IN THE SUPREME COURT OF OHIO

Lubrizol Advanced Materials, Inc. Petitioner, v. National Union Fire Ins. Co. of Pittsburgh, PA, *et al.*, Respondents.	)	Supreme Court Case No. 2018-1815 On Consideration of the Certified Question of State Law from the United States District Court, Northern District of Ohio, Eastern Division District Court Case No. 1:17-CV-01782

MERIT BRIEF OF AMICI CURIAE, The Ohio Chemistry Technology Council; Cleveland-Cliffs Inc.; Eaton Corporation; Goodrich Corporation; MTD Products Inc; Materion Corporation; PolyOne Corporation; RPM International Inc.; The Goodyear Tire & Rubber Company; The Interlake Steamship Company; The Lincoln Electric Company; and The Sherwin-Williams Company in Support of Petitioner Lubrizol Advanced Materials, Inc.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page No.

Cases

Other Authorities

INTEREST OF AMICI CURIAE

The Ohio Chemistry Technology Council is a statewide association representing 60 member companies, which collectively employ 45,685 Ohioans at over 120 facilities throughout the state, serving the public policy mission of promoting the highest standards of environmental, health, safety, and security performance.

The remaining amici curiae participating in this brief, which are listed in the caption, are companies that historically have engaged in various businesses or industries in Ohio. They are or have been incorporated in Ohio and/or conduct or have conducted substantial business operations in the state. As a result, they rely significantly upon general liability insurance policies in Ohio to provide coverage for their various risks and, correspondingly, upon the body of Ohio law that protects their insurance rights.

The certified question implicates a long-standing, fundamental insurance right. This right, forged by Ohio courts over many decades based upon insurance policy language similar or identical to that at issue here, creates an environment in which policyholders can conduct business in a sensible, reasonable manner and one that also is both fair and predictable for insurers. Ohio, accordingly, is a favorable venue for policyholders to conduct business and a favorable venue for insurers to sell coverage to protect against risks inherent in those businesses.

These amici curiae include companies that have an interest in this case, therefore, both as policyholders, whose insurance coverage rights are implicated by the certified question, and as policy purchasers, whose insurance market choices would be reduced if Ohio's well-crafted insurance coverage jurisprudence were abandoned or distorted as advocated by the particular insurer in this case. Further, as commercial policyholders engaged in Ohio in many businesses

and industries, the amici curiae are able to offer a broad perspective to this Court regarding the insurance coverage issues invoked by the certified question.

INTRODUCTION AND SUMMARY

The Federal District Court for the Northern District of Ohio certified the following question to this 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 damages that takes place during the policy period, when the property damage occurred over multiple policy periods?

(Merit Brief of Petitioner Lubrizol Advanced Materials, Inc., filed May 3, 2019, at Appx. 1). This Court already answered "yes" to this question where the policy provided the insurer would pay "all sums" the insured is legally required to pay because of property damage during the policy period. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, paragraph one of the syllabus. The Court should answer "yes" again here for multiple reasons, including: (a) The variance between "all sums" and "those sums," as they are used in the policies at issue in *Goodyear* and here, is a non-substantive distinction without a difference that does not change the scope of the insurer's obligation; (b) The reference in the policy at issue here to "property damage … during the policy period" also appeared in the policies considered in *Goodyear* and was rejected as a basis for allowing pro rata allocation, establishing that this phrase also should be rejected as a basis for mandating pro rata allocation here; and (c) The construction that National Union is advancing here—that "those sums" establishes a pro rata allocation approach—is inconsistent with the rest of the policy and contradicts a great many rules of insurance policy construction established and continually reinforced by this Court.

STATEMENT OF THE CASE AND FACTS

To maximize efficiency and minimize duplication, amici refer to the Statement of the Case and Facts in the Petitioner's brief. In sum, the underlying claim includes a suit filed by a company, IPEX, against Lubrizol for damage to pipe allegedly caused by resin Lubrizol supplied. The certified question assumes that the continuous, undifferentiated property damage at issue occurred over, and thus triggers, multiple policies. Thus, the only question to be answered is whether Lubrizol is entitled to choose one of the triggered policies from which to obtain reimbursement for its defense costs and the settlement, or if these costs must be allocated under the National Union policy form across multiple triggered policies pursuant to some formula to be created by this Court.

LAW AND ARGUMENT

I. The rule of law in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 that allows policyholders to pick and choose any triggered insurance policy from which to receive coverage applies even though the policy form states that it will pay "those sums" the insured is "legally obligated to pay" rather than "all sums" the insured is "legally obligated to pay."

Policyholders often face claims where the injury or property damage, such as that at issue here, has continued over numerous policy periods, thereby triggering multiple policies. The fact that policies are triggered, however, does not answer the question of how much each triggered policy has to pay. Courts across the country have adopted one of two primary methods for determining the extent to which a triggered policy provides coverage in such a case.

The first method is referred to by several shorthand names, *i.e.*, "joint and several," "pick and choose" and "all sums." *See, e.g., Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Nos. 23585, 23586, 2008-Ohio-3200, at ¶ 130-132. This method generally allows the policyholder to select any triggered policy from which to receive full coverage up to the policy's

limits. While most decisions adopting this rule address policies that use the phrase "all sums," the joint and several method also has been applied to policies that do not use those specific words. *See, e.g., Lennar Corp. v. Markel American Ins. Co.*, 413 S.W.3d 750, 757-58 (Tex. 2013) (applying joint and several allocation where policy covered the "total amount" of loss suffered as a result of property damage during the policy period). Rather, the hallmark of the joint and several approach is the lack of any policy language that clearly and unequivocally limits the amount to be paid by the insurer, as explained below.

