IN THE SUPREME COURT OF OHIO

LUBRIZOL ADVANCED MATERIALS, INC.,	)
	)
Petitioner,	) Supreme Court Case No. 2018-1815
	)
v.	) On Consideration of the Certified Question
	) of State Law from the United States
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, *et al*	) District Court, Northern District of Ohio,) Eastern Division
	)
Respondents,	) District Court Case No. 1:17-CV-01782
	)

MERIT BRIEF OF AMICI CURIAE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

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INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies. CICLA has appeared as amicus curiae in many important insurance-related appeals, and it seeks to fulfill "the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982); *State v. Ross*, 272 Conn. 577, 612, 863 A.2d 654, 674 (2005) (The "purpose [of an amicus] was to provide impartial information on matters of law about which there was doubt, especially in matters of public interest."). CICLA's members have written a substantial amount of insurance in Ohio and nationally, and they have significant experience with allocation issues, including the specific issue of whether courts should apply pro rata or "all sums" allocation to indemnity costs.

This Court previously has accepted and expressed appreciation for amicus support from CICLA in important insurance-coverage litigation. *See, e.g., Pilkington N. Am., Inc. v Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 485; 861 N.E.2d 121, 125 (2006). In fact, the Court has received amicus support from CICLA in the specific context of allocation. *See Pennsylvania Gen. Ins. Co. v Park-Ohio Indus.*, 126 Ohio St.3d 98, 99; 930 N.E.2d 800, 802 (2010). CICLA submits that its participation in this case will help balance the presentation of the issues and assist the Court in answering the certified question.

INTRODUCTION AND SUMMARY

Before the Court is the following certified question:

> 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?

Thus, the Court must decide whether indemnity costs for property damage that took place both during and outside of the National Union[1] policy period should be allocated such that National Union pays for that portion of the loss that took place *during* its policy period, or whether the insured should be allowed to collect all of the indemnity costs from National Union, even those attributable to injury that took place *outside* of its policy period.

There are several reasons why the Court should allocate the loss based on the language of the National Union policy notwithstanding its decision in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (2002), which, based on the language of the insurance policies at issue in that case--specifically, the inclusion of the words "all sums"—applied an "all sums" approach instead of allocating the loss.

The majority approach is to apply the policy language as written, which requires that the insurance policy only respond to losses that take place during its policy period. Thus, the loss is allocated across the entire time period during which it took place. In this case, the National Union policy requires allocation based on actual damage within the policy period. But even if actual allocation were not possible, i.e., if the parties are unable to determine the precise quantum of damage taking place in any particular time period, the loss should be allocated on a "pro rata" basis with an equal amount of damage being assigned to each year in question. This

[1] National Union Fire Insurance Company of Pittsburgh, PA.

majority approach, requiring actual or pro rata allocation, includes a number of decisions by courts that, like this Court, applied "all sums" where policies included those specific words. Those courts have recognized that policies with language such as is used in the National Union policy--i.e. "those sums"--simply are not susceptible to an "all sums" approach. They have also recognized the public policy benefits of following a pro rata approach, which include judicial economy through avoiding needless litigation for contribution among insurers.

Analysis of the majority and dissenting opinions in *Goodyear* against the backdrop of the National Union policies shows that actual or pro rata allocation should apply in this case. The language of the National Union policies is materially different from the policy language at issue in *Goodyear* on the very point that was dispositive of the majority opinion's decision to apply an "all sums" approach in that case. And the public policy rationales supporting actual or pro rata allocation apply with greater force here than they did in the factual scenario presented in *Goodyear.*

None of the arguments in favor of an "all sums" approach, including those presented by Lubrizol's amici, supports the conclusion they ask this Court to reach. Those arguments reflect a fundamental misunderstanding of the language of the National Union policy and the basis for allocation. They also improperly discount the important practical benefits of actual or pro rata allocation.

STATEMENT OF THE CASE AND FACTS

CICLA relies on the Statement of the Case and Facts set forth in National Union's merits brief. For ease of reference, CICLA sets forth the language of the insuring agreement in the National Union policy that is at issue:

> 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.

(See National Union policy at Dkt. No. 1-1 p. 55).

LAW AND ARGUMENT

I. The Language Of The National Union Policy Requires Allocation, As Most Courts Addressing That Language Have Concluded—Including Courts That Apply An "All Sums" Approach Where Supported By Different Policy Language.

