[noting that "(t)hose decisions apparently no longer mean all that they say"]), we plunge ahead into greater confusion, creating a constitutional violation and recoiling from the consequences.

For the foregoing reasons, I dissent and would affirm the Appellate Division order.

Judges RIVERA, STEIN and FAHEY concur; Judge GARCIA dissents and votes to affirm in an opinion in which Judges PIGOTT and ABDUS–SALAAM concur.

Order reversed and a new trial ordered.

27 N.Y.3d 244

In the Matter of VIKING PUMP, INC., et al., Insurance Appeals.

Viking Pump, Inc., et al., Appellants,

TIG Insurance Company et al., Respondents.

Court of Appeals of New York.

May 3, 2016.

Background: Two successors of insured pump manufacturer, who were potentially subject to significant liability in connection with asbestos exposure claims, brought action in a Delaware state court against insurers, seeking to recover under policies issued to insured. The Delaware Court of Chancery, Strine, Chancellor, 2 A.3d 76, ruled that New York law applied to the dispute, that both successors were entitled to coverage under the excess policies, and that the policies unambiguously provided for "all sums" allocation of losses among insurers. Following transfer, the Delaware Superior Court, New Castle County, Silverman, J., 2014 WL 1305003, ruled that under New York law, insured's alleged successors were obligated to horizontally exhaust all triggered primary and umbrella insurance layers before tapping any of insured's excess coverage. On appeal, the Delaware Supreme Court, Holland, J., —— A.3d ——, 2015 WL 3618924, certified questions to the New York Court of Appeals as to how to allocate losses among insurers for injuries potentially triggering coverage across multiple policy periods.

Holdings: The Court of Appeals, Stein, J., held that:

(1) existence of non-cumulation and prior insurance provisions in excess insurance policies mandated use of the all sums allocation method, and

(2) insureds were required to vertically exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess policies.

Certified questions answered.

1. Insurance ⚿2112

Generally, proration of liability among insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period in claims alleging a gradual and continuing harm.

2. Insurance ⚿1805

In determining a dispute over insurance coverage, courts first look to language of the policy.

3. Insurance ⚿1721, 1809

Insurance contracts, like other agreements, should be enforced as written, and parties to an insurance arrangement may generally contract as they wish and the courts will enforce their agreements without passing on the substance of them.

4. Insurance ⚿1817, 1820, 1822

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.

5. Insurance ⚿1810, 1828

Courts must construe an insurance policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect; significantly, surplusage is a result to be avoided.

6. Insurance ⚿1808, 1832(1)

While ambiguities in an insurance policy are to be construed against the insurer, a contract is not ambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion.

7. Insurance ⚿2285(4)

Existence of non-cumulation and prior insurance provisions in excess liability insurance policies mandated use of the all sums allocation method, particularly since several of the excess policies also contained continuing coverage clauses within the non-cumulation and prior insurance provisions.

8. Insurance ⚿2396

In light of language in excess liability insurance policies tying their attachment only to specific underlying policies in effect during the same policy period as the applicable excess policy, and in absence of any policy language suggesting a contrary intent, the excess policies were triggered by vertical exhaustion of the underlying available coverage within the same policy period, and thus insureds were required, under terms of the excess policies, to vertically exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess policies.

Kirkland & Ellis LLP, Chicago, Illinois (Michael P. Foradas, of the Illinois bar, admitted pro hac vice, Lisa G. Esayian of the Illinois bar, admitted pro hac vice, and William T. Pruitt of the Illinois bar, admitted pro hac vice, of counsel), and Kirkland & Ellis LLP, New York City (Peter A. Bellacosa of counsel), for Viking Pump, Inc., appellant.

Kasowitz Benson Torres & Friedman LLP, New York City (Robin L. Cohen, Elizabeth A. Sherwin and Keith McKenna of counsel), for Warren Pumps LLC, appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York City (Kathleen M. Sullivan of counsel), Simpson Thacher & Bartlett LLP, New York City (Mary Kay Vyskocil, Summer Craig and Alexander Li of counsel), O'Melveny & Myers LLP, Washington, D.C. (Jonathan D. Hacker, of the District of Columbia bar, admitted pro hac vice, of counsel), O'Melveny & Myers LLP, New York City (Tancred Schiavoni, Gary Svirsky, Anton Metlitsky and Brad M. Elias of counsel), Hinkhouse Williams Walsh LLP, Chicago, Illinois (Laura S. McKay, of the Illinois bar, admitted pro hac vice, of counsel), Day Pitney LLP, Hartford, Connecticut (Kathleen D. Monnes, of the Connecticut bar, admitted pro hac vice, John K. Scully, of the Connecticut bar, admitted pro hac vice and John W. Cerreta of counsel), Clausen Miller P.C., Chicago, Illinois (Mark D. Paulson, of the Illinois bar, admitted pro hac vice, Amy R. Paulus, of the Illinois bar, admitted pro hac vice and Don R. Sampen, of the Illinois bar, admitted pro hac vice, of counsel), Zelle Hofmann Voelbel & Mason LLP, Framingham, Mas-

sachusetts (Kristin Suga Heres, of the Massachusetts bar, admitted pro hac vice, of counsel), and Carroll, McNulty & Kull LLC, Basking Ridge, New Jersey (Heather E. Simpson and Christopher R. Carroll of counsel), for respondents.

Vedder Price P.C., New York City (John H. Eickemeyer and Daniel C. Green of counsel), and Wiley Rein LLP, Washington, D.C. (Laura A. Foggan and Nicole Audet Richardson of counsel), for Complex Insurance Claims Litigation and another, amici curiae.