The alternative method is known as the pro rata allocation method. Rather than permitting the policyholder to choose a single policy to respond, as the policy language provides, the pro rata allocation method divides the damages horizontally among all triggered policy periods. The pro rata method, therefore, permits insurers to pay less than they agreed to pay and does not assure that the policyholder will receive all to which it is entitled.

When asked to choose between these two approaches, this Court adopted the "joint and several" approach. The Court held that "[w]hen 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 Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, paragraph one of the syllabus. Insurers asked this Court to overrule *Goodyear* and adopt the pro rata method of allocation in *Pa. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800. This Court declined to do so. *Id.* at ¶ 2.

The issue in this case is whether, by using the phrase "those sums" instead of "all sums" in the liability policy it issued to Lubrizol, National Union materially altered the coverage it

would otherwise have been providing under Ohio law. The Court again should decline to depart from the rule set forth in *Goodyear*, which affirmed the long-standing law of Ohio. The fundamental elements of the policies at issue in *Goodyear* and in this case are the same, despite minor changes in form.

A. Long-established Ohio law permits policyholders to select among multiple triggered policies they purchased and, accordingly, own.

Ohio courts long have regarded insurance policies as assets that policyholders purchase, own, and, accordingly, can call upon or not call upon, as they choose, to pay their claims. As discussed above, this analysis finds implementation in *Goodyear*, which confirmed the policyholder's right to select which of its triggered policies would pay upon long-tail injury or property damage claims. "The policies covered Goodyear for 'all sums' incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence." *Goodyear,* 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶ 9. The Court in *Goodyear* recognized that "[t]here is no language in the triggered policies that would serve to reduce an insurer's liability if an injury occurs only in part during a given policy period." *Id.* These concepts were then confirmed unanimously in *Park-Ohio Indus.*, 126 Ohio St. 3d 98, 930 N.E.2d 800.

Goodyear followed a long history of courts applying Ohio law in cases involving multiple triggered policies that had consistently construed the plain language of standard liability insurance policies to mean that each triggered policy provides full indemnification and defense coverage up to the limits of that policy, with the policyholder being able to apply its claim to any of these triggered policies. *See, e.g., Motorists Mut. Ins. Co. v. Tomanski,* 27 Ohio St.2d 222, 223, 271 N.E.2d 924 (1971) (when an insurance contract is triggered by a claim, the presence of other available insurance does not serve to "postpone[], reduce[], or eliminate[]" the coverage

obligations of the triggered insurer.); *Owens-Corning Fiberglass Co. v. Am. Cont'l Ins. Co.*, 74 Ohio Misc.2d 183, 216, 660 N.E.2d 770 (C.P. 1995) (the policyholder "is permitted to, at its discretion, pursue its remedy in full against *one* insurer, regardless of the existence of other triggered policies")(emphasis in original); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 813 F.Supp. 576, 590, fn. 9 (N.D.Ohio 1993) (applying Ohio law and rejecting pro rata allocation of defense costs in case involving prolonged exposure to chemicals); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515, 1524 (D.C.D.C.1984) (applying Ohio law and holding an insured "may assign its liability for asbestos-related disease to a policy if any part of the injurious process associated with asbestos occurred while that policy was in effect"); *Morton Thiokol, Inc. v. Aetna Cas. & Sur. Co.*, Hamilton C.P. No. A-8603799, 1988 WL 1520456 (Ohio Ct. C. P. Dec. 28, 1988) (policyholder may "assign each asbestos claim to any Aetna policy"); *see also Commercial Cas. Ins. Co. v. Knutsen Motor Trucking Co.*, 36 Ohio App. 241, 246, 173 N.E. 241 (8th Dist.1930) (the policyholder "had the right to pursue his remedy in its entirety" under one policy with no allocation). Thus, even before *Goodyear*, courts applying Ohio law consistently had upheld the policyholder's right to obtain recovery under any triggered policy up to its limits and resisted any invitation to fashion court-created pro rata allocation formulas.

Likewise, Ohio courts continue to follow and apply *Goodyear* in long-tail, continuous injury and damage claims. *See, e.g., Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200 at ¶ 130-132; *Polk v. Landings of Walden Condo. Ass'n.*, 11th Dist. Portage No. 2004-P-0075, 2005-Ohio-4042 at ¶ 84-85. The only cases in Ohio that have not applied the joint and several method adopted in *Goodyear* have done so for reasons that do not exist or apply here. The Northern District of Ohio once declined to apply *Goodyear*

primarily because it found the injuries at issue were discrete and easily assignable to specific policy periods, as opposed to the continuous damage at issue in *Goodyear* and in the present case. *Manor Care, Inc. v. First Specialty Ins. Corp.*, N.D. Ohio No. 3:03CV7186, 2006 WL 2010782 (July 17, 2006). Likewise, the Ohio Court of Appeals for the 5th District distinguished *Goodyear* because the case before it involved discrete and easily assignable damage, and also because the policy at issue contained a provision explicitly requiring proportionate allocation, unlike the policy at issue in *Goodyear* and in this case. *Indiana Ins. Co. v. Farmers Ins. of Columbus,* 5th Dist. Tuscarawas No. 2002 AP 110089, 2003-Ohio-4855.