The insuring agreement in the National Union policy provides coverage for Lubrizol for certain "sums" subject to certain requirements. Of particular importance here is language stating that coverage extends only to "those sums" because of bodily injury or property damage "that takes place during the Policy Period . . . ." In other words, the National Union policy does *not* provide coverage for sums Lubrizol is required to pay for bodily injury or property damage that takes place *outside of* the policy period. Courts across the country construing language imposing this type of temporal component to covered damage have recognized that it requires allocation of the loss, rather than an "all sums" approach—because to do otherwise would be to hold the insurer accountable for coverage not provided in the policy. This approach is also in keeping with applicable equitable principles and common sense.

A. Allocation applies to policies containing a temporal limitation under the majority approach—including jurisdictions that apply "all sums" where different language is used.

The majority approach is to apply allocation of loss spanning multiple policy periods where policy language imposes a temporal component to coverage, i.e., limits coverage to bodily injury or property damage that occurs during the policy period. Courts have recognized that to hold otherwise, i.e., to hold that coverage extends to damage that occurs outside the policy

period, would be to hold insurers to coverage that they simply did not provide.[2] State high courts in Alabama,[3] Alaska,[4] Colorado,[5] Connecticut,[6] Hawaii,[7] Kansas,[8] Kentucky,[9] Louisiana,[10] Massachusetts,[11] Minnesota,[12] Nebraska,[13] New Hampshire,[14] New Jersey,[15] New York,[16] South

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[2] *See, e.g., Ins. Co. of North America v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212, 1224-25 (6th Cir. 1980) (recognizing that insurer "has not contracted to pay . . . for occurrences which took place outside the policy period"); *Stryker Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* 2005 WL 1610663, 6 (W.D. Mich., 2005) (emphasizing importance of provision imposing temporal limitation, i.e., limiting coverage to property damage that occurs during the policy period); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1393 (E.D.N.Y. 1988) (pro rata allocation comports with the language and structure of CGL policies).

[3] *Liberty Mut. Ins. Co. v Wheelwright Trucking Co.*, 851 So. 2d 466 (Ala. 2002).

[4] *Cont'l Ins. Co. v. U.S. Fid. & Guar. Co.,* 528 P.2d 430 (Alaska 1974).

[5] *Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007); *Pub. Serv. Co. of Colo. v. Wallis & Cos*., 986 P.2d 924 (Colo. 1999).

[6] *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas, Co*., 264 Conn. 688, 826 A.2d 107 (Conn. 2003).

[7] *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Haw., Ltd*, 76 Haw. 277, 875 P.2d 894 (Haw. 1994).

[8] *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co*., 275 Kan. 698,71 P.3d 1097 (Kan. 2003).

[9] *Aetna Cas. & Sur. Co. v. Commw.*, 179 S.W.3d 830 (Ky. 2005).

[10] *S. Silica of La., Inc. v. La. Ins. Guar. Ass 'n*, 979 So. 2d 460 (La. 2008).

[11] *Bos. Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E. 2d 290 (Mass. 2009).

[12] *Domtar, Inc. v. Niagara Fire Ins. Co*., 563 N.W.2d 724 (Minn. 1997).

[13] *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (Neb. 2010).

[14] *EnergyNorth Nat. Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 934 A.2d 517 (N.H. 2007).

[15] *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 179 N.J. 87, 843 A.2d 1094 (N.J. 2004); *Quincy Mut. Fire Ins. Co, v. Borough of Bellmawr*, 172 N.J. 409,799 A.2d 499 (N.J. 2002); *Owens-Illinois, Inc. v. United Ins. Co*., 138 NJ. 437,650 A.2d 974 (N.J. 1994).

[16] *Consol. Edison Co. of N.Y., Inc. v Allstate Ins. Co*., 98 N.Y.2d 208, 774 N.E.2d 687 (N.Y. 2002).

Carolina,[17] Utah,[18] and Vermont[19] all have endorsed allocation and have applied pro rata allocation where no more precise method is possible. In other jurisdictions, intermediate appellate courts have so ruled, or federal courts have predicted that state high courts would do so. *See, e.g., Thomson Inc. n/k/a Technicolor USA, Inc. v. Ins. Co. of N. Am. n/k/a Century Indem. Co.*, 33 N.E.3d 1039 (Ind. 2015)*; Pella Corp. v. Liberty Mut. Ins. Co.*, 244 F.Supp.3d 931 (S.D. Iowa 2017); *Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 864 F.Supp.2d 744, 759 (S.D.Ind., 2012) (among many others).

