product liability coverage that product manufacturers painstakingly placed in annual towers during a period when liability for product manufacturers was expanding greatly in the United States.

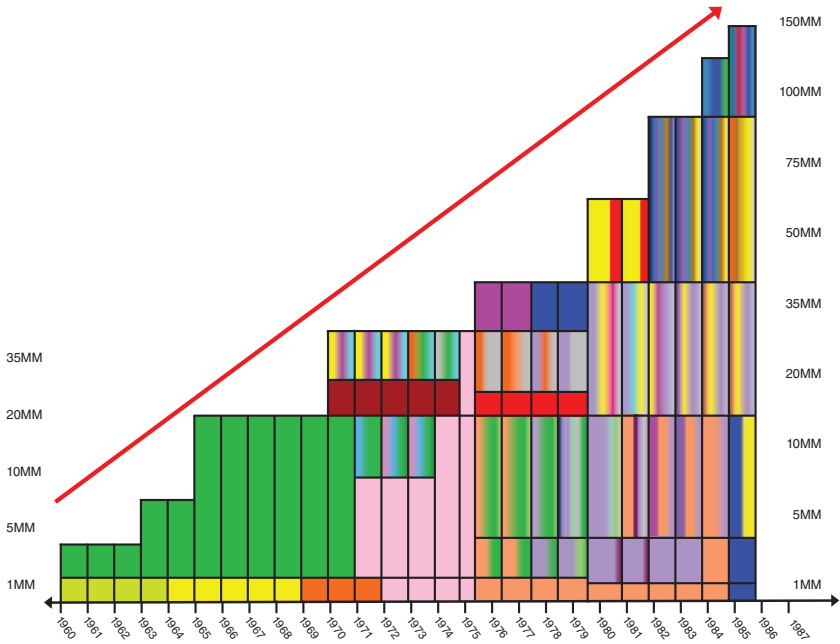
From 1960 through 1985, the adoption of the theory of "enterprise liability" into the law in the United States greatly expanded both the perception and reality of liability exposure for product manufacturers.⁶⁵ Particularly after the California Supreme Court's 1963 *Yuba Power Products* decision accelerated the adoption of enterprise liability in the law by holding a manufacturer strictly liable when a defect in its product causes injury, manufacturers year after year bought, and insurers met market demand by selling, increasingly taller "towers" of product liability coverage under occurrence-based general liability policies that provided such coverage subject to aggregate limits.⁶⁶ This phenomenon can be visualized through

programs that provide them with hundreds of millions of dollars of product liability coverage potentially responsive to those liabilities, these insurers' non-cumulation condition arguments, if widely accepted, would have the effect of eliminating billions of dollars of product liability coverage.

65. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUDIES 461, 505–27 (1985) (discussing the modern synthesis and adoption of the theory of enterprise liability into the law beginning with two landmark decisions in 1960 and 1963, the New Jersey Supreme Court decision, *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), and the California Supreme Court decision, *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963)). Two underpinnings of the theory of enterprise liability which resulted in strict liability for product manufacturers that were adopted in U.S. tort law beginning in the early 1960s are that (1) "[m]anufacturers or other corporate injurers are in a better position than victims to prevent injuries; thus strict defendant liability will create incentives to reduce the accident rate[.]" and (2) "accidents that cannot be prevented can only be insured against [and the] corporate injurers are also in a relatively better position than victims to purchase insurance for unpreventable injuries." See George L. Priest, *The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States*, 9 TEL-AVIV U. STUDIES IN LAW 93, 117–18 (1989); see also Priest ITT Deposition, *supra* note 57, at 32:5–33:6.

