IN THE SUPREME COURT OF OHIO

LUBRIZOL ADVANCED MATERIALS, INC.,	:	Case No. 2018-1815
Petitioner,	:	On Consideration of Certified Question from the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:17-CV-01782.
v.	:	
NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA.,	:	
Respondent.	:	

AMICUS CURIAE BRIEF OF THE OHIO INSURANCE INSTITUTE IN SUPPORT OF RESPONDENT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

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STATEMENT OF THE CASE AND FACTS

A. Statement of Interest

The Ohio Insurance Institute ("OII") is a member-run trade organization comprised of leading domestic, regional and national property and casualty insurance companies, trade groups and related organizations throughout the state of Ohio. Since 1968, the OII has sought to help Ohioans achieve a better understanding of insurance and related safety issues and has been recognized as the Ohio property and casualty insurance industry's voice on matters affecting or involving the industry.

OII provides a wide range of services to its members and to the public, media and government officials in three primary areas: education and research, legislative and regulatory affairs, and public information. In connection with these activities, OII closely monitors judicial decisions that address important issues of insurance law, and it has selectively participated as amicus curiae in many of this Court's landmark insurance cases. OII is uniquely qualified to provide this Court with a broad perspective on the basic principles of insurance law relevant to this appeal, as well as practical insight into how the answer to the certified question will impact insurers, insureds and all Ohioans.

The issues presented by this case are of great interest to the OII and its members. OII members routinely issue liability policies like the one before the Court in this case. The OII and its members have a keen interest in maintaining the transparency, uniformity and predictability of the law regulating insurance coverage disputes—particularly with respect to the kinds of complicated disputes that involve allocation issues—such as this case.

B. The Certified Question

This case presents a single question certified from federal district court:

> Whether an insured is permitted to seek full and complete indemnity, under a 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?

This question is not an abstraction and must be viewed as a necessary predicate to the larger question at the core of this case: whether Petitioner Lubrizol Advanced Materials, Inc. ("Lubrizol") may recover defense and indemnity expenses allegedly incurred for resolution of certain products liability claims (the "Product Claims") under Policy No. BE 7409379 issued by Respondent National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC"), effective February 28, 2001 to February 28, 2002 ("NUFIC Policy")?[1]

On the record before this Court, and under existing Ohio law, both the Certified Question and the larger question must be answered in the negative. As explained more fully below, this conclusion results because:

(1) the NUFIC Policy is a commercial umbrella policy that is not subject to the broad "all sums" primary policy allocation rule espoused by Lubrizol. See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶12 (explaining allocation from "the pool of triggered primary policies" but reserving analysis with respect to excess policies);

(2) Lubrizol has failed to demonstrate that the NUFIC Policy is "attached"—that is, that the amounts sought by Lubrizol constitute "those sums ***in excess of the Retained Limit***" of the NUFIC Policy (emphasis added)

(3) Lubrizol has failed to demonstrate that the NUFIC Policy is

[1] The Product Claims are more fully described at pp. 2-4 of Lubrizol's Merit Brief and pp. 4-5 of NUFIC's Merit Brief. The NUFIC Policy is found in the record at (Doc#:1, PAGEID#16-69).

"triggered"—that is, that the amounts sought by Lubrizol constitute "property damage" that happened during the policy period of the NUFIC Policy; and

(4) Finally, the NUFIC Policy does not include "all sums" language as to warrant application of the "all sums" primary policy allocation rule in *Goodyear*.

OII otherwise adopts the Statement of the Facts and Statement of the Case set forth by Respondent NUFIC in its Merit Brief at pp. 1-9.

LAW & ARGUMENT

CERTIFIED QUESTION: Whether an insured is permitted to seek full and complete indemnity, under a 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?

According to Lubrizol, *Goodyear* stands for the proposition that Lubrizol is entitled "to pick and choose ***any*** triggered policy from which to obtain coverage." (Lubrizol's Merit Brief, p. 4)(emphasis added). Pursuant to this "right under Ohio law . . . Lubrizol asserts its entitlement to insurance coverage under" the NUFIC Policy. (*Id*). However, as further explained, this case is predicated upon Lubrizol's incorrect interpretation of *Goodyear*. *Goodyear* itself holds that the NUFIC Policy is not subject to "all sums" allocation for the reasons previously stated and more fully explained below.