Of particular importance here is the fact that even courts that have construed "all sums" language to allow the insured to collect its entire loss from a single year of coverage have recognized that allocation is appropriate when the policy contains language such as is found in the National Union policy. For example, in *Thomson, Inc. v. Insurance Co. of North America*, 11 N.E.3d 982 (Ind. App. 2014), the court acknowledged that Indiana follows the "all sums" approach, citing *Allstate Insurance Company v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001) ("*Dana II*"). The court nevertheless ruled that when the policy language uses the phrase "those sums" instead of "all sums," and also states that coverage applies only to property damage during the policy period, a pro rata allocation is required. *See also Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 864 F.Supp.2d at 759; and *Irving Materials, Inc. v. Zurich American Ins. Co.*, 2007 WL 1035098, 21 (S.D.Ind.,2007). Decisions from other jurisdictions are in accord—including one from the federal district court in Northern Ohio in *Manor Care, Inc. v. First Specialty Ins. Corp.*

[17] *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (S.C. 2011).

[18] *Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 268 P.3d 180 (Utah 2012); *Sharon Steel Corp. v. Aetna Cos. & Sur. Co.*, 931 P.2d 127 (Utah 1997).

[19] *Towns v. N. Sec. Ins. Co.*, 184 Vt. 322, 964 A.2d 1150 (Vt. 2008); *Agency of Nat. Res. v. Glens Falls Ins. Co.*, 169 Vt. 426, 736 A.2d 768 (Vt. 1999).

2006 WL 2010782, 5 (N.D. Ohio, 2006) (holding that "all sums" approach should not be followed where policy uses "those sums"). *See also Stryker*, 2005 WL 1610663, at 6 (same, and emphasizing importance of provision imposing temporal limitation, i.e., limiting coverage to property damage that occurs during the policy period).

The Indiana Court of Appeals opinion in *Thomson* provides a sound blueprint for how this Court should analyze the issue. Indiana, like Ohio, followed an "all sums" approach in cases where insurance contracts contain "all sums" language, as set forth by the Indiana Supreme Court in *Dana II*. The insurer in *Thomson*, XL, argued that its insurance policy language was different than the language in *Dana II* and therefore required a different result. The language of the XL policy provided coverage only for "those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage,'" and also stated in the insuring agreement: "This insurance applies to 'bodily injury' and 'property damage' only if . . . the 'bodily injury' or 'property damage' occurs during the policy period . . . ." *Thomson*, 11 N.E.3d at 1019. The court in *Thomson* followed the lead of the federal district court opinions in *Irving Materials* and *Trinity Homes* that addressed the same issue under Indiana law. The federal district court had recognized that language that obligates an insurer to indemnify the insured "only for damages arising during its policy periods" must be enforced, and, therefore, does not allow for an "all sums" application. *Id.* at 1020, citing *Trinity Homes, LLC*, 864 F.Supp.2d at 758-59.

The Indiana court in *Thomson* agreed, and reached the same result for the same reason. The court said this:

> We find the reasoning in *Trinity Homes* persuasive and agree with Judge Barker that *Dana II* is not controlling in cases involving the decisively different policy language at issue here. Judge Barker's interpretation gives effect to the plain meaning of the limiting phrases "those sums" and "during the policy period" and does not render any of the remaining language meaningless. The cases cited

> and arguments made by Thomson focus almost exclusively on the distinction between "all sums" and "those sums" and ignore the critical phrase "during the policy period," and therefore we do not find them persuasive or as evidence of an ambiguity, as Thomson insists.

(*Thomson*, 11 N.E.3d at 1020-1021).

Lubrizol's amici urge the Court to disregard *Thomson*, but they give no good reason why the Court should do so (Lubrizol's amici's merits brief, pp 18-19). Indeed, they argue *exactly* what Thomson unsuccessfully argued in that case, and what the insureds unsuccessfully argued in both *Trinity* and *Irving Materials.* They argue that the use of the phrase "those sums" as opposed to "all sums," combined with a temporal component in coverage grant, should not allow a court to read into the policy a provision altering the method of allocation. But, as the courts in *Thomson*, *Trinity*, and *Irving Materials* all correctly recognized, the question is not one of reading an allocation method into a policy. The issue is whether contract language provides coverage *at all* of property damage that occurs outside of the policy period. If not, then there is no basis to apply "all sums", rather, allocation is *required*.