66. See Priest ITT Deposition, *supra* note 57, at 22:15–24:19 (testifying that "as a general matter, firms, especially asbestos firms, were increasing the amounts of coverage they were buying in this time" and that "when you look at these coverage charts you see the insurance rocketing up until asbestos was excluded"). Coverage for losses under policies in this period were typically limited in two ways: (1) through a per occurrence limit that applied to a loss or multiple losses arising out of an occurrence, and (2) with respect to product liability losses and completed operations losses arising out of multiple occurrences, an annualized aggregate limit. Policies without aggregate limits for product liability coverage were not available because insurers had "some concern about the correlation of [product liability] losses." *Id.* at 40:12–16. The expansion of product liability law in that period made it "crucial" for insurers to have an aggregate limit so that they did not "have unlimited obligations to pay." *Id.* at 41:21–42:1.

**Typical Shape of Manufacturer’s Product Liability Insurance Program
1960–1985**



a hypothetical chart showing a policyholder’s product liability coverage limits over this time period.⁶⁷

The sale and purchase of ever-increasing towers of liability coverage came to a crashing halt in the mid-1980s when insurance markets “unraveled” because the expansion of strict liability in the law caused “losses” among policyholders to become “too correlated” for insurance markets to operate efficiently; this resulted in the insurance industry adopting asbestos and absolute pollution exclusions as standard exclusions, and moving from “occurrence-based” general liability policies to “claims made” policies in 1986.⁶⁸ The casualty insurance crisis that began in the 1980s, particularly driven by asbestos-related and environmental damage long-tail liabilities, caused and continues to cause countless insolvencies of insurance companies that issued general liability coverage in the 1960s, 1970s, and 1980s.

67. Each color within the graphic depicts one insurer’s policies. The presence of multiple colors within a single layer reflects the practice of placing multiple policies in a “quota share” layer, meaning multiple insurers share the layer limits to curtail further any one insurer’s risk.

68. *Id.* at 36:22–38:13.

Non-cumulation conditions are ubiquitous in historic umbrella and excess general liability insurance programs during this period when manufacturers clamored and paid substantial premiums for increasingly taller towers of product liability coverage. To construe them in the manner that certain insurers now are “interpreting” them to wipe out products coverage without payment under years of policies ignores the reasonable expectations of the parties when they entered into the insurance contracts. The parties recognized that product liability law was increasing manufacturers’ potential liability exposure resulting in an increasing demand for more coverage. Through placing product liability coverage in annualized aggregate limited layers of coverage with such product manufacturers, insurers understood the bargain that they were striking. Insurers, wanting to meet that demand to earn premiums, but recognizing risks, agreed to sell policies that provided the coverage, but only at and for particular “layers” of coverage at *fixed* attachment points in an insurance program and subject to aggregate limits for product liability losses. The insurers guessed wrong about just how greatly the adoption of enterprise liability in the law would expand their insureds’ exposure to asbestos and environmental liabilities and, as a consequence, sold too much coverage.⁶⁹ The casualty insurance crisis followed with insurers adding asbestos exclusions, moving to claims made policy forms, and sometimes becoming insolvent.

If the ubiquitous non-cumulation conditions were intended to work in the manner that certain insurers now contend they were intended to work, none of this would have happened. The insurers would not have had to move to asbestos exclusions and claims made forms because the non-cumulation condition would have dramatically decreased the insurers’ exposure to their insureds’ asbestos liabilities.⁷⁰ Exposure to long-tail liabilities for U.S. insureds would not have caused the collapse of many insurers, including domestic insurers such as The Home Insurance Company, Highlands Insurance Company, and Mission Insurance Company, as well as London Market Insurers such as London United Investments PLC (“LUI”), a holding company of numerous London Market insurance companies administered by H.S. Weavers (Underwriting) Agencies Ltd. (“H.S. Weavers”).⁷¹ The incurred but not reported reserves carried by

69. See *id.* at 34:18–35:3, 35:24–36:15.

70. See Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 197:5–27 (testifying that beginning in October 1985 his underwriting syndicate H.S. Weavers only wrote business on a claims made wording because it decided it could no longer underwrite with the occurrence language because of “environmental pollution claims” and “asbestos claims” and the consequent need to establish incurred but not reported (“IBNR”) reserves for such claims).