As discussed below, the language of the National Union policy at issue does not compel a different rule.

B. The National Union policy language does not establish pro rata allocation.

Over many decades this Court has crafted clear and comprehensive rules for construing insurance policies under Ohio law, and these rules are determinative in this case. When these rules are applied to the policy language at issue, it is clear that the language does not require the insurer's liability to be allocated on a pro rata basis.

1. The applicable Ohio rules of policy construction do not support National Union's interpretation.

Multiple rules of insurance policy construction apply to the certified question. The joint and several allocation approach is supported both by broad canons and more specific rules of construction, all of which have been established through consistent decisions of this Court.

a. General principles of construction.

The plain language applies. Ohio law mandates that insurance policies are to be enforced in accordance with their stated contract terms. *Rhoades v. Equitable Life Assur. Soc. of the U.S.*, 54 Ohio St.2d 45, 47, 374 N.E.2d 643 (1978). Courts may not re-write an insurance

policy when "the language of the policy's provisions is clear and unambiguous[.]" *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992).

Policies are strictly construed against the insurer and liberally in favor of the insured. "Where provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d 63, 65, 543 N.E.2d 488 (1989) (citations omitted). This Court has reaffirmed and restated this guiding principle many times, in many consistent forms. *See, e.g., Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 122, 647 N.E.2d 1358 (1995) ("It is well-settled law in Ohio that insurance policies should be construed liberally in favor of the insured."); *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, syll., 519 N.E.2d 1380, (1988) (a policy provision that may be interpreted in different ways "will be construed strictly against the insurer and liberally in favor of the insured"); *Moorman v. Prudential Ins. Co. of Am.*, 4 Ohio St.3d 20, 22, 445 N.E.2d 1122 (1983) (noting that, if there is any "uncertainty" about the coverage, "this court must adopt the construction most favorable to the insured which would allow recovery"). In explaining the rationale for this rule, this Court has stated that "[t]he insurer, being the one who selects the language in the contract, must be specific in its use...." *Lane*, 45 Ohio St.3d at 65 (citing *Am. Fin. Corp. v. Fireman's Fund Ins. Co.,* 15 Ohio St.2d 171, 174, 239 N.E.2d 33 (1968).

The policyholder must prevail if its interpretation is a reasonable one, regardless of whether there may be other reasonable interpretations or more reasonable interpretations. For the policyholder to prevail it need not establish that its interpretation is the only reasonable interpretation, or even that its interpretation is *more* reasonable than the insurer's. Rather, the policyholder will prevail if its interpretation merely is *a reasonable interpretation*, perhaps one

among many: "[I]t will not suffice for [the insurer] to demonstrate that its interpretation is more reasonable than the policyholder's." *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 550, 757 N.E.2d 329 (2001), quoting Reiter, Strasser, & Pohlman, *The Pollution Exclusion Under Ohio Law: Staying The Course,* 59 U.Cin.L.Rev. 1165, 1179 (1991). Stated another way, "in order to defeat coverage, '*the insurer must establish* not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question.'" (Emphasis added.) *Andersen* at 549 (quoting Reiter, Strasser, & Pohlman at 1179). *See also, The Scott Fetzer Company v. Zurich American Insurance Company,* 6th Cir. No. 18-3057, 2019 WL 1925550, *5 (April 30, 2019)("Under Ohio law, a party seeking to interpret a clause in an insurance policy so as to deny insurance coverage must show its interpretation of the contract is the only fair one.")

Taken together, these general principles establish that the National Union policy must be enforced according to its plain terms, with any uncertainty resolved in the policyholder's favor.

b. Specific rules of construction.

These general rules of construction set forth above are reinforced by a series of more specific rules articulated by this Court. These more specific rules are particularly applicable here.

An ordinary layperson standard applies. When construing policies, courts are to view them as they would be viewed by ordinary laypersons or, in the context of a commercial liability policy such as the one at issue here, ordinary businesspersons. As this Court has stated, to determine the meaning of an insurance policy, a court must examine the policy language and accord that language "the usual meaning and understanding accorded it by persons in the ordinary walks of life." *Munchick v. Fid. & Cas. Co. of N.Y.*, 2 Ohio St.2d 303, 305, 209 N.E.2d 167 (1965). "The test to be applied by the court in determining whether there is an ambiguity is

not what the insurer intended its words to mean, but what a reasonably prudent person applying for insurance would have understood. . . . Thus, the criterion is ambiguity from the standpoint of a layman, not a lawyer." *Snedegar v. Midwestern Indemn. Co.*, 64 Ohio App.3d 600, 604, 582 N.E.2d 617 (10th Dist.1989) (citation omitted).

The policy must be read as a whole and in a way that gives meaning to each term. Policy provisions must be construed in the context of the entire policy, with any isolated words or phrases interpreted in light of the rest of the contract. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 172, 436 N.E.2d 1347 (1982) ("The intention of the parties must be derived instead from the instrument as a whole, and not from detached or isolated parts thereof."); *see also Sauer v. Crews*, 140 Ohio St.3d 314, 2014-Ohio-3655, 18 N.E.3d 410, at ¶¶ 14-15. Further, "[w]hen interpreting a contract, [the court] will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary." *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22.

