

Ohio Supreme Court Rejects “All Sums” Allocation For Discrete Injury Claims

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The Supreme Court of Ohio held that damage for which liability was sought that occurred at a discernible time should be allocated to specific policy periods based on actual damage. *Lubrizol Advanced Materials, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2020 WL 1943212 (Ohio Apr. 23, 2020). In doing so, the court rejected application of “all sums” or pro rata approaches to allocation.

Between 2001 and 2008, Lubrizol sold allegedly defective resin that was used in plumbing materials and resulted in property damage. Lubrizol argued that under Ohio law, each of its insurance policies issued between 2001 and 2008 was subject to “joint and several liability,” such that Lubrizol could recover for the resin claims under the policy of its choice. In contrast, National Union claimed that “all sums” allocation was inappropriate in light of policy language requiring the Insurer to pay “those sums” that Lubrizol was obligated to pay. National Union also argued that Ohio precedent applying “all sums” allocation was inapposite because those cases involved continuous and indivisible harm or damage, whereas the resin claims involved discrete harm that triggered coverage at individual, discernable points in time.

The court declined 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 also left open the possibility that Lubrizol could establish that the harm was progressive and continuous. Nonetheless, the court concluded that “all sums” allocation under which Lubrizol could select the policy under which it would receive coverage was unwarranted because the timing of damage was “known or knowable,” based on production and sale dates and dates of damage. The court explained that under this scenario, the operative policy language requires injury or damage “during the policy period.” The court therefore concluded that coverage is determined by reference to specific policy periods during which actual damage occurred.

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