A. The *Goodyear* "all sums" allocation rule is not applicable to the NUFIC Policy.

Under *Goodyear*, an insured, like Lubrizol, is only "permitted to choose, from a pool of triggered primary policies, a single primary policy against which it desires to make a claim. In the event that this policy does not cover [Lubrizol's] entire claim, then [Lubrizol] may pursue coverage under other primary or excess insurance policies." 2002-Ohio-2842, at ¶12 (Emphasis

added). When an insured seeks to allocate to excess policies, this Court advised "what insurance may be tapped next is dependent upon the terms of the particular policy that is put into effect". *Id*. Because standard umbrella or excess liability policy language is very different from standard primary commercial general liability policy language, in *Goodyear*, this Court found itself unable to determine whether the insured could allocate to any of its excess policies because it could not be determined whether any of the excess policies were "attached". *Id*.

Unlike the primary policies at issue in *Goodyear*, the NUFIC Policy is an "umbrella" liability policy. (Doc#: 1, PAGEID#: 16). "Umbrella policies" are a type of excess liability policy.[2] In this regard, the title of the NUFIC Policy is "COMMERCIAL UMBRELLA" coverage. (Doc#: 1, PAGEID#: 16, 55). Baseline coverage is provided by Commercial Umbrella Policy Form which states, in pertinent part:

Insuring Agreements

I. Coverage

> 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 . . . because of . . . Property Damage . . . that takes place during the Policy Period and is caused by an Occurrence happening anywhere in the world.

(Doc#: 1, PAGEID#: 55)(emphasis added). "Retained Limit" is defined, in pertinent part, as "[t]he total of the applicable limits of the underlying policies in the Schedule of Underlying

[2] Umbrella policies typically provide both: (1) vertical coverage beyond a retained limit; (2) and limited expanded primary (or horizontal) coverage when an insured's primary policies do not provide coverage. *Cincinnati Ins. Co. v. CPS Holdings, Inc*., 115 Ohio St.3d 306, 2007-Ohio-4917, ¶5. Lubrizol has not made (and presumably cannot make) any "drop down" arguments in this case, therefore the only provisions of the NUFIC Policy that are germane to the cases are the excess policy provisions.

Insurance ***and*** the applicable limits of any other underlying insurance providing coverage to the Insured." (Doc#: 1, PAGEID#: 57)(emphasis added). Thus, the NUFIC Policy is not attached until Lubrizol has exhausted all of the limits of applicable scheduled underlying insurance (see Doc#: 1, PAGEID#: 22) ***PLUS*** all of the limits of any other applicable unscheduled underlying insurance. This feature is repeated in the defense provisions (Doc#: 1, PAGEID#: 55) and in an "other insurance" clause which renders the NUFIC Policy "excess" to any other "valid and collectible insurance [that] applies to a loss that is also covered by this policy" except if such "other insurance is specifically written to be excess of this policy." (Doc#: 1, PAGEID#: 68). Finally, the NUFIC Policy includes a "Prior Insurance" provision which states: "If a loss covered by this policy is also 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." (Doc#: 1, PAGEID#: 68).

The foregoing excess policy provisions are very different from the primary policy provisions at issue in *Goodyear* which required 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." *Goodyear*, ¶7. The policies in *Goodyear* provided primary "first-dollar" coverage and, unlike this case, the parties did not dispute that multiple primary policies were triggered.[3] *Goodyear*, ¶6. All that was needed to trigger the primary policies in *Goodyear* was accidental property damage occurring during the policy period.[4]

[3] "First-dollar" primary coverage provides insurance from the first dollar of loss and generally must be exhausted before excess coverage is attached. *See e.g. Tscherne v. Nationwide Mut. Ins. Co.*, 8th Dist. No. 81620, 2003-Ohio-6158, ¶¶17-18.

[4] Property damage caused by an occurrence can be generally referred to as accidental property damage for purposes of the issue in this case.

Thereafter, the insured could select from the pool of triggered primary policies any single primary policy against which it wished to proceed. *Goodyear*, ¶12.

However, a different result attained for the excess policies in *Goodyear*. This Court found that, unlike the triggered primary policies, from which the insured could pick and choose, it could not yet be determined if any of the excess policies would be implicated. The excess insurers should remain involved in that litigation "so that their rights and obligations can be considered ***in the event that the policies become a factor***". *Goodyear*, ¶12 (emphasis added). Whether their policies were to become a factor was "dependent upon the terms of the particular policy" under which the insured sought allocation. *Id*.