Limiting language is subject to heightened scrutiny and must be clear and exact in order to apply. Finally, for language to bar or limit coverage, it must be explicit and clear. Any language in a policy that is asserted by an insurer to bar or limit coverage is to be construed as an exclusion. *See, e.g., Physicians Ins Co of Ohio v Swanson,* 58 Ohio St 3d 189, 191, 569 N.E.2d 906 (1991) (holding that a bar of coverage for bodily injury expected or intended by a policyholder is to be construed as an exclusion, regardless of whether it appears in a definition incorporated into a coverage grant or in a designated exclusion). Further, under Ohio law, an exclusion or limitation can only restrict coverage if it is clearly and explicitly stated. "[W]here exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such

contract is included in the operation thereof." *Home Indem. Co. of N.Y. v. Plymouth*, 146 Ohio St. 96, 64 N.E.2d 248 (1945), paragraph two of the syllabus. "[A]n exclusion from liability must be clear and exact in order to be given effect." *Lane v. Grange Mut. Cos.*, 45 Ohio St.3d 63, 65, 543 N.E.2d 488 (1989). Stated conversely, an insurance policy provision will not operate to limit coverage under Ohio law unless it "clearly, specifically, and unambiguously" does so. *Andersen* at 548.

2. The National Union policy language does not unambiguously warrant pro rata allocation.

When the above-referenced general and specific rules of insurance policy construction are applied to policy language at issue in this case, the determination in this case becomes clear. The National Union Policy provides that:

> We 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. *The amount we will pay for damages is limited as described in Insuring Agreement III, Limits of Insurance.*

(Emphasis added.) National Union Policy No. BE 7409379 (Feb. 28, 2001-2002), Commercial Umbrella Policy Form 57697 (6/93). (Supp. 1 (ECF Doc 1-1) at PageID 16.) This language, when considered both in isolation and in the broader context of the entire policy, does not clearly and unambiguously permit National Union to limit its liability.

a. The plain meaning of the term "those sums" does not limit the amount National Union must pay.

The essence of National Union's argument in this case is that use of the phrase "those sums" in its policy, rather than the "all sums" phrase used in the *Goodyear* policies, necessarily mandates a pro rata approach. Even if the Court were to narrowly focus on the phrase "those

sums," without regard to the many other provisions in the policy that bear on the issue, the policyholder would prevail.

To begin with, National Union's argument fails on a grammatical level, although the degree of grammatical analysis necessary to evaluate this is not one an ordinary businessperson should have to undertake. Grammatically, "those" is the plural form of "that," and it is used to point to or reference something. *Cambridge Dictionary*, https://dictionary.cambridge.org/us/grammar/british-grammar/determiners/this-that-these-those (last accessed May 4, 2019). Further "those," as used here, is a demonstrative adjective. *The American Heritage Dictionary of the English Language* 484 (4th ed. 2000) (defining "demonstrative," in the grammatical sense, as "[s]pecifying or singling out the person or the thing referred to…" and noting that there can be demonstrative pronouns and adjectives). In this sense, it modifies the noun it references, functioning as an adjective. Here, "those" modifies, by pointing to or referencing, the noun "sums," and, more expansively, those "sums" the insured "is legally obligated to pay as damages." In this usage, "those" is indistinguishable from "all." It refers to the damages the policyholder is legally obligated to pay, but it does not, absent further modifiers lacking here,[1] limit the amount or scope of sums to be paid. *See State Farm Fire & Cas. Co. v. Anthony J. Cefali Tr. No. 1,* Ind. Super. No. 45 D04-0507-PL-00030, 2007 WL 1152987, at II.A.4 (Jan. 25, 2007) ("'Those' implies multiple sums, not a pro rata allocation. 'Those' is a plural adjective for 'that.'").

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[1] National Union may argue that its policy in fact contains a further modifier—the later reference in the coverage grant to "Property Damage … that takes place during the Policy Period." As explained more fully below, however, this Court determined in *Goodyear* that "property damage" during the "policy period" is necessary to trigger the policy, but it does not serve to limit the scope or extent of coverage provided by the policy. In effect, National Union is arguing that Lubrizol's interpretation is not a reasonable one, notwithstanding that it is the exact interpretation applied by this Court in *Goodyear*.

To support its contrary view, National Union may contend that "those" as used here is not a demonstrative adjective but, rather, is a demonstrative pronoun, meant to designate only an implied, prorated portion of the amounts the policyholder is legally obligated to pay, thereby limiting the available coverage. The problem with such an argument is that there is no noun anywhere in this provision of the policy that would encompass such a concept. Hence, the pronoun would lack any evident referent.

Alternatively, National Union may contend that "those" is, in fact, a demonstrative adjective, but that it modifies "sums" that are related to "Property Damage … that takes place during the policy period." This argument suffers from at least two defects. First, as discussed more fully below, the phrase "Property Damage…that takes place during the policy period" determines trigger, *not allocation*. Second, National Union's argument would merely beg the question it implicitly poses. It asserts that "those sums" does not mean *all* "those sums," but rather means *a pro-rated portion* of "those sums." In other words, National Union is asking the Court, contrary to multiple rules of policy construction, to select and read into the policy language National Union itself chose not to include when it drafted the policy.