71. H.S. Weavers underwrote for five LUI companies collectively known as “KWELM,” for the first letter in each of their names. At the time of LUI’s collapse in 1990, H.S. Weavers was the London market’s largest underwriting agency for U.S. casualty risks. See Laurie Cohen, *London Insurance Crisis Rattles Liability Market Here*, CHI. TRIB., Apr. 11, 1990.

these insurers that always or often had non-cumulation conditions in their policies would have been substantially smaller, and more insurers would have weathered the storm.⁷² But that is not what happened,⁷³ and these insurers instead were placed into runoff due to their large potential exposure to asbestos and environmental liabilities.

V. CONCLUSION

Historic umbrella and excess occurrence-based general liability policies sold by domestic and London Market Insurers to product manufacturers in the 1960s, 1970s, and early 1980s were intended to provide broad product liability coverage subject to an aggregate limit at particular layers above fixed attachment points in a manufacturer's insurance program. This fact is reflected in the policies' insuring agreements, limit of liability provisions, and loss payable conditions. It also is reflected in how they underwrote and priced the coverage that they issued. They sold this coverage each year to meet the increasing demand by product manufacturer insureds for ever-taller towers of coverage in response to an expansion of tort liability adopted by courts across the country. To contain their exposure to their insureds' losses, these insurers counted on not only aggregate limits for the coverage they provided, but also a "buffer" of underlying aggregate-limited coverage that would respond to the same product liability losses. However, in the early- to mid-1980s, with more and more insureds confronting an explosion of asbestos-related and environmental-related liabilities, an insurance crisis resulted that ended with insurers excluding asbestos and environmental liabilities from coverage and moving from occurrence-based to claims made general liability policies.

Over the last three decades, those insurers that survived the crisis advanced coverage arguments in courts across the country to contain their exposure to their insureds' asbestos-related and environmental-related liabilities from the historic products that they sold and operations they conducted. Some courts in some states accepted the insurers' arguments and found, for example, that historic occurrence-based general liability policies do not cover "all sums" of "damages" because of "bodily injury" or "property damage" arising from an occurrence, and instead cover only a "pro

72. Conversely, more product manufacturers that have been swept up into the asbestos litigation, including formerly third and fourth tier defendants, would have declared bankruptcy as their historic insurance programs of decades of coverage would have been reduced to the amount of aggregate limits in one year.

73. See Wilson ITT Trial Testimony (Afternoon), *supra* note 16, at 197:16–198:27 (testifying that in setting IBNR reserves the H.S. Weavers companies before becoming insolvent did not take into account the non-cumulation conditions in their policies because IBNR was "based on what we think the claims reserves will turn out to be eventually . . . [i]t's got nothing to do with what conditions you've got in your policy").

rata” share of such damages.⁷⁴ Other courts found that an “all sums” recovery applied, but that excess coverage in an insurance program could only be reached if all policies at lower layers of coverage for all policy periods triggered by the underlying liabilities are “horizontally exhausted” first.⁷⁵ For example, beginning in the late 1990s, federal courts “predicted” that New York courts would apply a “pro rata” allocation to environmental-related property damage or asbestos-related bodily injury claims.⁷⁶ In 2002, the New York Court of Appeals found that “pro rata” allocation applied to Consolidated Edison’s environmental-related property damage claims.⁷⁷ Although the *Consolidated Edison* court cautioned that its ruling turned on the particular policy language before it and that “different policy language” might compel an “all sums” allocation, insurers and most policyholders had accepted the insurer assertion that New York was a pro rata state.⁷⁸

Following *Consolidated Edison*, umbrella and excess insurers that had issued coverage to New York insureds, or had issued coverage to which New York law might be applied, banked on having a diminished exposure to their insureds’ asbestos-related and environmental-related liabilities. The *Viking Pump* court’s “all sums” and vertical exhaustion rulings for policies containing the ubiquitous non-cumulation condition upset these insurers’ expectations of exposure. In the wake of that decision, these insurers increasingly have turned to advancing arguments in courts across the country that non-cumulation conditions in historic insurance policies act in a manner to limit an insured’s coverage for product liability losses across an entire insurance program to essentially the amount of one year’s aggregate limits of liability.⁷⁹

74. “Pro rata” allocation rulings, particularly for asbestos-related bodily injury claims, ignore the policy language and the basic nature of the underlying liability for which the insurance was purchased. See Cox & Konkel, *supra* note 2.