This Court's differing treatment between the primary policies and excess policies actually became part of *Goodyear*'s syllabus which expressly limited "all sums" allocation to "primary insurance policies". *Goodyear*, at paragraph one of the syllabus. At the time, in pertinent part, only what was actually stated in the syllabus of this Court's decisions represented a pronouncement of the law by this Court. *LGR Realty, Inc. v. Frank London Ins. Agency*, 152 Ohio St.3d 517, 2018-Ohio-334, ¶18.

Based upon the foregoing, there is nothing in *Goodyear* or the NUFIC Policy that renders the NUFIC Policy subject to "all sums" allocation within the meaning of Lubrizol's claims.

B. Lubrizol has failed to demonstrate that the NUFIC Policy is "attached".

With respect to excess policies, the issue this Court grappled with in *Goodyear* was "attachment"—that is, the issue of whether the insured had exhausted any requisite retained limits of underlying insurance before the excess policies could be implicated. This Court's holding in *Goodyear* (that an insured could only allocate to triggered primary policies), and its reservation of

any allocation decision on the excess policies because "we are also unable to determine whether the primary policy limits will be exhausted" logically means that an insured may only allocate to an excess policy that is both "triggered" (ie. accidental property damage occurs during the policy period) and "attached" (i.e., any requisite underlying limits of insurance have been exhausted). Lubrizol has the burden of proving both trigger and attachment.[5] Such issues are always implicated when considering *Goodyear* in the context of excess policies.

The provisions of the NUFIC Policy previously addressed definitively establish that if other insurance is applicable to the Product Claims, then the NUFIC Policy is not "attached" until the limits of all such insurance are exhausted. Such provisions are valid and enforceable. *See e.g. Castronovo v. NUFIC*, 571 F.3d 667 (7th Cir. 2009)(applying Ohio law to hold that NUFIC's excess policy was not triggered where remaining underlying insurance was not exhausted and NUFIC's excess policy was not triggered unless "any other underlying insurance providing coverage to the Insured have been exhausted"); *Federal-Mogul U.S. Asbestos Personal Injury Trust v. Cont'l. Cas. Co*., 666 F.3d 384, 388-391 (6th Cir. 2011) (relying upon *Castronovo* to hold that excess insurer with similar policy language was not required to provide coverage for asbestos claims until all potentially applicable underlying insurance was exhausted). Such holdings are

[5] It is well-established that Lubrizol, as the insured, bears the burden of establishing compliance with all provisions of coverage which are precedent to recovery, including proving that the claims fall within the insuring agreements and all pre-conditions of coverage have been met. *See e.g. City of Sharonville v. Am. Employers Ins. Co*., 109 Ohio St.3d 186, 2006-Ohio-2180, ¶19; *Marolt v. Lisitz*, 94 Ohio App. 298, 115 N.E.2d 169 (8th Dist. 1952); *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192 (9th Dist. 1986), *motion to certify overruled by*, No. 86-419 (May 14, 1986); *Helman v. Hartford Fire Ins. Co.*,105 Ohio App.3d 617, 664 N.E.2d 991(9th Dist. 1995); *Yunker v. Republic-Franklin Ins. Co.*, 2 Ohio App.3d 339, 442 N.E.2d 108(6th Dist. 1982); *Lynd v. Sandy & Beaver Valley Farmers Mut. Ins. Co.*, 103 Ohio App. 408, 145 N.E.2d 453 (4th Dist. 1957).

also consistent with Ohio law that excess insurers do not "drop down" to provide coverage below agreed amounts unless they have expressly contracted to do so. *Revco D.S., Inc., v. Gov't. Employees Ins. Co*., 791 F.Supp.1254, 1264-1268 (N.D. Ohio 1991), *aff'd by* 984 F.2d 154 (6th Cir. 1992); *Wurth v. Ideal Mut. Ins. Co*., 34 Ohio App.3d 325, 328-331, 518 N.E.2d 607 (12th Dist. 1987); *Value City, Inc. v. Integrity Ins. Co*., 30 Ohio App.3d 274, 275-279, 508 N.E.2d 184 (10th Dist. 1986).