Although there has been little consideration of this issue nationally, confirming that the policy modification has not been regarded as a substantive one, the case law thus far confirms that use of the phrase "those sums," standing alone, is not enough to justify pro rata allocation. As one court held, "[b]oth 'those' and 'all' are used in these coverage provisions as a term that merely refers to the actual limitations on which 'sums' are covered by the insurance. Though the word 'those' might imply a greater degree of particularity than the word 'all,' upon review of applicable authority, this distinction alone does not suffice to weigh noticeably in favor of [the insurer's] interpretation." *Pella Corp. v. Liberty Mut. Ins. Co.*, 244 F.Supp.3d 931 (S.D.Iowa

2017)(applying pro rata allocation for different reasons)(internal citations omitted). Other courts agree. *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982 (Ind.App. 2014) (basing its decision not on the difference between "all sums" and "those sums" but rather other language in the policy that the court found to be limiting); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011) (finding other limiting language in the policy to be key in support of allocation, rather than any perceived difference in the terms "all sums" and "those sums"); *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 170 F.Supp.3d 634 (S.D.N.Y. 2016) (same); *State Farm Fire & Cas. Co. v. Anthony J. Cefali Tr. No. 1,* Ind. Super. No. 45 D04-0507-PL-00030, 2007 WL 1152987, at II.A.4 (Jan. 25, 2007)(use of the term "those sums" instead of "all sums" does not establish the right to prorate). *See also, Fluke Corp. v. Hartford Acc. & Indem. Co.,* 102 Wash.App. 237, 243, fn.1, 7 P.3d 825 (2000) (finding no meaningful distinction between "those sums" and "all sums" as it relates to coverage for punitive damages).

Two courts have refrained from analyzing whether there is any meaningful difference between "all sums" and "those sums," and they did not rely on any assumed difference between these terms that reduced the insurers' obligation. Rather, they noted the difference and moved on to discuss other reasons to apply pro rata allocation. In the first of these cases, the court pointed out that the policy before it did not contain the term "all sums" like the policies construed by courts adopting joint and several allocation, but it provided no further discussion on the point and instead discussed several other reasons it chose to apply a prorated allocation. *Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pitt., Pa*, W.D. Mich. No. 4:01-CV-157, 2005 WL 1610663, *6-7 (July 1, 2005). Likewise, in the second case, the Northern District of Ohio noted the difference in terminology, but did not further discuss this difference. *Manor Care, Inc. v. First Specialty Ins. Corp.*, N.D. Ohio No. 3:03CV7186, 2006 WL 2010782, *5 (July 17, 2006).

Rather, the court in *Manor Care* proceeded to discuss what appears to be its primary reason for declining to apply *Goodyear*: unlike in *Goodyear*, the damages at issue before it were discrete and easily assignable to a particular policy year. *Id.* Had it considered the type of continuous damage at issue here and in *Goodyear*, the *Manor Care* court likely would have applied *Goodyear*'s joint and several approach, notwithstanding that the policy used the phrase "those sums" instead of "all sums."

Hence, even though the body of case law addressing this issue is small, it generally reflects that courts making allocation determinations, even in policies requiring payment of "those sums" rather than "all sums," generally do so for reasons unrelated to this specific change in language. Rather, such cases have tended to turn on other language in the policy. In this case, especially when other provisions in the National Union policy are considered as discussed below, the phrase "those sums" is best regarded, and perhaps could only be reasonably regarded, as the functional equivalent of "all sums," which does not serve to limit coverage.

b. The reference to "Property Damage ... during the policy period" is a requirement for the policy to be triggered, not for the triggered coverage to be prorated.

Perhaps in recognition of the fact that the phrase "'those sums" cannot bear the weight of its argument by itself, National Union further asserts that the policy allows it to allocate its liability because the coverage grant in its policy form requires that the property damage take place "during the policy period." But this is not a new argument; this is the language that insurers primarily rely on across the country to support pro rata allocation arguments. Commercial general liability policies almost always require that injury or damage occur during the policy period in order to trigger coverage, and insurers have repeatedly pointed to this language to try to convince courts that it limits their obligations. *See, e.g., Owens-Corning*

Fiberglas Corp. v. Am. Centennial Ins. Co., 74 Ohio Mis.2d 183, 218, 660 N.E.2d 770 (Lucas Cty. C.P. 1995)("Because the policy states that an insurer is liable only for injuries that occur 'during the policy period,' the defendants argue that when an injury triggers multiple policies, each insurer is responsible only for the potion of injury that occurred during its policy period."). The jurisdictions that have adopted pro rata allocation have found this argument to be persuasive, but this Court did not. In *Goodyear*, this Court considered this same language and rejected the insurers' argument that it required allocation:

> The starting point for determining the scope of coverage is the language of the insurance policies. The policies at issue require the insurer to "pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of * * * property damage to which this policy applies caused by an occurrence." (Emphasis added.) The policies define "property damage" as "injury to or destruction of tangible property *which occurs during the policy period* * * *." (Emphasis added.) The italicized portions of this language provide the point of contention.