Ohio rules of insurance contract interpretation are not merely consistent with the approach followed in *Thomson*, they should require it. As Ohio's appellate courts have recognized, "[w]here the provisions of an insurance policy are clear and unambiguous, courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties." *Raudins v Hobbs*, 104 N.E.3d 1040, 1049 (Ohio Ct. App., 2018) (citations omitted). Rather, a "court looks only to the plain language of the policy in determining the rights and obligations of the parties." *Id.* A contract for insurance "must be given a fair and reasonable interpretation to cover the risks anticipated by the parties." *Felton v. Nationwide Mut Fire Ins Co*, 163 Ohio App. 3d. 436, 441; 839 N.E.2d 34, 37 (2005)

(citation omitted). In short, an insurer should not be held to owe coverage that it did not agree to provide in the contract. *Id.*

In sum, allocation of indemnity costs is consistent with widely used insurance policy terms such as those at issue in this appeal, the nationwide weight of authority, and Ohio rules of insurance contract interpretation.

B. Actual or ro rata allocation is also consistent with equity and common sense.

Aside from the fact that allocation is supported by the contract language, the use of actual or pro rata allocation is consistent with applicable equitable principles and common sense. Allocation makes it easier for insurers to predict and underwrite risks, by extending precisely the coverage for which the policyholder bargained and paid. It also avoids the serious inequity of holding insurers responsible for losses that are not covered under their policies, as well as the needless contribution litigation that would be necessitated by such inequity.

1. Allocation, unlike the "all sums" approach, promotes fundamental fairness by providing the coverage for which policyholders bargained and paid.

Policyholders are entitled to purchase insurance against bodily injury or property damage that takes place within a discrete policy period. The premium charged for such policies is calculated based on the potential risks posed during that particular time, and not outside of that time frame. See *Wrecking Corp. of Am., Va., Inc. v. Ins. Co. of N. Am.*, 574 A.2d 1348, 1351 (D.C. 1990) (coverage under a policy is "limited to damage occurring while the policy is in effect").

Imposing liability on an "all sums" basis would give policyholders who purchased insurance against a risk for a single policy period the same coverage as those who had bought insurance continuously over many years. As one court has put it, "[b]y contrast [with "all sums"

allocation], time-on-the-risk allocation would treat these two hypothetical insureds differently, in accordance with the vastly different insurance protection they had purchased with their respective amounts of insurance premiums." *Pub. Serv. Co.*, 986 P.2d at 940. Indeed, under an "all sums" approach, the responsible policyholder that consistently purchased insurance year after year, and that paid premiums far in excess of those paid by the intermittent policyholder, would be punished for being so conscientious of its business needs. It would have been forced to internalize the full costs of its risks, while its intermittently insured competitor would enjoy a free ride.[20]

Unlike "all sums", the pro rata method "promotes risk spreading." *Arceneaux v. Amstar Corp.*, No. 2015-C-0588, 2016 WL 4699163, at *8 (La. Sept, 7, 2016). *See also Owens-Illinois*, 650 A.2d at 992 ("Because insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance when available to cover their risks. Spreading the risk is conceptually more efficient.").

The Sixth Circuit stressed these equity considerations in *Forty-Eight Insulations.* In the context of allocating defense costs, the court explained that "a manufacturer which had insurance coverage for only one year out of 20 would be entitled to a complete defense of all asbestos actions the same as a manufacturer which had coverage for 20 years out of 20." *Forty-Eight Insulations, Inc.*, 633 F.2d at 1225. As that court recognized, "[n]either logic nor precedent supports such a result." *Id.*

[20] On the other hand, "a pro rata allocation forces companies to internalize part of the costs of long-tail liability and creates incentives for companies to minimize environmental carelessness by not permitting a policyholder who chooses not to be insured for part of the long-tail injury period to recover as if the policyholder had been fully covered for that period." *EnergyNorth Nat. Gas*, 156 N.H. at 344, 934 A.2d at 526.

Ohio law is consistent with these principles. In fact, this Court and the Court of Appeals of Ohio have recognized the importance of assessing the nature of the coverage purchased by insureds in the very context of allocation. In *Buckeye Union Ins. Co. v. State Auto Mut. Ins. Co.*, 49 Ohio St. 2d 213, 218; 361 N.E.2d 1052, 1054–55 (1977), this Court addressed proration between primary insurers that covered the same risk. The Court adopted the majority rule, which prorated liability according to the amount of coverage provided by each insurer. *Id.,* at 1054. The Court recognized that this proration method "takes into consideration the respective liabilities that the two insurers would have incurred had there not been other insurance" based on the amount of insurance the insured purchased from the respective insurers. *Id.,* at 1055.