It does not matter that some of Lubrizol's underlying insurance are "fronting" policies. (NUFIC's Merit Brief, pp. 25-27). This Court has held that "fronting" policies are subject to the same rules and requirements as any other liability insurance policy. *Gilchrist v. Gonsor*, 104 Ohio St.3d 599, 2004-Ohio-7103, ¶¶5-9. Moreover, nationally, it is well-established that excess policies are not required to provide coverage until primary policies with self-insured retentions are fully exhausted because to do otherwise would "obliterate[] the distinction between primary and excess insurance." *Padilla Constr. Co., Inc. v. Transportation Ins. Co*., 150 Cal.App.4th 984, 1003, 58 Cal.Rptr.3d 807 (2007); *Pacific Coast Bldg. Products, Inc., v. AIU Ins. Co*., 300 Fed. Appx. 546, 549 (9th Cir. 2008); *Missouri Pacific RR Co. v. Int'l. Ins. Co*., 288 Ill. App.3d 69, 80-82, 679 N.E.2d 801 (1997); *Lamorak Ins. Co. v. Kone, Inc*., 2018 IL App (1st) 163398 (2018), ¶28. As the Twelfth Appellate District stated in *Wurth*: "It seems to us, by definition and longstanding principle, that an excess insurer is not generally liable for any part of the loss or damage which is covered by other insurance (be it collectible or uncollectible), but is liable only for the amount of loss or damage in excess of the coverage provided by all other applicable insurance policies." 34 Ohio App.3d at 328.[6]

[6] The same result attains when an excess "other insurance" clause renders one primary policy

In this case, it is apparently undisputed that: (1) other insurance is applicable to the Product Claims; and (2) such other insurance has not yet been exhausted. (Doc#: 1, PAGEID#: 11, ¶19; Lubrizol's Merit Brief, pp. 4-5; NUFIC's Merit Brief, pp. 6-7). Nevertheless, Lubrizol contends that *Goodyear* allows it to ignore the foregoing provisions of the NUFIC Policy. However, as previously explained, *Goodyear* says no such thing. Indeed, *Goodyear's* analysis implies exactly the opposite.

From the record before the Court, under *Goodyear*, it is clear that Lubrizol has failed to establish that the NUFIC Policy is attached.[7] Accordingly, Lubrizol cannot allocate to the NUFIC Policy and the Certified Question must be answered in the negative.

C. Lubrizol has failed to demonstrate that the NUFIC Policy is "triggered".

In *Goodyear*, this Court implicitly found that "all sums" primary policy language of the type previously addressed would be triggered by accidental property damage occurring during the policy period. Of course, trigger was not disputed in *Goodyear*—the parties just disputed the method of allocation among triggered policies. *Goodyear*, ¶¶5-12. In this case, however, NUFIC disputes whether the Product Claims trigger the NUFIC Policy, i.e. resulted in accidental

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excess to another. *See Motorists Mut. Ins. Co. v. The Lumbermens Mut. Ins. Co*., 1 Ohio St.2d 105, 205 N.E.2d 67 (1965), at syllabus (excess other insurance clause given effect over primary other insurance clause); *Wildeboer v. State Auto. Mut. Ins. Co*., 1st Dist. No. C-790296, 1980 WL 352870, *2 (same); *Oblinger v. State Auto Ins. Cos*., 163 Ohio App.3d 266, 2005-Ohio-4695, ¶¶43-44 (1st Dist.) (same); *see also U.S. Gypsum Co. v. Admiral Ins. Co*., 268 Ill.App.3d 598, 654, 643 N.E.2d 1226 (1994) (holding that comparison between other insurance clauses prohibited insured from seeking coverage from excess policies while full fronting policy remained unexhausted).

[7] Pro rata allocation for the NUFIC Policy, later addressed in this Brief, would not change the attachment analysis (by limiting the inquiry to insurance available in 2001-2002) unless Lubrizol were to prove that none of the underlying was written on an "all sums" basis. Even then, it would be necessary to determine what amounts could be allocated to the 2001-2002 coverage tower (ie. primary and excess coverage during a particular year).

property damage during the policy period. (Doc#: 21, PAGEID#: 191, ¶26). Additionally, NUFIC asserts that any accidental property damage is readily identifiable and divisible. (NUFIC's Merit Brief, pp. 17-23). Accordingly, the issue is whether there is any evidence in the record to demonstrate that accidental property damage happened during the 2001-2002 time period. This question must be answered in the negative.