(Emphasis sic.) *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 7. The Court went on to find that, despite this language, the insurers were obliged to indemnify the policyholder in full, up to their policy limits, and that there was no language in the policy limiting this obligation and permitting pro rata allocation. *Id.* at ¶ 9. The *Goodyear* court further found that:

> Like the insured in [the seminal ruling on joint and several allocation, *Keene Corp. v. Ins. Co. of N.Am.*, 667 F.2d 1034 (D.C.D.C. 1981)] we are persuaded that Goodyear expected complete security from each policy that it purchased. This approach promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible. Therefore, we find 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.

Id. at ¶ 11.

In so holding, this Court joined the ranks of other courts recognizing that arguments such as National Union's in this case conflate the concepts of trigger and allocation, which sometimes is referred to as scope of coverage. That injury or damage must occur "during the policy period" establishes whether a policy is triggered, not the extent of coverage to be provided by a triggered policy. "Although the *trigger* of the duty to defend [and indemnify] is limited to the policy period, the *extent* of the duty to defend [and indemnify] is not." *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909, 932 (Cal. 1997). As one court explained:

> The event which triggers coverage does not define the scope of coverage. Although each policy is triggered only by the occurrence of an injury during the policy period, once a policy is triggered, the policy obligates the insurer to pay "all sums" for which the policyholder becomes liable. There is nothing in the policies limiting the scope of coverage to that portion of a continuous injury that developed during the policy period.

Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App.4th 1, 54-55, 52 Cal.Rptr.2d 690 (1996); *accord, Plastics Engineering Co. v. Liberty Mutual Ins. Co.*, 759 N.W.2d 613, 627 (Wisc. 2009)("bodily injury during the policy period is what triggers the policy; the definition of 'bodily injury' is not a limitation of liability clause."); *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 255 (Wash. 1998)("the event that triggers coverage does not define the scope of coverage"); *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 218, 660 N.E.2d 770 (Lucas Cty. C.P. 1995) ("The definitions of 'occurrence' and 'personal injury' [limited by the phrase 'during the policy period'] prescribe the circumstances under which the policy will be triggered; they do not limit the coverage owed by each defendant once its policy is triggered."); *Monsanto Co. v. C.E. Heath Comp. and Liab. Co.*, 652 A.2d 30, 34-35 (Del. 1994)("A policy is activated by bodily injury or property damage that takes place 'during the policy period.' The triggering language in the…insurance policies does not define the extent of coverage.").

The National Union policy form and the policy form in *Goodyear* contain the same "during the policy period" trigger requirement; the only difference is the precise path through which it makes its way into the coverage grant. In *Goodyear,* the requirement appeared in the definition of "property damage," which was incorporated into the coverage grant. In the National Union policy form, this requirement does not appear via a defined term, but rather appears in the coverage grant itself. Regardless, the requirement is the same and this Court should reject National Union's argument, as it did in *Goodyear*.

National Union may urge this Court to follow a split appellate court decision from Indiana which came to a different conclusion. *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982 (Ind.App. 2014). In *Thomson*, the Indiana Court of Appeals construed a "those sums" policy and found it to be sufficiently distinguishable from the language addressed by the Indiana Supreme Court in its seminal decision adopting "all sums" allocation, *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058 (Ind. 2001)("*Dana II*"). The *Thomson* court's decision did not focus on the difference between "all sums" and "those sums"; rather, it found "critical" the phrase "during the policy period." *Thomson*, 11 N.E.3d at 1021.

This Court should not find *Thomson* persuasive. As an initial matter, the policy form at issue in *Thomson* is not the same as the form at issue here. More significantly, the *Thomson* majority did not discuss the fact that the policies in *Dana II,* which it declined to follow, contained the same "critical" requirement that the injury or damage occur "during the policy period."[2] This language should not have served as a basis for departing from *Dana II's*

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[2] *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058 (Ind. 2001)("The policies provide that Allstate will pay 'all sums which [Dana] shall be obligated to pay by reason of the liability ... imposed upon [Dana] by law ... for damages because of [personal injury or property damage] ... caused by an OCCURRENCE....' The definition of 'occurrence,' in determining coverage for liability from personal injury or property damage, is 'an accident, event or happening including

application of the joint and several rule. The dissenting opinion in *Thomson* is the better reasoned opinion and the opinion that is more consistent with this Court's analysis in *Goodyear*.

c. The policy, considered as a whole, cannot be reconciled with the implied proration requirement advocated by National Union.

As noted above, "The intention of the parties must be derived … from the instrument as a whole, and not from detached or isolated parts thereof." *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 172, 436 N.E.2d 1347 (1982). When the focus broadens then, as it must, from the narrow phrase "those sums" to the entire policy, taking into account multiple related provisions, it becomes clear that "those sums" cannot reasonably be read to mean, as National Union argues, "a prorated amount of sums." In fact, the contrary conclusion is compelled.