Lowenstein Sandler LLP, New York City (David L. Elkind and Eric Jesse of counsel), for New York State Electric & Gas Corporation, amicus curiae.

Anderson Kill P.C., New York City (Robert M. Horkovich and Edward J. Stein of counsel), and Amy Bach, United Policyholders, San Francisco, California, for United Policyholders and others, amici curiae.

Jenner & Block LLP, Chicago, Illinois (Craig C. Martin, of the Illinois bar, admitted pro hac vice, and Peter J. Brennan of counsel), for Olin Corporation, amicus curiae.

Morgan, Lewis & Bockius LLP, Washington, D.C. (Randall M. Levine, Gerald P. Konkel, Stephanie Schuster and Christopher M. Popecki of counsel) and Morgan, Lewis & Bockius LLP, Los Angeles, California (David S. Cox of counsel), for ITT Corporation, amicus curiae.

[250] OPINION OF THE COURT

STEIN, J.

In this complex insurance dispute, we have accepted two certified questions from the Delaware Supreme Court asking us to determine (1) whether "all sums" or "pro rata" allocation applies where the excess insurance policies at issue either follow form to a non-cumulation provision or contain a non-cumulation and prior insurance provision, and (2) whether, in light of our answer to the allocation question, horizontal or vertical exhaustion is required before certain upper level excess policies attach. We reaffirm that, under New York law, the contract language of the applicable insurance policies controls each of these questions, and we answer the certified questions in accordance with the opinion herein, concluding that all sums allocation and vertical exhaustion apply based on the language in the policies before us.

[251] I.

The facts and procedural history of the underlying litigation are explained in more detail in decisions of the Delaware courts (*see In re Viking Pump, Inc.*, —— A.3d ——, 2015 WL 3618924 [June 10, 2015]; *Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003, 2014 Del.Super. LEXIS 707 [Feb. 28, 2014, C.A. No. 10C–06–141 FSS CCLD]; *Viking Pump, Inc. v. Century Indem. Co.*, 2013 WL 7098824, 2013 Del.Super. LEXIS 615 [Oct. 31, 2013, C.A. No. 10C–06–141 FSS CCLD]; *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 [Del.Ch.2009]). As relevant here, Viking Pump, Inc., and Warren Pumps, LLC, acquired pump manufacturing businesses from Houdaille Industries, Inc. in the 1980s. Those acquisitions later subjected Viking and Warren to significant potential liability in connection with asbestos exposure claims. Houdaille had extensive multilayer insurance coverage spanning from 1972 to 1985 that included coverage for such claims. More specifically, Liberty Mutual Insurance Company provided Houdaille with primary insurance (totaling approximately $17.5 million) and umbrella excess coverage (totaling approximately $42 million) through successive annual policies. Beyond that, Houdaille obtained additional

layers of excess insurance through annual policies issued by various excess insurers (totaling over $400 million in coverage), including a number of policies issued by defendants, designated herein as "the Excess Insurers."

Viking and Warren sought coverage under the Liberty Mutual policies, and the Delaware Court of Chancery determined that both companies were entitled to exercise rights as insureds under those policies (*see generally Viking Pump, Inc. v. Liberty Mut. Ins. Co.,* 2007 WL 1207107, 2007 Del.Ch. LEXIS 43 [Apr. 2, 2007, C.A. No. 1465–VCS]). As the Liberty Mutual coverage neared exhaustion, litigation arose regarding whether Viking and Warren were entitled to coverage under the additional excess policies issued to Houdaille by the Excess Insurers and, if so, how indemnity should be allocated across the triggered policy periods.

Central to the underlying litigation, the Liberty Mutual umbrella policies provide that the insurer

> "will pay on behalf of the insured *all sums* in excess of the retained limit which the insured shall become
> [252]legally obligated to pay, or with the consent of the [insurer], agrees to pay, as damages, direct or consequential, because of:
>
> "(a) personal injury . . .
>
> "with respect to which this policy applies and caused by an occurrence" (emphasis added).

"Occurrence" is defined, in relevant part, as "injurious exposure to conditions, which results in personal injury" which, in turn, is defined as "personal injury or bodily injury which occurs *during the policy period* " (emphasis added). The policies also state that, "[f]or the purpose of determining the limits of the [insured's] liability: (1) all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions . . . shall be considered as the result of one and the same occurrence." The excess policies issued by the Excess Insurers either follow form to (i.e., incorporate) these provisions, or provide for substantively identical coverage.

The majority of the excess policies at issue also follow form to a "non-cumulation" of liability or "anti-stacking" provision in the Liberty Mutual umbrella policies, which provides that

> "[i]f the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any 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 [Liberty Mutual] 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."

Those excess policies that do not follow form to the Liberty Mutual non-cumulation provision contain a similar two-part "Prior Insurance and Non[-]Cumulation of Liability" provision, sometimes referred to as "Condition C," as follows:

> "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 Insured prior to the inception date hereof[,] the limit of liability hereon . . . shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
>
> [253]"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 con-

tinuing at the time of termination of this Policy the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium."

