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Client Alert: The Supreme Court of Ohio Ruling in Lubrizol Advanced Materials, Inc. v. National Union Fire Insurance Company of Pittsburgh

27 Apr 2020

Kristen C. Vine

The Supreme Court of Ohio agreed to accept the matter of *Lubrizol Advanced Materials, Inc. v. National Union Fire Insurance Company of Pittsburgh, Pa.*, Case No. 1:17-cv-01782-DAP (N.D. Ohio) on certified question as to whether an insured is permitted to seek full and complete indemnity under a single policy providing coverage for "those sums" when the property damage occurred over multiple policy periods. The Court answered that question in the negative, finding that the type of injury at issue was discrete and the amount of injury in each policy period was knowable, as distinguished from the long-tail progressive injury supporting the adoption of all sums in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co*., 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, and *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800. While the Court ruled in favor of National Union, it declined to base its decision on the "those sums" and "all sums" language.

In *Lubrizol*, the insured allegedly manufactured and sold defective resin to a pipe manufacturer whose pipes then failed, resulting in numerous claims against the manufacturer for selling defective pipes. Lubrizol sought to compel National Union to pay the entire $50 million limit of its single year umbrella policy toward Lubrizol's defense and indemnity costs incurred in past and anticipated future litigation over the faulty pipe materials, arguing that under the Supreme Court of Ohio's *Goodyear* and *Park Ohio* decisions, all of its triggered policies should be treated as having joint and several liability such that Lubrizol could recover under the policy of its choice. National Union argued Lubrizol was not entitled to allocate all costs to a single policy period due to the "those sums" language in its policy's insuring agreement, in contrast with the "all sums" language contained in the policies at issue in *Goodyear* and *Park Ohio*. National Union also argued "all sums" allocation applies only to situations in which the injury is continuous and indivisible, such as in many asbestos-exposure and environmental-pollution claims, but that the harm in that case was discrete (i.e., the allegedly defective resin caused known or knowable damage in each year between 2001 and 2008) and therefore actual or pro rata allocation was appropriate.

The Supreme Court of Ohio ruled Lubrizol cannot compel one insurer to fully cover expenses resulting from property damage spanning multiple years. The Court cautioned, however, against using the decision as a blanket rule applicable to all policies with "those sums" language, noting the terms of the contract and the circumstances surrounding the liability would control. The Court agreed, generally, that "those sums" may indicate a subset of "all sums" but as contractual ambiguities are construed in favor of the insured, it refused to engage in a "hypertechnical grammar analysis." The meaning of "those sums" depends of the context of each policy and each case, and the Court declined to set a bright-line rule based merely on a policy's use of the word "those" instead of "all."

The Court noted it was compelled to clarify the scope of its *Goodyear* decision in order to resolve the certified question. Since the injury alleged in the *Lubrizol* litigation did not involve long-term or progressive injury caused by ongoing, continuous exposure, the all sums allocation provided for in *Goodyear* was therefore inapplicable. The Court found Lubrizol's arguments that the claims involved long-property damage unpersuasive, but left open the possibility Lubrizol could marshal more evidence to establish it as a progressive-injury case. Even if it was able to do so, however, the Court concluded that an "all sums" allocation under *Goodyear* was unnecessary because the time of damage was known or knowable, such as how much resin was produced on a given date, how much and which lots of resin were sold to the pipe manufacturer, and when the piping was sold, installed, and failed. The Court ruled:

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.

Lubrizol, at pg. 8. Notably, three Justices concurred in the decision but stated the plain language of the "those" sums language prevented the application of "all sums" allocation under Ohio law and there was no need to address *Goodyear* and *Park Ohio*, decided under different policy language, nor the proper method to apportion liability for the type of injury at issue.

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CLIENT ALERT: THE SUPREME COURT OF OHIO RULING IN LUBRIZOL ADVANCED MATERIALS, INC. V. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

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TAGGED: insurance coverage, Lubrizol Advanced Materials Inc v. National Union Fire Insurance Company of Pittsburgh PA, Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co, Supreme Court of Ohio