Lubrizol alleges that the Product Claims arise from the sale of a resin that was used to manufacture composite pipe that "either failed or malfunctioned". (Doc#: 1, PAGEID#: 10, ¶15). While Lubrizol refers to the Products Claims as "long-tail property damage" or "progressive and continuous property damage claims" (Lubrizol Merit Brief, p. 8, 10), there is no evidence or allegation in the record from which this Court can determine whether accidental property damage occurred ***at any time***—let alone ***during*** the policy period of the NUFIC Policy. Accordingly, Lubrizol has failed to establish that the NUFIC Policy is triggered by the Product Claims. Under *Goodyear*, an insured can only allocate to triggered primary policies. Accordingly, Lubrizol's allocation claim against NUFIC must fail.

D. The NUFIC Policy does not include "all sums" language as to make it subject to *Goodyear*.

Even if Lubrizol were to somehow establish that the NUFIC Policy was both "attached" and "triggered" under the record before the Court, the insuring agreement in the NUFIC Policy promises to pay "those sums" Lubrizol is obligated to pay because of accidental property damage that takes place during the NUFIC policy period. Lubrizol contends that the distinction between the "all sums" language in *Goodyear* and the "those sums" language in the NUFIC Policy is a distinction without a difference, but this Court did not treat the language so cavalierly. Rather, this Court explained:

> 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 covered Goodyear for "all sums" incurred as damages for any injury to property occurring during the policy period. The plain language of this provision is inclusive of <u>all damages</u> resulting from a qualifying occurrence***. Therefore, we find that the "all sums" allocation approach is the correct method to apply here.

Goodyear, ¶9 (emphasis added).

In so ruling, this Court did not chart its own course, but instead relied upon three cases from outside of Ohio: *Am. Nat'l. Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wash.2d 413, 951 P.2d 250 (1998); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D. C. Cir. 1981); and *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502 (1993). All three courts predicated "all sums" allocation upon the fact that the insurer had promised to pay "all sums" caused by injury as opposed to some lesser amount. These cases concluded that the use of the word "all", as opposed to a more limited word, purported to make the insurer liable for any and all damages, including damages that did not occur during the policy period, provided that at least some covered damages did happen during the policy period. *B&L Trucking*, 134 Wash.2d at 428-429; *Keene*, 667 F.2d at 1047-1050; *J.H. France Refractories*, 534 Pa. at 39.[8] Even skeptical courts have observed: "There is an inherent awkwardness in advocating 'all sums' allocation when the insurance policies at issue do not include those words." *Pella Corp. v. Liberty*

[8] Both *B&L Trucking* and *Keene* found that the inclusion of the word "all" rendered the policy language "ambiguous" so as to require an expansive finding of coverage for the insured. *B&L Trucking*, 134 Wash.2d at 428-429; *Keene*, 667 F.2d at 1041. *Keene* further purported to rely upon the insured's "reasonable expectations" (667 F.2d at 1041-1042, 1048)—a doctrine which has been rejected in Ohio. See *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 135-136, 506 N.E.2d 1192 (9th Dist. 1986) *J. H. France Refractories* found the "most compelling" reason for "all sums" allocation was "the language of the policies themselves" under which "the insurer contracted to pay *all sums* which the insured becomes legally obligated to pay, not merely some pro rata portion thereof." 534 Pa. at 39 (emphasis in original).

Mut. Ins. Co., 244 F.Supp.3d 931, 943 (S.D. Iowa 2017).

Keene acknowledged that "neither the case law nor the terms of the policies lead us directly to a resolution of the" allocation issues, and therefore the court was left to "interpret these contracts in a manner that is equitable and administratively feasible and that is consistent with insurance principles, insurance law and the terms of the contracts themselves." 667 F.2d at 1041.[9] Applying these admittedly new and broad principles,[10] *Keene* found the import of such "all sums" language to be significant:

> ***The policies at issue in this case provide that the insurance company will pay on behalf of Keene "all sums" that Keene becomes legally obligated to pay as damages because of bodily injury during the policy period.*** We have defined "bodily injury" to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of the disease. As a result, when Keene is held liable for an asbestos-related disease, only part of the disease will have developed during a single policy period. The rest of the development may have occurred during another policy period or during a period when Keene had no insurance. The issue that arises is whether an insurer is liable in full, or in part, for Keene's liability once coverage is triggered. We conclude that the insurer is liable in full . . .
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> * * *
>
> With each policy, ***Keene paid for insurance against <u>all</u> liability for bodily injury***. The policies do not distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury . . . Nor do the policies provide that the "injury" must occur entirely during the policy period for full indemnity to be provided.