75. Horizontal exhaustion rulings ignore the policy terms and underwriting of historic occurrence-based general liability umbrella and excess policies, which were placed with a consideration only of fixed attachment points, amount of limits, and the insured’s potential exposure to losses for that upcoming policy year.

76. See, e.g., *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 325–27 (2d Cir. 2000); see also *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1192 (2d Cir. 1995), *modified on denial of reh’g*, 85 F.3d 49 (2d Cir. 1996).

77. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 622, 695 (N.Y. 2002).

78. *Id.* at 694–95.

79. See, e.g., *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 2016 WL 4203543, at *4–5 (S.D.N.Y. Aug. 8, 2016) (ruling on a motion to reconsider a ruling on allocation in the wake of the *Viking Pump* decision and Liberty Mutual’s motion seeking, for the first time, “a declaration that ‘the limits afforded to Fairbanks under each of the 1975–1981 Umbrella Policies for the Asbestos Claims must be reduced by the amount of payments that Liberty makes for Asbestos Claims under any previous Umbrella Policy’”); *Hopeman Bros., Inc. v. Cont’l Cas. Co.*, 307 F. Supp. 3d 433, 455 (E.D. Va. 2018); *Carrier Corp. v. Travelers Indem. Co.*, Index No. 2005-EF-7032, RJI No. 33-06-4408, 2018 WL 7137965, at *7 (N.Y. Sup. Ct. Nov. 21, 2018); Cannon Elec.

Non-cumulation conditions in an insurance program never were intended to wipe away years of aggregate-limited insurance towers that have not paid product liability losses merely because different product liability losses were paid under earlier years of coverage. The conditions, by their terms and in fact, were narrowly intended to limit an insured's attempt to recover for a particular "loss" arising out of a particular "occurrence" to the amount of one year's policy limits. As "conditions" to coverage, they were never intended to override the policy's insuring agreement promise, nor upend the orderly response of a coverage tower to multiple covered product liability losses, with each policy providing a specified aggregate-limited coverage layer paying its limits before the next policy up the tower responds by paying its limits.

The notion recently advanced by insurers that many years of product liability coverage may be washed away by reducing aggregate limits to zero without payment violates the policies' plain language, the drafters' intent, and the historic expectations of both insureds that sought increasingly larger annual towers of product liability coverage during the boom of enterprise liability and the insurers that met that demand. Should courts accept this notion without scrutiny, eliminating years of potentially responsive coverage without payment, the effects on historic products manufacturers' coverage could be drastic: the largest manufacturers regularly purchased tens or hundreds of millions of dollars of product liability coverage each year. Yet courts that abide by bedrock principles of insurance policy interpretation should reject this unintended and pernicious result and instead enforce the plain and consistent meaning of language throughout these policies, in light of their purpose and the reasonable expectations of insureds from decades ago when they annually contracted for the utmost insurance protection from rapidly expanding tort liability.

Inc. v. ACE Prop. & Cas. Co. (ITT II), No. BC 290354, 2019 WL 2157716, at *11 (Cal. Super. Ct. Jan. 9, 2019) ("For the first time, after this Court's statement of decision in 2017, Resolute invoked the Prior Insurance and Non Cumulation condition ('Non Cum condition') of these excess policies to assert that this provision reduces the aggregate limits available for what Resolute characterized as ITT's single asbestos-related loss."); *see also* Brief of National Union in Support of its Sur-Reply and Cross-Motion for Partial Summary Judgment Regarding the 1977-79 National Union Policy, *In re Rapid-American Corp.*, No. 15-01095-smb (Bankr. S.D.N.Y. June 7, 2019).