In the underlying litigation, the parties cross-moved for summary judgment with respect to the availability of coverage and the allocation of liability under the excess policies. The Delaware Court of Chancery granted Viking and Warren summary judgment on those issues, and denied the Excess Insurers' cross motions (2 A.3d at 130). As a threshold matter, the Court of Chancery held that New York law applied to the dispute and that Viking and Warren were each entitled to coverage under the excess policies (*see id.* at 90).[1]

With regard to the allocation issue, the Court of Chancery agreed with Warren and Viking (hereinafter, collectively, the Insureds) that the proper method of allocation was the all sums approach, as compared with the pro rata allocation method propounded by the Excess Insurers (*see id.* at 119–127). The Court of Chancery acknowledged that this Court had previously applied the pro rata method in *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222, 746 N.Y.S.2d 622, 774 N.E.2d 687 (2002), where the policy language similarly provided that the insurer would pay "all sums" for an occurrence happening "during the policy period" (*see* 2 A.3d at 120–121). However, the Court of Chancery distinguished the policy language at issue here from that interpreted in *Consolidated Edison* on the ground that the non-cumulation and prior insurance provisions in the policies here evinced a clear and unambiguous intent to use all sums allocation (*see id.* at 119–127). The Court of Chancery rejected the argument of the Excess Insurers that these provisions would not apply if liability was apportioned on a pro rata basis because, according to that court, such an interpretation would—contrary to New York principles of contract interpretation—render the non-cumulation and prior insurance provisions surplusage (*see id.* at 124–126). The Court of Chancery also observed that, even if the policy language was ambiguous, 254 "the only substantial extrinsic evidence offered by the parties weighs in favor of the use of the all sums method" because, the court asserted, Liberty Mutual had, in the past, routinely allocated its liability under its own policies—to which the excess policies followed form—in accordance with the all sums method (*id.* at 119, 127–129). The Court of Chancery further noted that, to the extent the policies are ambiguous, any ambiguity must be resolved in favor of the Insureds (*see id.* at 129–130).

The matter was transferred to the Delaware Superior Court (*Viking Pump, Inc. v. Century Indem. Co.*, 2010 WL 2989690, 2010 Del.Ch. LEXIS 301 [June 11, 2010, C.A. No. 1465–VCS]), where a trial was ultimately held (2013 WL 7098824, *6–7, 2013 Del.Super. LEXIS 615, *21–22). A verdict was returned largely in the Insureds' favor, and the parties made post-judgment motions. As relevant here, the Superior Court rejected the Excess Insurers' renewed arguments that pro rata allocation applied. The Superior Court also determined that, as a matter of New York law, the Insureds were obligated to horizontally exhaust (i.e., deplete) every triggered primary and umbrella layer of insurance before accessing the excess policies. While the Superior Court agreed with the Insureds that policy language supported vertical exhaustion, in the court's view, New York law required that horizontal

1. Neither of those holdings is before us.

exhaustion be utilized with respect to primary and umbrella policies.[2]

On appeal, the Delaware Supreme Court concluded that resolution of the allocation and exhaustion disputes between the Excess Insurers and the Insureds "depends on significant and unsettled questions of New York law that have not been answered, in the first instance, by the New York Court of Appeals" (—— A.3d ——, ——, 2015 WL 3618924, *2). Therefore, the Delaware Supreme Court certified, and we accepted, the following questions:

"1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions?

"2. Given the Court's answer to Question # 1, under New York law and based on the policy language at [255]issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?" (—— A.3d at ——, 2015 WL 3618924, *3; *see Matter of Viking Pump, Inc.*, 25 N.Y.3d 1188, 16 N.Y.S.3d 46, 37 N.E.3d 104 [2015].)

II. Allocation

A.

Courts across the country have grappled with so-called "long-tail" claims—such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or continuing environmental contaminations—in the insurance context. These types of claims present unique complications because they often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage. Given the particular certified questions presented here, we are not asked to review the Delaware courts' rulings regarding which policies were triggered and upon what events such triggering occurred, and we do not pass on those issues here.[3] Rather, we consider only the allocation and exhaustion issues, and we first address the question of allocation.

The Insureds argue that the losses should be allocated through a "joint and several" or "all sums" method. This theory of allocation "permits the insured to 'collect its total liability ... under any policy in effect during' the periods that the damage occurred," up to the policy limits (*Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, 154, 969 N.Y.S.2d 808, 991 N.E.2d 666 [2013], quoting *Consolidated Edison*, 98 N.Y.2d 208, 222, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]; *see United States Fid. & Guar. Co. v. American Re–Ins. Co.*, 20 N.Y.3d 407, 426, 962 N.Y.S.2d 566, 985 N.E.2d 876 [2013]). The burden is then on the insur-

2. The Superior Court subsequently limited that ruling to the primary/umbrella layers, holding that horizontal exhaustion did not apply among additional layers of excess coverage (*see Viking Pump, Inc. v. Century Indem. Co.*, 2014 WL 1305003, 2014 Del.Super. LEXIS 707 [Feb. 28, 2014, C.A. No. 10C–06–141 FSS CCLD]). The propriety of that holding is not before us.

3. After the Delaware Court of Chancery held that the policies were triggered upon an injury-in-fact that occurred upon asbestos exposure (2 A.3d 76, 110–111 [Del.Ch.2009]), the trigger issue was litigated at trial, and the Superior Court declined to alter the jury's verdict on this point (*see* 2013 WL 7098824, *17–18, 2013 Del.Super. LEXIS 615, *55–58 [Super.Ct., Oct. 31, 2013, C.A. No. 10C–06–141 FSS CCLD]).

er against whom the insured |256recovers to seek contribution from the insurers that issued the other triggered policies (*see Consolidated Edison,* 98 N.Y.2d at 222, 746 N.Y.S.2d 622, 774 N.E.2d 687).