In *Pierson v. Wheeland*, No. 23442, 2007 WL 1489814 (Ohio Ct. App., May 23, 2007), the court was required to prorate liability for a loss between Nationwide and Allstate where there had been a payment by a tortfeasor that was used as a setoff. The court adopted a different allocation method in that case, recognizing that the circumstances warranted a departure from the method espoused in *Buckeye*. And the reason the court did so was because of the different amounts of coverage purchased from Nationwide and Allstate for different amounts of premium. As the court explained,

> There is little question that Nationwide received a higher premium than Allstate in exchange for offering substantially higher policy limits. As such, it would be inequitable to reward Nationwide a second time by permitting it to use total policy limits to establish pro rata shares. This approach would give Nationwide the advantage of receiving higher premiums, while at the same time denying the advantage Allstate receives through the proportional effect of the setoff.

Id., at *5, ¶19.

Ohio courts thus recognize the importance of equity considerations, including the nature of the insurance purchased, in assessing the proper method of allocation. Ohio law is consistent

with that of jurisdictions that have rightly recognized the inequity of the "all sums" approach based on the insurance coverage purchased by the insured. The inequity of the "all sums" approach is particularly apparent in the context of insureds who purchase insurance with terms such as are employed in the National Union policy—terms that simply do not allow for the use of the "all sums" approach. Fundamental fairness requires the application of pro rata allocation in this context under Ohio law, just as it does under the law of the jurisdictions that have addressed this point.

2. Allocation avoids the deleterious consequences of holding insurers responsible for losses not covered under their policies.

An insurer on the risk for a defined period of time should not be forced to provide coverage for an injury that happened outside that period. Contribution rights held by insurers recognize this unassailable principle, but the right of contribution does not fully protect insurers from the injustice of being held to provide coverage for non-covered losses in the first place. Actual or pro rata allocation upholds this principle while minimizing needless litigation costs—by eliminating the need for complex and protracted contribution litigation among insurers.

The "all sums" approach not only disregards the temporal component in the coverage grant of policies like the National Union policy, it would hold a single insurer unilaterally targeted by a policyholder responsible for an entire loss even though much or most of that loss is not even covered under that insurer's policy. Thus, the "all sums" approach is both unfair and inefficient, because it expands the liability of the designated insurer beyond its policy term and requires further litigation to resolve the fair shares owed by each insurer.[21]

[21] The "all sums" approach increases litigation costs unnecessarily and impedes judicial economy by postponing rather than solving the allocation problem. Under that approach, the case is divided into two separate suits: in the first suit, the policyholder selects and sues one of the
(Continued on next page.)

Another problem with the "all sums" approach is that a targeted insurer forced to provide unallocated coverage has no control over whether the policyholder will abide by its contractual obligations with its other insurers. A policyholder's failure to comply with terms of other insurers' policies could forfeit coverage under those policies and prevent the targeted insurer from recovering contribution from other insurers altogether should a court find that the targeted insurer inherits the rights (and forfeitures) of its insured vis-à-vis the other insurers.

In fact, this Court found it necessary to "clarify" *Goodyear* in another decision, and hold that the insured "has a duty to cooperate with the targeted insurer." *Pennsylvania Gen Ins Co v Park-Ohio Indus*, 126 Ohio St. 3d 98, 104; 930 N.E.2d 800, 807 (2010). Recognizing that *Goodyear* allows the insured to choose a targeted insurer from which it may recover a full amount of indemnification where the "all sums" approach applies, the Court said, "[T]his does not mean that the insured may engage in tactics to delay or obstruct the targeted insurer in the process of obtaining contribution from nontargeted insurers." *Id.* While that holding clarifies the duty to cooperate owed by the insured in that context, it also exemplifies yet another source of litigation spawned by the "all sums" approach. And it highlights the potential for even more litigation, over whether insureds have complied with their duty to cooperate.

Actual or pro rata allocation eliminates all of these sources of ancillary litigation by allocating losses to insurers in a way that gives effect to the insurance contracts, rather than by allowing one insurer to be targeted unjustly, only to have to seek the right outcome through

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triggered insurers; in the second suit, the selected insurer sues the other triggered insurers for contribution. *EnergyNorth Nat. Gas, Inc.*, 156 N.H. at 345, 934 A.2d at 526-27. As such, "the joint and several method does not decrease litigation costs, does not give courts guidance as to how to allocate liability, and requires insurers to factor the costs of uncertain liability into their premiums." *Id.* (internal quotation and citation omitted).

potentially multitudinous litigation. The "all sums" approach thus undermines the goals of efficiency and judicial economy and is antithetical to the timeless principle of honoring contracts between private parties.

3. The "inherent simplicity and predictability" of pro rata allocation protects not only the bargain reached between insurers and policyholders, but the insurance system in general.

