

## Ohio Supreme Court: “Those Sums” Isn’t “All Sums” Where Damages Occur at a Discernable Time

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The Ohio Supreme Court declined to adopt a bright-line rule regarding whether Ohio’s “all sums” allocation rulings apply to property damage occurring over multiple policy periods under policies that use the phrase “those sums.” The court found this closely watched case, *Lubrizol Advanced Materials, Incorporated v. National Union Fire Insurance Company of Pittsburgh, PA*, Slip Opinion No. 2020-Ohio-1579 (Ohio Apr. 23, 2020), factually distinguishable from prior “all sums” scenarios, which involved continuous, progressive harm, because the property damage at issue apparently occurred at discrete points in time.

The policyholder filed suit in Ohio federal court to recover defense and indemnity in connection with underlying liabilities involving an allegedly defective resin product it sold over several years. It relied on cases in which the Ohio Supreme Court found joint-and-several liability based on “all sums” language – specifically, *Goodyear Tire & Rubber Company v. Aetna Casualty & Surety Company*, 769 N.E.2d 835 (Ohio 2002), and *Pennsylvania General Insurance Company v. Park-Ohio Industries*, 930 N.E.2d 800 (Ohio 2010) – and asked the court to hold that the phrase “those sums” similarly allowed it to choose a single policy under which it could recover all of its defense and indemnity for property damage allegedly occurring over multiple policy periods. The insurer countered that *Goodyear* was inapplicable given the differences in policy language and the fact that the alleged property damage caused by the defective resin occurred at discrete times, as opposed to the continuous and indivisible harm at issue in *Goodyear* (environmental property damage) and *Park-Ohio* (asbestos bodily injury).

At the request of the parties, the federal court certified the following question to the Ohio Supreme Court:

Whether an insured is permitted to seek full and complete indemnity, under a single policy providing coverage for “those sums” 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 this question in the negative based on the policy language and the facts at issue. While agreeing generally that “‘those sums’ may indicate a subset of ‘all sums,’” 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.” It thus declined to adopt a bright-line rule based merely on the use of the word “those” versus “all,” noting, instead, that insurance policies should be interpreted as written and that the meaning of “‘those sums’ depends on the context of each policy and each case.”

The court concluded that joint-and-several liability is not appropriate where the timing of damage from the policyholder’s resin products was known or knowable. In such circumstances, the court said, the operative policy language is not “those sums” but rather injury or damage “that takes place during the Policy Period.” The court further cautioned against interpreting this as a blanket ruling applicable to all policies with “those sums” language since the policy terms and “circumstances surrounding the liability control.”

Three of the seven justices concurred in the result, but wrote in a separate opinion that they would have rejected the policyholder’s request for joint-and-several liability based solely on the “those sums” policy language, which, in their view, “unambiguously” provides that the policyholder “is not entitled to allocate to a single policy period defense and indemnity costs that resulted from injuries that occurred over multiple policy periods.” Thus, the concurring justices saw no need to address the “continuing vitality” of *Goodyear* and

*Park-Ohio* or to consider the proper method to allocate liability for "long tail" claims.

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