[1] The Excess Insurers, by contrast, advocate for pro rata allocation. Under this method, an insurer's liability is limited to sums incurred by the insured during the policy period; in other words, each insurance policy is allocated a "pro rata" share of the total loss representing the portion of the loss that occurred during the policy period (*see Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 154, 969 N.Y.S.2d 808, 991 N.E.2d 666; *Consolidated Edison,* 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687).[4] Generally, "[p]roration of liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period" in claims alleging a gradual and continuing harm (*Consolidated Edison,* 98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687).

Courts of different states and federal jurisdictions are divided on the issue of allocation in relation to long-tail claims. Some jurisdictions have expressed a preference for the all sums method, usually relying on language in policies obligating an insurer to pay "all sums" for which an insured becomes liable (*see e.g. State of California v. Continental Ins. Co.,* 55 Cal.4th 186, 199, 145 Cal.Rptr.3d 1, 281 P.3d 1000, 1007 [2012], *as mod.* [Sept. 19, 2012]; *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.,* 315 Wis.2d 556, 583, 759 N.W.2d 613, 626 [2009]; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512, 515, 769 N.E.2d 835, 840 [2002]; *Hercules, Inc. v. AIU Ins. Co.,* 784 A.2d 481, 491 [Del.2001]; *American Physicians Ins. Exch. v. Garcia,* 876 S.W.2d 842, 855 [Tex. 1994]; *J.H. France Refractories Co. v. Allstate Ins. Co.,* 534 Pa. 29, 39, 626 A.2d 502, 507 [1993]; *Keene Corp. v. Insurance Co. of N. Am.,* 667 F.2d 1034, 1047 [D.C.Cir. 1981]). Others have, instead, utilized the pro rata method, emphasizing language in the insurance policies that may be interpreted as limiting the "all sums" owed to those resulting from an occurrence "during the policy period," or public policy reasons supporting pro rata allocation, or a combination of the two (*see e.g. EnergyNorth Nat. Gas, Inc. v. Certain Underwriters at Lloyd's,* 156 N.H. 333, 344, 934 A.2d 517, 526 [2007]; *Public Serv. Co. of Colorado v. Wallis & Cos.,* 986 P.2d 924, 940 [Colo. 1999]; *Owens–Illinois, Inc. v. United Ins. Co.,* 138 N.J. 437, 473, |257650 A.2d 974, 992 [1994]; *Insurance Co. of N. Am. v. Forty–Eight Insulations, Inc.,* 633 F.2d 1212, 1225 [6th Cir.1980], *decision clarified on reh.* 657 F.2d 814 [6th Cir.1981], *cert. denied* 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 [1981]).

We first confronted the question of pro rata versus all sums allocation in *Consolidated Edison,* 98 N.Y.2d at 222, 746 N.Y.S.2d 622, 774 N.E.2d 687. In that case, we applied the pro rata method to claims involving environmental contamination over a number of years and insurance policy periods. 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 interpreta-

4. Courts have devised different methods of fixing losses between policy periods (*see Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 N.Y.2d 208, 224–225, 746 N.Y.S.2d 622, 774 N.E.2d 687 [2002]). Again, we have no occasion to discuss these methods in this case.

tion, and made clear that the contract language controls the question of allocation.

[2, 3] We emphasized in *Consolidated Edison,* and have reiterated thereafter, that " '[i]n determining a dispute over insurance coverage, [courts] first look to the language of the policy' " (*Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666, quoting *Consolidated Edison,* 98 N.Y.2d at 221, 746 N.Y.S.2d 622, 774 N.E.2d 687; *see Selective Ins. Co. of Am. v. County of Rensselaer,* 26 N.Y.3d 649, 655, 27 N.Y.S.3d 92, 47 N.E.3d 458 [2016]). We did not adopt a strict rule mandating either pro rata or all sums allocation because insurance contracts, like other agreements, should "be enforced as written," and "parties to an insurance arrangement may generally 'contract as they wish and the courts will enforce their agreements without passing on the substance of them' " (*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.,* 21 N.Y.3d 324, 334, 970 N.Y.S.2d 733, 992 N.E.2d 1076 [2013], quoting *New England Mut. Life Ins. Co. v. Caruso,* 73 N.Y.2d 74, 81, 538 N.Y.S.2d 217, 535 N.E.2d 270 [1989]).

[4–6] 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" (*Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143 [2012], quoting *Cragg v. Allstate Indem. Corp.,* 17 N.Y.3d 118, 122, 926 N.Y.S.2d 867, 950 N.E.2d 500 [2011]). Furthermore, "we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666 [internal quotation marks and citations omitted]). Significantly, "surplusage [is] a result to be avoided" (*Westview Assoc. v. Guaranty Natl. Ins. Co.,* 95 N.Y.2d 334, 339, 717 N.Y.S.2d 75, 740 N.E.2d 220 [2000]). Moreover, while " 'ambiguities in an insurance policy are to be construed against the insurer' " (*Dean,* 19 N.Y.3d at 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143, quoting *Breed v. Insurance Co. of N. Am.,* 46 N.Y.2d 351, 353, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1978]; *see Federal Ins. Co. v. International Bus. Machs. Corp.,* 18 N.Y.3d 642, 650, 942 N.Y.S.2d 432, 965 N.E.2d 934 [2012]), a contract is not ambiguous "if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Selective Ins. Co. of Am.,* 26 N.Y.3d at 655, 27 N.Y.S.3d 92, 47 N.E.3d 458 [internal quotation marks and citation omitted]).

