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Ohio Supreme Court Rules Pro Rata Allocation Method Required Under "Those Sums" Policies Where Timing of Damages is Known or Knowable

April 24, 2020
Insights for Insurers

On April 23, 2020, the Ohio Supreme Court issued an opinion in *Lubrizol Advanced Materials, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*., Slip Opinion No. 2020-Ohio-1579 rejecting a policyholder's quest to impose an "all sums" allocation on a single insurer.

On a question certified by the U.S. District Court for the Northern District of Ohio, the Ohio Supreme Court was asked to determine whether a policyholder 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 Ohio Supreme Court answered the question "in the negative." The Court added that "because the terms of the contract and the circumstances surrounding the liability control, we caution against using our answer to the question as a blanket rule applicable to all policies with 'those sums' language."

The policyholder, Lubrizol Advanced Materials, Inc., manufactured and sold allegedly defective resin to IPEX, Inc., between 2001 and 2008. IPEX used the resin to make pipes for its Kitec plumbing systems that were sold to consumers in the United States and Canada. These pipes failed, resulting in numerous claims against IPEX for selling defective pipes. IPEX settled the claims, but sued Lubrizol. IPEX alleged negligence, breach of contract, and breach of warranty on the basis that Lubrizol knew—or should have known—the resin it sold to IPEX was not fit or suitable for its intended purpose as a pipe manufacturing component. IPEX sought complete indemnification from Lubrizol; IPEX and Lubrizol settled their claims.

Subsequently, Lubrizol sued National Union, which insured Lubrizol under an umbrella policy effective from February 28, 2001 to February 28, 2002. The National Union insurance policy provides:

[w]e will pay on behalf of the Insured **those sums** in excess of the Retained Limit that the Insured becomes 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.

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Other insurers also provided coverage to Lubrizol at various points during the time in which Lubrizol sold the allegedly defective resin to IPEX.

Lubrizol argued that under Ohio law, all its triggered insurance policies should be treated as establishing joint and several liability, such that Lubrizol could recover under the policy of its choice. Accordingly, Lubrizol claimed it was entitled to recover all amounts it paid to defend and settle IPEX's claims from National Union, less the underlying policy limits and retention amount. The policyholder relied upon two prior Ohio Supreme Court cases applying an "all sums" allocation in the context of *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co*., 769 N.E.2d 835 (Ohio 2002) (environmental property damages claims) and *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 930 N.E.2d 800 (Ohio 2010) (asbestos bodily injury claims).

National Union filed a counterclaim against Lubrizol, seeking a declaration that Lubrizol is not entitled to allocate all defense costs and indemnity to a single policy period when multiple policies and corresponding policy periods were triggered. It argued that *Goodyear* and *Park-Ohio* were distinguishable because, unlike the "those sums" language contained in the National Union policy, the older policies in those cases contained "all sums" language. 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. Here, the allegedly defective resin caused "known or knowable damage in each year between 2001 and 2008," but "not indivisible injury similar to the long-term pollution damage in *Goodyea*r." Since the harm in this case was discrete, an "actual or pro rata allocation" is appropriate.

The Ohio Supreme Court majority stated that the "governing principle in contract interpretation is to give effect to the intent of the parties, and we presume that the intent of the parties is reflected in the plain language of the contract." Noting that the immediate question before the Court is whether contract language providing coverage for "those sums" should be treated like contract language providing coverage for "all sums," the Court stated,

"We agree that generally, 'those sums' may indicate a subset of 'all sums.' However, we have long assumed that the insurer, as the drafter of the policy, is in a stronger bargaining position than the insured, and therefore, we construe contractual ambiguities in favor of the insured. [Citations omitted] Consequently, we refuse to engage in a hyper technical grammar analysis to determine whether the phrase 'those sums' is always more limited than 'all sums' and would always lead to a different allocation. As 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. We decline to set a bright-line rule based merely on a party's use of the word 'those' instead of 'all.'"

Thus, the Court noted the distinction between "all sums" and "those sums." However, the Court later explained that under the circumstances of this case, "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.'"

It was the distinction between the nature of the alleged damages in this case and the nature of the damages in a progressive damages or injuries case—such as the environmental pollution or asbestos bodily injury claims in *Goodyear* and *Park-Ohio*—that drove the Court's determination.

To resolve the certified question, the Court said it was compelled to clarify the scope of its decision in *Goodyear*, particularly the distinguishing features of that analysis. In *Goodyear*, the Court stated, "[t]he 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." The Court pointed out that both *Goodyear* and *Park-Ohio* involved ongoing, continuous exposure, which it has described as "progressive injury." According to the Court,

"In this case, 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.' For the limited purpose of resolving the certified question, we conclude 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."

Based on the contract and the facts alleged in this case, the Court answered the certified state-law question in the negative.

Three justices concurred in judgment only. The concurring opinion stated:

"[w]hen a contract provision says that an insurer is required to pay only 'those sums' that arise from damage that occurs 'during the policy period,' that is all the insurer may be required to pay. The insurance provision at issue here unambiguously so provides. Thus, Lubrizol Advanced Materials, Inc., is not entitled to allocate to a single policy period defense and indemnity costs that resulted from injuries that occurred over multiple policy periods. Because the majority qualifies its answer to the certified question, I concur in judgment only. I note further that because a plain reading of the policy language set forth in the certified question answers that question, there is no need for us today to address the continuing vitality of [*Goodyear* and *Park-Ohio*] cases that interpreted different policy language. Nor do we have occasion to consider, under the instant policy language, the proper method to apportion liability for long-tail claims in which an indivisible injury occurs over multiple policy periods."

By acknowledging that "those sums" represents a subset of "all sums," the majority clearly afforded weight to that language. Its caution about not creating a "blanket rule" appears to be an attempt to avoid completely undermining *Goodyear* and *Park-Ohio*. It is clear that the distinction between "all sums" and "those sums" language was dispositive for the three justices concurring in the judgment. It is also clear that "all sums" is somewhere between dead and "on the ropes" for post-1985 policies.