1. National Union explicitly required proration in certain provisions, but not with respect to the scope of coverage.

When National Union meant to require proration, it did so expressly and clearly. In the "Cancellation" section of the policy, National Union wrote: "If we cancel, final premium will be calculated pro rata; it will be based on the time this policy was in force." (Section VI., Conditions (D)(4), Supp. 1 (ECF Doc 1-1) at PageID 66). This Cancellation condition was amended by Endorsement 19, but National Union continued to clearly and expressly provide that if it cancelled the policy, the final premium would be "calculated pro rata based on the time the policy was in force." (Endors. 19, Condition 5, Supp. 1 (ECF Doc 1-1), at PageID 54). These proration concepts are express, clear, unambiguous, and unequivocal. A reasonable businessperson reading the policy would understand them. Such a policyholder would not be

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continuous or repeated exposure to conditions which results, during the policy period, in Personal Injury [or] Property Damage ... neither expected nor intended from the standpoint of the Insured.'"); *id.* ("These policies require Allstate to indemnify Dana for all sums paid as a result of liability arising from any covered accident or event resulting in property damage or personal injury that occurs during the policy period.")

required to read into the policy, after engaging in a detailed grammatical analysis, a limiting and implied pro ration requirement, as National Union is arguing policyholders must do in regard to the coverage grant.

Had National Union so chosen, it could have included a similarly clear, unambiguous, and unequivocal provision requiring a prorated allocation of its limits. *See, e.g., Indiana Ins. Co. v. Farmers Ins. of Columbus,* 5th Dist. Tuscarawas No. 2002 AP 110089, 2003-Ohio-4855 (holding that "all sums" ruling in *Goodyear* did not apply in part because the policy contained an express allocation provision which stated "[o]ur share is the proportion that our limit of liability bears to other total of all applicable limits of liability for coverage on either a primary or excess basis"); *Monsanto Co. v. C.E. Heath Comp. and Liab. Co.*, 652 A.2d 30 (Del. 1994) (allocating based on an express provision stating that: "The limit of liability under this policy…shall be limited to the proportion of the total loss and expense which the number of utterances or disseminations during the period of this policy bears to the total number of all utterances or disseminations."). National Union, however, chose not to include such a provision in its policy.

2. Multiple policy provisions cannot be reconciled with pro rata allocation.

Further, many provisions within the policy cannot be reconciled with National Union's proration argument. For instance, a reasonable business person interested in knowing of any limitation on coverage, including whether its coverage would be prorated in any respect, logically would look first to the policy provisions that relate to the limits of insurance. This includes the Declarations page, which states that the "Limits of Insurance" are $50,000,000 per occurrence and $50,000,000 for the type of product hazards at issue here, without any suggestion of the possibility that these limits will be prorated. (Supp. 1 (ECF Doc 1-1) at PageID 16.)

Next, a reasonable businessperson would look to the coverage grant in the "Insuring Agreements I" (Supp. 1 (ECF Doc 1-1) at PageID 55.) In addition to the Insuring Agreement provisions discussed above, the Insuring Agreement states that the policy covers liability for "Bodily Injury, Property Damage, Personal Injury and Advertising Injury," all of which are defined in the policy and none of which is defined in a manner that suggests these covered risks will be prorated. (Definitions A, C, I, and K, Supp. 1 (ECF Doc 1-1) at PageID 57, 59-60.) For instance, "Property Damage," which is the type of damage or injury at issue in this case, is defined to include: "Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it." (*Id.* at PageID 60.)

The analysis is no different under the definition of the "Products … Hazard," which is the type of claim at issue here. (Definition J(1), Supp. 1 (ECF Doc1-1) at PageID 60.) The Products Hazard is defined to include "all … Property Damage occurring away from premises you own are arising out of Your Product …." Here, "all" is quite express and unequivocal. It does not permit any implication of a prorated responsibility for National Union.

The Insuring Agreement also states the policy provides coverage when any of these risks are "caused by an Occurrence," which is defined in a unitary way that is contrary to any concept of proration. In fact, the definition of "Occurrence" provides that the policy treats a covered matter as one, whole occurrence, even if there is "continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage …" and that "[a]ll such exposure to substantially the same general conditions shall be considered as arising out of one Occurrence." (Definition H(1), Supp. 1 (ECF Doc 1-1) at PageID 59.) In this regard, the "Occurrence" definition is clear and does not permit proration, much less require it.

Further, the Insuring Agreement states, "The amount we pay for damages will be limited as described in Insuring Agreement III, Limits of Insurance." (Insuring Agreements I, Supp. 1 (ECF Doc 1-1) at PageID 55.) A reasonable business person, therefore, who might be interested in knowing of any limitation of coverage, including any proration requirement, would look to this expressly referenced "Limits of Insurance" Section. This Section, however, also contains no proration provision. To the contrary, it indicates National Union will pay the full amount of products claims up to the $50,000,000 limit referenced in the Declarations Sheet, without any reference to proration. (Limits of Insurance, Supp. 1 (ECF Doc 1-1) at PageID 56-57.) Further, the "Retained Limit" provision of the Limits of Insurance Section states that National Union will pay only a "portion of damages," but that "portion" is the *full amount* of the claim that exceeds the policy's attachment point, which is described in this Section and in the Declarations sheets as either the amount of underlying insurance if such insurance covers the claim or $10,000 if the underlying insurance does not. (Retained Limit, Supp. 1 (ECF Doc 1-1) at PageID 57.)