In *Consolidated Edison,* we applied the foregoing principles to the parties' arguments in support of, and in opposition to, pro rata allocation. The arguments presented in that case, and our resulting decision, turned exclusively upon the interpretation of two phrases in the insurance policies that were before us: (1) that an insurer agreed to indemnify the insured for "*all sums*" for which the insured was liable and which were caused by or arose out of an "occurrence"; and (2) that the "policies provide[d] indemnification for liability incurred as a result of an accident or occurrence *during the policy period, not outside that period*" (*Consolidated Edison,* 98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphasis added]). The Court concluded that "[p]ro rata allocation under th[o]se facts, *while not explicitly mandated by the policies,* [was] consistent with the language of the policies," whereas the mere use of the phrase

"all sums" was insufficient to establish a contrary view (98 N.Y.2d at 224, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphasis added]). To be sure, we also suggested that, in the absence of language weighing in favor of a different conclusion, pro rata allocation was the preferable method of allocation in long-tail claims in light of the inherent difficulty of tying specific injuries to particular policy periods. Nevertheless, we recognized that "different policy language" might compel all sums allocation (98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687), citing, as a point of comparison, to the Delaware Supreme Court's decision in *Hercules, Inc. v. AIU Ins. Co.,* wherein the Delaware Court adopted the all sums method (784 A.2d 481).

The policy language at issue here, by inclusion of the non-cumulation clauses and the two-part non-cumulation and prior insurance provisions, is substantively distinguishable from the language that we interpreted in *Consolidated Edison,* and the arguments that were made to us in that case were, likewise, different.[5] Indeed, the excess policies before us here present the very type of language that we signaled might compel all [259] sums allocation in *Consolidated Edison.* Inasmuch as the question is now squarely before us, we must determine whether the presence of a non-cumulation clause or a non-cumulation and prior insurance provision mandates all sums allocation.

B.

[7] Generally, non-cumulation clauses 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" (12 Couch on Insurance 3d § 169:5; *see* 1 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 11.02[e] [16th ed. 2013]). Such clauses originated during the shift from "accident-based" to "occurrence-based" liability policies in the 1960s and 1970s, and were purportedly designed to prevent any attempt by policyholders to recover under a subsequent policy—based on the broader definition of occurrence—for a loss that had already been covered by the prior "accident-based" policy (*see* Jan M. Michaels et al., *The "Non–Cumulation" Clause: Policyholders Cannot Have Their Cake and Eat It Too,* 61 U. Kan. L. Rev. 701, 717 [2013]; Christopher C. French, *The "Non–Cumulation Clause": An "Other Insurance" Clause by Another Name,* 60 U. Kan. L. Rev. 375, 386 [2011]). More recently, courts have been called upon to analyze the impact of these clauses on the allocation question. Significantly, we have enforced non-cumulation clauses in accordance with their plain language (*see Nesmith v. Allstate Ins. Co.,* 24 N.Y.3d 520, 523, 2 N.Y.S.3d 11, 25 N.E.3d 924 [2014]; *Hiraldo v. Allstate Ins. Co.,* 5 N.Y.3d 508, 513, 806 N.Y.S.2d 451, 840 N.E.2d 563 [2005]), despite the limiting impact that such clauses may have on an insured's recovery (and, by extension, that of an injured plaintiff). However, we have never addressed the interplay between non-cumulation/prior insurance provisions and allocation.

Courts in other states that have addressed this issue—both those that have adopted all sums allocation and a few that have followed a pro rata approach—have concluded that non-cumulation clauses cannot be reconciled with pro rata allocation. For example, in *Chicago Bridge & Iron*

5. While such provisions were included in some of the policies at issue in *Consolidated Edison,* there was no reference in our decision to their existence.

Co. v. Certain Underwriters at Lloyd's, London, a Massachusetts appellate court rejected pro rata allocation, in part, on the ground that the non-cumulation/prior insurance provision "would be superfluous had the drafter intended that damages would be [260]allocated among insurers based on their respective time on the risk" (59 Mass.App.Ct. 646, 656, 797 N.E.2d 434, 441 [2003]). Similarly, the Supreme Court of Wisconsin supported its determination that all sums allocation applied by pointing to non-cumulation clauses contemplating indemnity where an injury occurs " 'partly before and partly within the policy period' " (*Plastics Eng'g Co.,* 315 Wis.2d at 583, 759 N.W.2d at 626; *see also Riley v. United Servs. Auto. Assn.,* 161 Md.App. 573, 592, 871 A.2d 599, 611 [2005] [noting that prohibiting stacking would run counter to pro rata allocation], *affd.* 393 Md. 55, 899 A.2d 819 [2006]).

In addition, at least two courts in jurisdictions that have adopted the pro rata allocation method have held that non-cumulation clauses cannot be enforced in conjunction with that method (*see Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.,* 176 N.J. 25, 44–46, 819 A.2d 410, 422–423 [2003]; *Outboard Mar. Corp. v. Liberty Mut. Ins. Co.,* 283 Ill.App.3d 630, 670 N.E.2d 740 [1996], *lv. denied* 169 Ill.2d 570, 675 N.E.2d 634 [1996] [declining to enforce non-cumulation clause with pro rata allocation]). In *Spaulding Composites Co., Inc. v. Aetna Cas. & Sur. Co.,* the New Jersey Supreme Court explained that, "even if the non-cumulation clause was not facially inapplicable, . . . it would thwart the . . . pro-rata allocation modality" (176 N.J. at 44, 819 A.2d at 422). That court reasoned that,

> "[o]nce the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy. . . . The pro-rata sharing methodology has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters. By applying the non-cumulation clause, insurers who were actually 'on the risk' would be insulated from their fair share of liability" (176 N.J. at 44–45, 819 A.2d at 422; *see* 15 Couch on Insurance 3d § 220:30 ["Once a court has determined that a loss is to be shared among sequential insurers on a pro rata basis, 'prior insurance' and 'non(-)cumulation of liability' clauses in the policies become unenforceable"]).