[9] Similarly, *Goodyear* only found policy language to be the "starting point" for allocation. 2002-Ohio-2842, ¶7. Subsequently, in *Pa. Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, 126 Ohio St.3d 98, 2010-Ohio-2745, ¶¶14-19, this Court held that "all sums" allocation was "equitable" in nature.

[10] In her concurring opinion in *Keene*, Judge Wald pronounced: "This is a case of first impression and, irrespective of how it is resolved, requires a 'leap of logic' . . . from existing precedent". 667 F.2d at 1057.

667 F.2d at 1047- 1049 (emphasis added; footnotes omitted).[11]

While *Goodyear* and similar cases imposed "all sums" allocation on such policy language, others did not. There is currently a national divide on whether such policy provisions mandate "all sums" or "pro rata" allocation. *Pella*, 244 F.Supp.3d at 943-944 (comparing cases from across the country and noting there "does not appear to be a clear dominant approach among other states"); *Stryker Corp v. Nat'l. Union Fire Ins. Co. of Pittsburgh, PA*., No. 4:01-CV-157, 2005 WL 1610663 (W.D. Mich. July 1, 2005)(noting that the "all sums" is "not denominated as a majority rule", but "has been followed by certain courts across the country").[12] Lubrizol correctly notes that the battle lines of this national divide tend to be centered around policy language requiring that property damage occur "during the policy period". (Lubrizol's Merit Brief, pp. 6-18). However, Lubrizol wrongly ignores the grammatical difference that occurs when an insurer contracts to pay "those sums" rather than "all sums", in conjunction with "during the policy period". The grammatical combination of "those sums" with "during the policy period" has caused many courts to adopt pro rata allocation rather than antiquated notions of "all sums" allocation which are associated with much older policy forms. *See e.g. Pella*, 244 F.Supp.3d at 942-946; *Thomson Inc. v. Ins. Co. of N. Am*., 11 N.E.3d 982, 1019-1021 (Ind. App. Ct. 2014); *Manor Care, Inc. v. First Specialty Ins. Corp*., No. 3:03CV7186, 2006 WL 2010782 (N.D. Ohio July 17, 2006), *5; *Stryker*, at *4-6; *Trinity Homes LLC v. Ohio Cas. Ins. Co*., 864 F.Supp.2d 744,

[11] *Keene, B&L Trucking* and *J.H. France Refractories* all held that the policies' "other insurance" clauses would be instrumental in allocating coverage. However, this issue was never addressed in *Goodyear* or *Pa. Gen. Ins. Co.* (which addressed *Goodyear's* continued viability eight years later).

[12] Lubrizol wrongly refers to "all sums" as the "majority rule". (Lubrizol's Merit Brief, p. 7, FN 3). However, as pointed out at pp. 20-23 of NUFIC's Merit Brief pro rata allocation now appears to be the majority position—even under policies with "all sums" policy language.

758-759 (S.D. Ind. 2012).

For the reasons that follow, these cases provide the correct and only reasonable interpretation of the unambiguous "those sums" language in the NUFIC Policy with respect to allocation. As a preliminary matter, "all" no longer modifies any part of the insuring agreement. "All" can mean, among other things, "the whole amount" and/or "as much as possible". Webster's Ninth New Collegiate Dictionary (1990)("Dictionary"), p. 70-71. *Goodyear* and its constituent cases considered such an encompassing word as "all" to suggest much more than pro rata liability, and therefore extended coverage to even those amounts that clearly fell outside of the policy period of the disputed insurance contract. "Those", on the other hand, is the plural of "that" (which follows since "sums" is plural). "Those" is clearly less encompassing than "all" and means simply "the person, thing, or idea specified, mentioned or understood". Dictionary, p. 1221. When used in combination with "during the policy period", it limits NUFIC's liability only to "those sums" (in excess of the Retained Limit) that Lubrizol becomes legally obligated to pay by reason of liability imposed by law because of property damage that actually happened during the policy period. This calls for pro rata liability. (*See* NUFIC's Merit Brief, pp. 11-13).

