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The Ohio Supreme Court in *Lubrizol Advanced Materials, Inc. v. National Union Fire Insurance Co. of Pittsburgh Pa*., 2020-Ohio-1579, held that a single insurance policy does not have to cover damages occurring over several years. The case came before the court on a certified question from the United States District Court from the Northern District of Ohio which asked the Ohio Supreme Court to determine whether an insured is permitted to seek full and complete indemnity under a single policy providing coverage for "those sums" that the insured becomes legally obligated to pay because of property damage that takes place during the policy period, when the property damage occurred over multiple policy periods.

The underlying federal court action involved a dispute between Lubrizol and IPEX Inc. of Canada arising from Lubrizol's sale of resin which IPEX used to make Kitec plumbing systems. The sales occurred during the period between 2001 and 2008. The systems failed and numerous claims were filed against IPEX. IPEX settled the claims and then sued Lubrizol seeking indemnification for what it paid its customers alleging that the resin was not suitable for use in the manufacture of pipes.

Lubrizol negotiated a settlement and then sought reimbursement from its various insurers. It sought payment from National Union for the full amount of coverage under its

umbrella policy that was in effect between February 28, 2001 and February 28, 2002. National Union refused to cover damages that were not proven to have occurred during its period of policy coverage. Lubrizol filed suit against National Union in federal court seeking to recover the full amount Lubrizol paid to settle with IPEX along with its defense costs. Lubrizol argued that under Ohio law all of Lubrizol's insurance policies that were triggered by the resin damage should be treated as having joint and several liability. Thus, Lubrizol could choose one policy to cover all of its legal costs. Thereafter, the insurers could decide allocation of coverage.

The relevant policy language in the National Union policy provided as follows:

> "We will pay on behalf of the Insured those sums in excess of the Retained Limit that the Insured beco mes legally obligated to pay by reason of liability imposed by law or assumed by the Insured under an Insured Contract because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world."

Lubrizol argued the term "those sums" in the National Union policy is similar to the term "all sums" found in policies other businesses have used to collect damages for long-term injuries under the authority of *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512 (2002). In *Goodyear*, the tire manufacturer was found liable for

environmental pollution caused by waste disposed at landfills that triggered claims over a long period of time. The Court allowed the "all sums" language from one policy to cover the entire cost. The Ohio Supreme Court in *Pennsylvania Gens. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98 (2010) similarly allowed an "all sums" provision to trigger coverage from one insurance policy for the multi-year damage of asbestos-related injuries.

National Union argued that,

> *Goodyear* was inapplicable because the National Union policy refers to "those sums"-not "all sums." Further, National Union argued that *Goodyear* applies only to situations in which the injury is continuous and indivisible, such as in many asbestos-exposure and environmental-pollution claims. National Union argued that the harm in this case was discrete and therefore actual or pro rata allocation is appropriate. Specifically, according to National Union, the allegedly defective resin caused "known or knowable damage in each year between 2001 and 2008," "not indivisible injury similar to the long-term pollution damage in *Goodyear*."

Lubrizol Advanced Materials at P12.

In addressing National Union's first argument, the Court refused to "engage in a hypertechnical grammar analysis to determine whether the phrase 'those sums' is always more limited than "all sums" and would always lead to a different allocation." The Court explained that "[a]s with any contract, insurance policies should be interpreted as written,

and the meaning of the phrase "those sums" depends on the context of each policy and each case" and thus the Court "decline[d] to set a bright-line rule based merely on a party's use of the word 'those' instead of 'all.'" *Lubrizol Advanced Materials* at P13.

In order to resolve the certified question, the Court felt it was compelled to clarify the scope of its *Goodyear* decision. The Court stated as follows:

> In *Goodyear*, we stated, "The issue of allocation arises in situations involving long-term injury or damage, such as environmental cleanup claims where it is difficult to determine which insurer must bear the loss." *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 5. As we will discuss below, this case does not appear to involve long-term or progressive injury or property damage and therefore the type of allocation provided for in *Goodyear* is unnecessary.

Lubrizol Advanced Materials at P14. The Court further distinguished *Goodyea*r as follows:

> … In *Goodyear*, we held that "when a continuous occurrence of environmental pollution triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers 'all sums' incurred as damages 'during the policy period,' subject to that policy's limit of coverage." *Goodyear* at ¶ 11. Similarly, in *Park-Ohio*, we stated that when "loss or injury is caused over a period of time and multiple insurance policies cover that time frame," an all-sums allocation was applicable. *Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 1. But both of those cases involved ongoing, continuous exposure, which we have described as "progressive injury," *see id.* In *Goodyear*, waste disposed at landfills over a long period migrated,

causing widespread environmental pollution. In *Park-Ohio*, asbestos dust caused continuous progressive injury like the court described in *Keene*.

Here, however, National Union has alleged that the harm is discrete, not ongoing and continuous. In other words, the policy coverage is triggered at a single, discernable point in time. Lubrizol makes the assertion that the claims involve "long tail property damage" but does not offer persuasive arguments to support the idea that a garden-variety product defect creates the same kind of continuous progressive harm that occurred in *Goodyear* and *Park-Ohio*. Lubrizol argues that the "divisibility of harm is outside of the scope of the certified question," but we disagree. However, we leave open the possibility that Lubrizol could marshal more evidence before the trial court to establish this as a progressive-injury case.

But, even if Lubrizol's assertions are true, we would conclude that allocation under *Goodyear* is unnecessary. As National Union states, the time of damage is known or knowable. For example, it should be ascertainable how much resin was produced on a given date, how much resin was sold to IPEX, which lots of Kitec plumbing were produced on certain dates, when the Kitec plumbing was sold and installed, and when it failed. Under these circumstances, the operative contract language is not the reference to policy coverage for "those sums" but rather to injury or damage "that takes place during the Policy Period."

Lubrizol Advanced Materials at PP 16-18

Thus, the Court concluded that,

there is no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time. In that circumstance, the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim. As alleged by National Union, the facts here are distinguishable from *Goodyear*, *Park-Ohio*, and *Keene*, in which there was

> an "injurious process that beg[an] with an initial exposure and end[ed] with manifestation of disease" but that continued to develop injury at all the points in between. *Keene*, 667 F.2d 1034 at 1047.

Lubrizol Advanced Materials at P 19.

Justice DeWine stated in his concurring opinion that under unambiguous policy language National Union was only required to pay “those sums” that arise from damage that occurred “during the policy period” and that Lubrizol was “not entitled to allocate to a single policy period defense and indemnity costs that resulted from injuries that occurred over multiple policy periods.” *Lubrizol Advanced Materials* at P23. Thus, the concurring justices would not have given a “qualified” answer to the certified question. Because of “the plain reading of the policy language set forth in the certified question” the concurrence noted there was no need for the Court to address *Goodyear* or subsequent cases that interpreted different language than found in the National Union policy.