These cases are persuasive authority for the proposition that, in policies containing non-cumulation clauses or non-cumulation[261] and prior insurance provisions, such as the excess policies before us, all sums is the appropriate allocation method. We agree that it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation here. Such policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [insured] prior to the inception date" of the instant policy.

By contrast, the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the "during the policy period" limitation, de-

spite the fact that the injuries may not actually be capable of being confined to specific time periods. The non-cumulation clause negates that premise by presupposing that two policies may be called upon to indemnify the insured for the same loss or occurrence. Indeed, even commentators who have advocated for pro rata allocation and propounded the complications that can be caused by all sums allocation have recognized that non-cumulation clauses cannot logically be applied in a pro rata allocation (*see* Jan M. Michaels et al., *The Avoidable Evils of "All Sums" Liability for Long–Tail Insurance Coverage Claims,* 64 U. Kan. L. Rev. 467, 489 [2015] ["Provisions such as the non-cumulation clause (do) not even apply and need not be analyzed under pro rata allocation"]). In a pro rata allocation, the non-cumulation clauses would, therefore, be rendered surplus-age—a construction that cannot be countenanced under our principles of contract interpretation (*see Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666; *Consolidated Edison,* 98 N.Y.2d at 221–222, 746 N.Y.S.2d 622, 774 N.E.2d 687; *Westview Assoc.,* 95 N.Y.2d at 339, 717 N.Y.S.2d 75, 740 N.E.2d 220), and a result that would conflict with our previous recognition that such clauses are enforceable (*see Nesmith,* 24 N.Y.3d at 523, 2 N.Y.S.3d 11, 25 N.E.3d 924; *Hiraldo,* 5 N.Y.3d at 513, 806 N.Y.S.2d 451, 840 N.E.2d 563).[6]

[262]Several of the excess policies here also contain continuing coverage clauses within the non-cumulation and prior insurance provisions, reinforcing our conclusion that all sums—not pro rata—allocation was intended in such policies. The continuing coverage clause expressly extends a policy's protections beyond the policy period for continuing injuries. Yet, under a pro rata allocation, no policy covers a loss that began during a particular policy period and continued after termination of that period because that subsequent loss would be apportioned to the next policy period as its pro rata share. Using the pro rata allocation would, therefore, render the continuing coverage clause irrelevant. Thus, presence of that clause in the respective policies further compels an interpretation in favor of all sums allocation (*see Hercules, Inc.,* 784 A.2d at 493–494; *Dow Corning Corp. v. Continental Cas. Co., Inc.,* 1999 WL 33435067, *7–8, 1999 Mich.App. LEXIS 2920, *23–24 [Oct. 12, 1999, No. 200143 et al.], *lv. denied* 463 Mich. 854, 617 N.W.2d 554 [2000]; *Boston Gas Co. v. Century Indem. Co.,* 454 Mass. 337, 362, 910 N.E.2d 290, 309 [2009]; *Liberty Mut. Ins. Co. v. Those Certain Underwriters at Lloyds,* 650 F.Supp. 1553, 1559 [W.D.Pa.1987]).

The Excess Insurers contend that a conclusion that all sums allocation is required would be inconsistent with the Second Circuit's holding in *Olin Corp. v. American Home Assur. Co.,* 704 F.3d 89, 95 (2d Cir.2012) (*Olin III*) and those cases that have followed in its stead (*see Liberty Mut. Ins. Co. v. Fairbanks Co.,* —— F.Supp.3d ——, ——, 2016 WL 1169511, *7 [S.D.N.Y., Mar. 22, 2016, Nos. 13–CV–3755 (JGK) & 15–CV–1141 (JGK)]; *Liberty Mut. Fire Ins. Co. v. J. & S. Supply*

6. Notably, the Insurers originally argued to the Delaware courts that the non-cumulation clauses should not be given effect in a pro rata allocation. Apparently recognizing that this would conflict with our principles of contract interpretation—as the Delaware Court of Chancery concluded—the Insurers now take the position that the non-cumulation clauses can be given effect with pro rata allocation. Indeed, according to the Delaware Superior Court, even the Excess Insurers' own witness, an insurance law professor, conceded that non-cumulation clauses were inconsistent with pro rata allocation (*see* 2013 WL 7098824, *12, 2013 Del.Super. LEXIS 615, *39).

Corp., 2015 U.S. Dist. LEXIS 177124, *24–25 [S.D.N.Y., June 29, 2015, No. 13–CV–4784 (VSB)]). We discern no such impediment to our holding.

In *Olin I,* the Second Circuit held that pro rata allocation applied to distribute the insured's liability to insurance policies triggered by soil and groundwater contamination resulting from Olin Corporation's pesticide manufacturing operations (*see Olin Corp. v. Insurance Co. of N. Am.,* 221 F.3d 307 [2d Cir.2000] [*Olin I*]). There, the Second Circuit relied both on public
263 policy reasons supporting pro rata allocation, and on language in the insurance policies limiting the scope of coverage to damages incurred during the policy period (*see id.* at 324–326). In a later appeal in additional related litigation (*see Olin Corp. v. Certain Underwriters at Lloyd's London,* 468 F.3d 120, 127 [2d Cir.2006] [*Olin II*]), the Second Circuit reaffirmed that its conclusion was consistent with our decision in *Consolidated Edison.*