By contrast with the difficulties presented by the "all sums" approach, courts and commentators have recognized the "inherent simplicity and predictability of the *pro rata* 'time on the risk' allocation method." *Stryker,* 2005 WL 1610663 at *8. *See also* Michael G. Doherty, Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies,* 64 U. Chi. L.Rev. 257, 281-83 (1997) ("The time-on-the-risk method should be adopted by courts because its inherent simplicity promotes predictability, reduces incentives to litigate, and ultimately reduces premium rates.... The time-on-the-risk method has intuitive, commonsense appeal...."); and William P. Shelley, *Fundamentals of Insurance Coverage Allocation* (Jan. 5, 2000), Mealey's Litigation Reports (Insurance) 25, 30 ("all sums" approach leads to inequitable results, creates perverse incentives, and does not comport with the reasonable expectations of insurers and policyholders alike. It is thus unsurprising that "[t]he vast majority of courts have rejected the joint and several (or 'pick and choose') approach to allocation.").

Unlike allocation, which holds insurers liable to cover what they actually agreed to cover, the "all sums" approach allows insurers to be held liable for sums that insurers did not agree to cover. Holding insurers liable for coverage under general liability policies where no such coverage was purchased has significant adverse implications for the insurance system. Insurers underwrite policies based on assumptions about the risk to be undertaken. Allowing insurers to

be held liable for losses not covered by their policies disrupts that risk calculus, lead to uncertainty, and proliferates litigation costs.

As the California Supreme Court has observed, judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 408, 770 P.2d 704, 711 (Cal. 1989) (internal citation omitted); accord *Am. Home Prod. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984) ("[T]he person's whom [insurers] now cover may well be grievously hurt in future years by the lower coverage that results, or by the bankruptcies caused by companies becoming self-insured in an effort to avoid the higher rates required to pay for broader theories of coverage.").

By ensuring that losses are properly allocated to the insurers that contracted to insure them, pro rata allocation avoids these many inefficiencies and injustices. It also protects against the prospect of increased premiums that would be necessitated by imposing on insurers the cost of providing coverage for that which they did not agree to provide coverage.

II. Analysis Of The Majority And Dissenting Opinions In *Goodyear* Against The Backdrop Of The National Union Policy Language Demonstrates That Pro Rata Should Apply.

Goodyear presented a very close question. Indeed, as demonstrated by the four-three vote, the case was as close as a case in this Court can be. Like any close case, if there were a material change in the facts—or, in this case, the contract language under interpretation—presumably the result should change as well. In fact, there is a notable difference between the insurance contract language at issue in *Goodyear* and the language of the National Union policy. That difference calls for the application of allocation, rather than "all sums," even under the Court's analysis in *Goodyear*.

CICLA believes it is instructive to begin by considering the dissenting opinion in *Goodyear*. The dissenting opinion recognized that to apply pro rata allocation "would be in line with the majority of jurisdictions that . . . have adopted rules allocating damages among multiple periods of coverage." *Goodyear,* 95 Ohio St.3d at 844, ¶ 29 (Young, dissenting). As Justice Young noted, "The vast majority of courts have rejected the joint and several (or 'pick and choose') approach to allocation." *Id.*, quoting Shelley*, Fundamentals of Insurance Coverage Allocation*, at 30.

Justice Young also pointed out that under the "all sums" approach, "the insurance carrier chosen by the insured would bear the burden of obtaining contribution from other applicable primary insurance carriers as it deems necessary." *Id.* at 521-522, ¶ 30. Justice Young recognized that this is "fundamentally flawed" because, as he put it, "the insured, not the targeted insurance carrier, is the one that chose the other insurance carriers." *Id.* Justice Young deemed it unseemly that the targeted carrier should bear the financial burden of pursuing other carriers, rather than for that burden to fall on the insured that was responsible for choosing its insurance. *Id.*

The majority opinion, notably, did not take issue with Justice Young's analysis of the equities. But the majority opined that the *insurance contract language at issue* warranted the "all sums" approach. As the majority recognized, the insurance contract at issue in *Goodyear* required the insurer to:

> [p]ay 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.

Goodyear, 95 Ohio St.3d at 515, ¶ 7 (emphasis added by the Court). In addition to the use of the phrase "all sums," the coverage agreement did not itself contain language explicitly stating that

the sums that were covered were limited to damages because of property damage that occurred during the policy period. Rather, that temporal requirement was contained in the definition of property damage, which was defined as "injury to or destruction of tangible property which occurs during the policy period . . . ." (*Id.* at ¶ 7 (emphasis added).