Beyond the insuring agreement, the defined terms contained therein, and limits of insurance provisions, other policy provisions, two of which are conceptually related, further make the point that the coverage under the National Union policy is not to be prorated. The first of these is the "Other Insurance" provision. (Other Insur. Condition, Supp. 1 (ECF Doc 1-1) at PageID 68.) These provisions typically control potential rights among co-insurers, not the rights between an insurer and the policyholder. *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 218, 660 N.E.2d 770 (Lucas Cty. C.P. 1995) (holding that 'other insurance' clauses apply to competing co-insurers, but not to an insurer's obligation to its policyholder). Three different types of "Other Insurance" provisions are common: a "pro rata type," which would be consistent with the type of prorated approach National Union seems to be

advocating here; an "excess type,' which states that the subject policies will function as if they were excess of other triggered policies; and an "escape" type, which provides that if other policies are triggered, the subject policy escapes any responsibility whatsoever. *See generally, Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.,* 2nd Dist. Montgomery No. 8662, 1984 WL 5379, *4 (July 17, 1984)(describing the types of "other insurance" clauses).

This leads to two points. First, if National Union's policy actually provided only prorated coverage, as it suggests, there would be no need for an "Other Insurance" provision. National Union alone, and no other insurer, would have any responsibility for its prorated obligation. Second, National Union's "Other Insurance" provision is not even the "pro rata" type. Rather, it is the "excess type." Hence, even where a reasonable businessperson might most expect to find an indication by National Union that it regarded its coverage obligations to be in some respect prorated, no such provision could be found.

The second of these conceptually related provisions is specifically referred to as the "Prior Insurance" provision. (Prior Insurance Condition L, Supp. 1 (ECF Doc 1-1) at PageID 68.) That provision states: "If a loss covered by this policy also is covered in whole or in part under any other excess policy issued to the insured prior to the effective date of this policy, our Limits of Insurance … will be reduced by any amounts due the Insured under such prior insurance." *Id.* Although the provision generally is construed to have limited application for reasons not relevant here, what is clear is that there would be no need for such a provision if National Union were responsible to pay only its putative prorated amount of a claim. If National Union agreed to pay for only part of an occurrence, a prorated amount, there would have been no point to reducing its limits because some prior insurer might be paying some other part. Such

provisions have been construed to require "all sums" allocation and to be irreconcilable with pro rata allocation. *See, e.g.*, *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 52 N.E.3d 244 (N.Y. 2016).

In another example, the "Bankruptcy or Insolvency" Condition provides that if the policyholder is to become bankrupt or insolvent, National Union nonetheless remains obligated to make "payment of any claim covered by this Policy," not a portion of such covered claim. (Condition C, Supp. 1 (ECF Doc 1-1) at PageID 66.)[3]

Also instructive are the defense coverage provisions of the policy, which are implicated by the Northern District of Ohio's Order certifying the question now before this Court, which states, "Lubrizol seeks a judgment against National Union ... for all defense costs," including "past and future anticipated defense costs ...." (Certifying Order, p. 3.) The "Defense" provisions of the policy state that National Union has the "right and duty to defend any claim" when the limits of the underlying insurance are exhausted or when the underlying insurance does not cover the claim. (Defense Provisions, Supp. 1 (ECF Doc 1-1) at PageID 55.) Significantly, these provisions do not simply require National Union to pay defense costs—they expressly require National Union to actually "defend any claim." In other words, the policy does not require the insurer to pay an amount; rather, it requires the insurer to render a complete service, the provision of a defense. Such a service cannot be prorated. An insurer, for instance, cannot defend a fraction of a deposition, provide a fraction of an expert report, or provide counsel for a fraction of a trial.

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[3] In fact, there are many provisions of the policy where National Union could be expected to argue that "those sums" has quite a broad meaning, rather than the narrow meaning it is advancing here. For instance, in the Employee Benefits Liability Endorsement, where National Union writes, "This insurance does not apply for those sums the insured shall become legally obligated to pay as damages" for any employee benefits related "Wrongful Act," National Union could be expected to argue for a very broad application of "those sums." (Endorsement 3, Supp. 1 (ECF Doc 1-1) at PageID 23.)

And the list could go on. Time and again throughout the policy there are references or provisions consistent with National Union having a coverage obligation that is whole, not prorated. A reasonable business person reading these provisions would understand them in that way.

3. Any ambiguity must be construed in favor of the insured.

National Union might argue that there is some ambiguity in the policy on this issue, but any such ambiguity would have to be resolved in favor of the policyholder. Further, given that the language in question is argued by National Union to have a limiting effect, it could be construed in National Union's favor only if it expressly, clearly, exactly, and unequivocally limited coverage. Changing "all sums" to "those sums" in an isolated provision of the policy falls far short of meeting these standards.

CONCLUSION

National Union asks this Court to read into its coverage grant a pro rata liability limit that National Union itself chose not to expressly include. Even if there were some degree of ambiguity concerning this issue if the phrase "those sums" is considered in isolation, any such ambiguity would have to be resolved against National Union. Moreover, when the phrase "those sums" in the coverage grant is considered in the context of the policy as a whole, which includes many provisions that indicate coverage is not to be prorated, any ambiguity disappears. Moreover, a construction that rejects National Union's argument would be consistent with Ohio's well developed body of insurance coverage jurisprudence, particularly the determination by this Court in *Goodyear* that the requirement that there be "property damage" during the policy period bears on whether the policy is triggered, not on the amount the policy must pay.

Accordingly, this Court should answer the certified question in the affirmative, preserving Ohio's carefully crafted insurance coverage law that provides the answer.

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