Subsequently, in *Olin III,* the issue on appeal in related litigation against one of Olin's excess insurance carriers was whether the attachment point (i.e., the point at which the insured's liability triggers excess coverage) for two excess policies had been met (704 F.3d at 93–95). Applying strict pro rata allocation to the underlying policies, as provided for in *Olin I,* the attachment point for the two excess insurance policies was not reached (*see id.* at 95). The parties' arguments in *Olin III* centered upon the "Prior Insurance and Non–Cumulation of Liability" provision in the underlying policies to which the excess policies followed form (*id.* at 94), which had not been raised in *Olin I* or *Olin II* (*see id.* at 98). Olin argued that, although pro rata allocation applied under the Second Circuit's earlier holding in *Olin I,* the continuing coverage clause contained in the non-cumulation/prior insurance provision required that the losses allocated to subsequent years be swept back into the policy periods covering the earlier years. The excess insurer, by contrast, argued, as relevant here, that pro rata allocation was inconsistent with the non-cumulation and continuing coverage clauses and, consequently, those provisions could not be enforced in conjunction with pro rata allocation.

The Second Circuit held that the plain language of the continuing coverage clause of the prior insurance provision "require[d] the insurer to indemnify the insured for personal injury or property damage continuing after the termination of the policy" (*id.* at 100). The court, therefore, divided up the damages for each year as if allocating them on a pro rata basis, but then swept the shares attributable to the years outside the policy period back into the earlier policy periods.

At first glance, the Second Circuit's decision in *Olin III* could be viewed as harmonizing the non-cumulation and prior insurance provision containing the continuing coverage clause with pro rata allocation. However, the court's rejection of the insurer's argument that these provisions were inconsistent with pro rata allocation turned on its conclusion that "New
264 York state court decisions and those prior decisions of this Court endorsing the pro rata approach foreclose [the Court] from interpreting [the non-cumulation and prior insurance provision] as imposing joint and several liability" (*id.* at 102). As discussed above, our holding in *Consolidated Edison* does not require pro rata allocation in the face of policy language undermining the very premise upon which the imposition of pro rata allocation rests. In light of the Second Circuit's view that it was foreclosed from utilizing all sums allocation—either by *Consolidated Edison* or by its own

earlier holding in *Olin I* imposing pro rata allocation—and the fact that the resulting allocation apportioning numerous years of liability outside the policy period to the relevant policies closely resembles an all sums allocation, the Excess Insurers' contention that *Olin III* supports a pro rata allocation here is unavailing. Nor have those courts that have followed *Olin III* reconciled the language of the non-cumulation clause and prior insurance provision with pro rata allocation (*see Liberty Mut. Ins. Co. v. Fairbanks Co.*, —— F.Supp.3d at ——, 2016 WL 1169511, *7; *Liberty Mut. Fire Ins. Co. v. J. & S. Supply Corp.*, 2015 U.S. Dist. LEXIS 177124, *24–25). Indeed, the Excess Insurers have cited to no authorities satisfactorily reconciling non-cumulation clauses with pro rata allocation.

Accordingly, based on the policy language and the persuasive authority holding that pro rata allocation is inconsistent with non-cumulation and non-cumulation/prior insurance provisions, we hold that all sums allocation is appropriate in policies containing such provisions, like the ones at issue here.

III. Exhaustion

[8] With the allocation issue resolved, we turn to the second question—namely, whether horizontal or vertical exhaustion applies under the relevant policies. That is, we must determine whether the Insureds are required under the terms of the excess policies to "horizontally" exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess insurance policies, or whether the Insureds need only "vertically" exhaust the primary and umbrella policies, which would allow the Insureds to access each excess policy once the immediately underlying policies' limits are depleted, even if other lower-level policies during different policy periods remain unexhausted. The Excess Insurers argue [265] that, if we utilize all sums allocation, then horizontal exhaustion should be applied.[7]

All of the excess policies at issue primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit. In our view, vertical exhaustion is more consistent than horizontal exhaustion with this language tying attachment of the excess policies specifically to identified policies that span the same policy period. Further, vertical exhaustion is conceptually consistent with an all sums allocation, permitting the Insured to seek coverage through the layers of insurance available for a specific year (*see Westport Ins. Corp. v. Appleton Papers Inc.*, 327 Wis.2d 120, 168–169, 787 N.W.2d 894, 919 [Ct.App. 2010], *review denied* 329 Wis.2d 63, 791 N.W.2d 66 [2010]; *Cadet Mfg. Co. v. American Ins. Co.*, 391 F.Supp.2d 884, 892 [W.D.Wash.2005]; J. Stephen Berry & Jerry B. McNally, *Allocation of Insurance Coverage: Prevailing Theories and Practical Applications*, 42 Tort Trial & Ins. Prac. L.J. 999, 1015–1016 [2007]).

The only argument of the Excess Insurers in support of horizontal exhaustion that merits discussion is their contention that it is compelled by the "other insurance" clauses in the Liberty Mutual umbrella policies and the subject excess policies. The Liberty Mutual umbrella policies pro-

7. While, in some situations, horizontal exhaustion may be beneficial to excess insurers, particularly where the underlying layers of insurance contain a non-cumulation clause, we note that—like with the allocation issue—neither method necessarily militates in favor of insurers or insureds, with much depending on the specifics of the underlying policies and their limits.

vide that the insurer will pay "all sums in excess of the retained limit," which is defined as the relevant limit of liability of underlying policies, "plus all amounts payable under other insurance, if any." An "underlying policy" is "a policy listed as an underlying policy in the declarations," which, as already stated, includes only policies spanning the same policy period as the respective excess policy. Other insurance, in turn, "means any other valid and collectible insurance (except under an underlying policy) which is available to the Insured, or would be available to the Insured in the absence of this policy." The excess policies have similar clauses providing for such policies to be excess to other insurance.