Based on this language, the majority reasoned as follows:

> There 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. The policies cover Goodyear for "all sums" incurred as damages for an injury to property occurring during the policy period.

Id. at 516, ¶ 9. In other words, the Court found that once the definition of property damage was met, it construed the phrase "all sums" as susceptible to a reading that coverage extends to "all sums" paid as damages because of the property damage that occurred during the policy period—which the Court construed to mean all sums for which the insured was liable throughout the relevant time frame.

Even accepting, arguendo, the analysis in *Goodyear* for purposes of this case, the language of the National Union policy presents a stark contrast with the language at issue in that case. The coverage grant in the National Union policy, unlike the coverage grant in the policy at issue in *Goodyear*, limits coverage to "those sums" paid as damages because of property damage "that takes place during the Policy Period." Simply put, the National Union policy makes clear that which the policy language at issue in *Goodyear* did not (at least according to the majority): coverage is not arguably provided for "all sums" for which the insured becomes liable in the event property damage has occurred both during and outside of the policy period. The National Union policy specifically limits its coverage to only "those sums" that reflect damages because of property damage that takes place during the policy period.

This difference in contract language makes the difference in this case. The courts that have applied the "all sums" approach to policy language similar to that which was at issue in *Goodyear* have correctly recognized that that approach does not apply to insurance contracts of the type at issue in this case. *See, e.g., Thomson, Trinity Homes, Irving Materials, Manor Care, Stryker.*

For starters, the very name of the loss assignment method—"all sums"—reflects the importance of the inclusion of the phrase "all sums" versus "those sums." Lubrizol's amici suggests that there is no difference between the phrase "all sums" and "those sums." But clearly there *is* a difference—as this Court recognized by emphasizing the use of the phrase "all sums" in *Goodyear*, and as many other courts have also recognized. And the National Union policy demonstrates the parties' understanding of a difference between the phrases "all sums" and "those sums." Elsewhere in the contract the parties used the phrase "all sums" in referring to the particular sums that would or would not be covered. (*See* National Union Policy Endorsement 1, p 1 ("We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or operator . . . ."); Endorsement 3 ("this insurance does not apply for those sums the Insured shall become legally obligated to pay as damages because of . . .")).

But the difference between "all sums" and "those sums" is not the only material difference between the National Union policy and the policy at issue in *Goodyear*. This Court found that the location of the temporal limitation language, i.e., the limitation of coverage to damages that occur or take place during the policy, is significant. In the National Union policy that language is contained in the insuring agreement unlike in *Goodyear* where it was contained in the definition of property damage. This difference was recognized by the courts in *Thomson*, *Trinity Homes*, and *Irving Materials*, and to the extent that this Court continues to believe that

this difference is relevant, it should follow that same approach here. The National Union policy simply cannot be read to extend coverage for damages because of property damage that takes place *outside* the policy period.

Aside from the important difference in contract language, the policy rationales supporting allocation as articulated by the dissenting opinion in *Goodyear* warrant application of pro rata allocation in this case. The majority opinion in *Goodyear* did not disagree with or otherwise take issue with those public policy rationales set forth in the dissenting opinion. And rightly so. Those and other considerations that favor pro rata allocation, discussed above, warrant application of pro rata allocation—particularly since allocation is required by the insurance contract language.

Indeed, those equitable considerations apply with greater force here than they did in *Goodyear,* given the insurance contract language that more clearly expressed the parties' intent that coverage does not extend to bodily injury or property damage outside of the policy period. The Court should honor the parties' intent as expressed by their contract, and apply pro rata allocation.

III. Lubrizol's Amici's Arguments Fundamentally Misunderstand The National Union Insurance Contract And Are Otherwise Without Merit.

Lubrizol's amici urge the Court apply "all sums" essentially on the grounds that the Court did so in *Goodyear*. Their argument as to why this case does not call for application of pro rata allocation reflects a fundamental misunderstanding of the National Union policy and of the reason why pro rata allocation should apply.

Lubrizol's amici claim that the pro rata method "permits insurers to pay less than they agreed to pay" (Lubrizol's Amici's Merits Brief, p. 4) based on an "implied proration requirement" that they say National Union is asking the Court to read into the insurance contract.

(*Id.*, p. 19). Amici further suggest that if National Union wanted to "imply" a pro rata requirement it should have stated one explicitly. And they argue that there is at least an ambiguity as to whether a proration requirement is set forth in the National Union policy. As amici summarize,

> 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.

(*Id.*, p. 25).