266 The Excess Insurers contend that the "other insurance" available to the Insureds includes coverage provided by *successive* insurance policies. Their argument in this regard is not completely baseless (*see Dow Corning Corp.,* 1999 WL 33435067, *9, 1999 Mich.App. LEXIS 2920, *26–29; *United States Gypsum Co. v. Admiral Ins. Co.,* 268 Ill.App.3d 598, 653, 205 Ill.Dec. 619, 643 N.E.2d 1226, 1261 [1994], *lv. denied* 161 Ill.2d 542, 649 N.E.2d 426 [1995]). However, we stated in *Consolidated Edison* that "other insurance" clauses "apply when two or more policies provide coverage during the *same* period, and they serve to prevent multiple recoveries from such policies," and that such clauses "have nothing to do" with "whether any coverage potentially exist[s] at all among certain high-level policies that were in force during *successive years*" (*Consolidated Edison,* 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687 [emphases added]). Those cases relied on by the Delaware Superior Court do not hold otherwise because they each involved instances of concurrent insurance policies (*see e.g. American Home Assur. Co. v. International Ins. Co.,* 90 N.Y.2d 433, 437, 661 N.Y.S.2d 584, 684 N.E.2d 14 [1997]; *State Farm Fire & Cas. Co. v. LiMauro,* 65 N.Y.2d 369, 372, 492 N.Y.S.2d 534, 482 N.E.2d 13 [1985]; *Lumbermens Mut. Cas. Co. v. Allstate Ins. Co.,* 51 N.Y.2d 651, 435 N.Y.S.2d 953, 417 N.E.2d 66 [1980]; *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.,* 53 A.D.3d 140, 855 N.Y.S.2d 459 [1st Dept.2008]). Moreover, our conclusion in *Consolidated Edison* that other insurance clauses are not implicated in situations involving successive—as opposed to concurrent—insurance policies finds support in other jurisdictions (*see Ohio Cas. Ins. Co. v. Unigard Ins. Co.,* 268 P.3d 180, 184 [Utah 2012]; *Century Indem. Co. v. Liberty Mut. Ins. Co.,* 815 F.Supp.2d 508, 516 [D.R.I.2011]; *Westport Ins. Corp.,* 327 Wis.2d at 168–169, 787 N.W.2d at 919; *Boston Gas Co.,* 454 Mass. at 361, 910 N.E.2d at 308 [the "other insurance" clauses simply reflect a recognition of the many situations in which concurrent, not successive, coverage would exist for the same loss]; *LSG Tech., Inc. v. United States Fire Ins. Co.,* 2010 WL 5646054, *12, 2010 U.S. Dist. LEXIS 140879, *33–35 [E.D.Tex., Sept. 2, 2010, No. 2:07–CV–399–DF]; *Owens–Illinois, Inc. v. United Ins. Co.,* 138 N.J. 437, 470, 650 A.2d 974, 991 [1994]).

Here, the Insureds are not seeking multiple recoveries from different insurers under concurrent policies for the same loss, and the other insurance clause does not apply to successive insurance policies (*see Consolidated Edison,* 98 N.Y.2d at 223, 746 N.Y.S.2d 622, 774 N.E.2d 687). Thus, in light of the language in the excess policies tying their attachment only to specific underlying policies in effect 267 during the same policy period as the applicable excess policy, and the absence of any policy language suggesting a contrary intent, we conclude that the excess policies are triggered by vertical exhaustion of the under-

lying available coverage within the same policy period (*see United States Fid. & Guar. Co. v. American Re–Ins. Co.*, 20 N.Y.3d at 428, 962 N.Y.S.2d 566, 985 N.E.2d 876; 2 Barry R. Ostrager & Thomas R. Newman, Handbook on Insurance Coverage Disputes § 13.14).

IV.

Accordingly, following certification of questions by the Supreme Court of Delaware and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, the certified questions should be answered in accordance with this opinion.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, ABDUS–SALAAM and FAHEY concur; Judge GARCIA taking no part.

Following certification of questions by the Supreme Court of Delaware and acceptance of the questions by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified questions answered in accordance with the opinion herein.

27 N.Y.3d 337

The PEOPLE of the State of New York, Respondent,

v.

Quanaparker HOWARD, Appellant.

Court of Appeals of New York.

May 3, 2016.

Background: Following respondent's criminal conviction for unlawful imprisonment of a child, the County Court, Erie County, Kenneth F. Case, J., adjudicated respondent as a level three sex offender in a proceeding under the Sex Offender Registration Act (SORA), and respondent appealed. The Supreme Court, Appellate Division, 125 A.D.3d 1331, 999 N.Y.S.2d 783, affirmed. Leave to appeal was granted.

Holding: The Court of Appeals, DiFiore, C.J., held that hearing court reasonably declined to engage in downward departure from presumptive risk level three.

Affirmed.

Rivera, J., filed dissenting opinion.

1. Mental Health ⇦469(4)

In a proceeding under the Sex Offender Registration Act (SORA), the hearing court has the discretion to depart from a presumptive level, although such a departure should be the exception, not the rule. McKinney's Correction Law § 168–n(3).

2. Mental Health ⇦469(3)

In determining whether to depart from a presumptive risk level under the Sex Offender Registration Act (SORA), the hearing court weighs the aggravating or mitigating factors alleged by the departure-requesting party to assess whether, under the totality of the circumstances, a departure is warranted. McKinney's Correction Law § 168–n(3).