The reason actual or pro rata allocation applies is not because the National Union policy sets forth, or implies, an allocation provision within its policy terms, either explicitly or implicitly. It is because the National Union policy *does not provide coverage for sums paid because of property damage that takes place outside of the policy period.*

Contrary to Lubrizol's amici's framing of the issue, pro rata allocation does not permit insurers "to pay less than they agreed to pay . . ." (Amici's merits brief, p. 4).[22] Instead, pro rata allocation overlooks an insured's inability to prove which damages are covered under a particular policy,[23] and allocates a loss based on the only approach that purports to honor the parties' agreement to limit coverage to damage that takes place during the policy period: time on the

[22] It is "all sums" allocation that would permit the insured to recover *more* than what the parties agreed to cover.

[23] Under well settled Ohio law, the insured bears the burden of proving coverage. *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 846 N.E.2d 833, ¶ 19 (2006) (the insured has the burden to prove a loss and to demonstrate coverage under a policy of insurance); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, ¶ 35 (2003) (same); *Hickory Groves 339, LLC v. Cincinnati Ins Co.*, No. 15CA38, 2016 WL 3261018, at *5 (Ohio Ct. App., 2016) (As an initial factor, in Ohio, an insured has the burden of showing facts sufficient to prove a loss and entitlement to coverage under the policy).

risk. That is the only allocation approach that gives effect to the provision limiting coverage to property damage that takes place during the policy period.

Lubrizol's amici's reliance on other provisions in the National Union policy is a road to nowhere. They point out provisions that allow for certain types of allocation in different contexts, and argue that if National Union wished to include a pro rata allocation provision in its policy it could have done so. (Amici's merits brief, pp 20-24). Again, however, this is a strawman argument. National Union is not asking the Court to imply, or read into the policy, a pro rata allocation method. It is asking the Court to enforce the unambiguous policy language that limits coverage to property damage that takes place during the policy period. Enforcing that clear, unambiguous policy language *requires* allocation because taking an "all sums" approach would hold National Union responsible for loss that it did not agree to cover.[24]

Lubizol's amici's argument that the provision expressly confining coverage to sums "because of . . . Property Damage . . . that takes place during the Policy Period" merely suggests what triggers the policy, and does not speak to what is covered (Amici's merits brief, p 13), simply ignores that language. Amici's argument, at best, is aimed at the context of the policy language at issue in *Goodyear*, in which the temporal coverage component was set forth only in the definition of "property damage." Those policies, unlike the National Union policy, provided coverage for "all sums which the insured [was] obligated to pay as damages because of . . . property damage to which this policy applies . . . ." Thus, this Court found that so long as the

[24] The "Prior Insurance" provision that Lubrizol's amici address on page 23 does not, contrary to amici's suggestion, state or imply that the National Union policy provides coverage for loss prior to the policy period. Quite to the contrary, it states that if a loss *covered by this policy*, i.e. involves bodily injury or property damage that takes place during the policy period, is also covered by another policy issued for a policy period that *begins* before the National Union policy period, the policy limit of the National Union policy may be reduced. That potential reduction of the policy *limit* has nothing to do with proration.

loss involved property damage (defined as property damage that occurred during the policy period) both during and outside the policy period, the policy coverage was triggered and the insurer was held liable for "all sums" to which the insured was obligated.

Under the language of the National Union policy, however, the temporal coverage requirement is set forth not in the definition of property damage, but in the coverage grant. Coverage simply is not granted for property damage that takes place outside the policy period. Lubrizol's amici's suggestion that this language within the coverage grant only address whether the policy is triggered, and does not also address what is covered, is just wrong.

Perhaps most notably, Lubrizol's amici do not and cannot refute the public policy benefits of applying pro rata allocation. Those include judicial economy and efficiency, avoiding needless litigation over contribution rights that insurers should not be forced to undertake with regard to damages that are not covered under their insurance contracts in the first place. They also include the inherent simplicity and predictability that are of great benefit to the insurance system in general. Particularly in this case, which involves insurance contract language that is not susceptible to the "all sums" approach, this Court should adopt actual or pro rata allocation based on those many public policy benefits.

CONCLUSION

For the reasons set forth herein and in National Union's Merits Brief, CICLA requests that the Court apply actual or pro rata allocation in this case, and answer the certified question in the negative.

Respectfully Submitted

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DATED: June 24, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2019, a copy of the Merit Brief of Amici Curiae Complex Insurance Claims Litigation Association in Support of Respondent National Union Fire Insurance Company of Pittsburgh, PA was served via U.S. Mail, postage prepaid and e-mail on the following:

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