Furthermore, there can be no valid argument that use of the term "those sums", as opposed to "all sums", in isolation, does not lead to this result because, as Lubrizol and its amici concede,[13] insurance policy terms are not to be read in isolation, but as part of a whole and in context. *Sauer v. Crews,* 140 Ohio St.3d 314, 2014-Ohio-3655, ¶¶10-14. When one word is changed, the contextual meaning of other words is often changed as well.[14] Such is the case when "all sums"

[13] See Merit Brief of Amici Curiae, The Ohio Chemistry Technology Council, etc. ["OChem Amicus Brief"], p. 10.

[14] *Compare* "We hold these truths to be self-evident, that ***all*** men are created equal" *with* "We hold

is replaced with "those sums" in a liability policy. The heart of the reason for "all sums" allocation is removed when "all" is removed because the insurer has no longer arguably promised to pay everything—regardless of whether the injury happened during the policy period.

This obvious contextual change is even more important because it was part of a well-documented, intentional effort by the insurance industry to promulgate new policy language to supersede cases like *Goodyear*.[15] As explained by one leading Ohio legal commentator, the 1986 change from "all sums" to "those sums" was prompted, in part, as:

> [A] reaction to some court decisions that construed the Insuring Agreement as a promise to pay under a single policy "all sums" the insured became legally obligated to pay for environmental damages or latent bodily injuries, even though the damages or injuries began during one policy period but continued into successive policy periods.

Oh. Ins. Coverage §3.1 (2018); see also ISO Commercial Lines Policy and Rating Simplification Project, Introduction and Overview (1985) ["ISO Circular"], pp. 1-2, ¶¶1-4 (explaining that revisions to standard general liability policies were being promulgated in response to long-tail, progressive injury caselaw like *Goodyear*).[16] As further explained in the ISO Circular, p. 2, ¶3, changes were proposed, in part, because:

> Some courts have adopted legal theories in latent-injury or long-term exposure cases, which hold that injury occurred during a long series of "occurrence" policies . . . As a result, insurers don't know how much is at stake, and for how long under these contracts. That makes it difficult to determine accurate premiums and loss reserves. And beyond that, such

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these truths to be self-evident, that ***those*** men are created equal" (emphasis added).

[15] While *Goodyear* was not decided until 2002 (well after the 1986 changes from "all sums" to "those sums"), the genie was already out of the bottle as *Keene* and other cases had been decided in the early 1980s.

[16] The Insurance Services Office, Inc. ("ISO") provides support services for approximately 1,400 domestic property and casualty insurers across the nation and is recognized as an integral part of the domestic insurance market. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772, 113 S.Ct. 2891 (1993); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 15.

> "stacking" of limits poses a serious threat to the very solvency of some insurers. In view of this, some insurers and reinsurers have become increasingly reluctant to handle "occurrence" coverage. Without some change, there could be real insurance-availability problem.

The 1986 replacement of "all sums" with "those sums" was part of a larger effort by insurers to shore up insurance markets staggered by nearly two decades of judicial decisions that had greatly expanded insurer liability under occurrence based policies. The insurance industry's efforts did not go unnoticed by policyholders and regulators, and, in fact, spawned a massive anti-trust litigation that made its way to the highest court in the land. See *Hartford Fire Ins. Co.*, 509 U.S. at 770-772.[17]

Based upon the foregoing, part of the intent of NUFIC (and other insurers) in switching from "all sums" to "those sums" was to eliminate the exorbitant costs and uncertainty associated with "all sums" allocation. While Lubrizol discounts the legal significance of the change in language, it cannot discount the well-documented change in intent. This is important to the outcome of this case because the cardinal rule of contract interpretation is that a reviewing court "give effect to the intent of the parties." *Galatis*, 2003-Ohio-5849, at ¶11. Ordinarily, the plain language of the contract is presumed to manifest the intent of the parties. *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011-Ohio-2720, at ¶37. However, this Court has directed that discerning intent is not supposed to be an exercise in abstraction. Even plain dictionary definitions must give way to the paramountcy of the contracting parties' intent if necessary. See *Graham v. Drydock Coal Co*., 76 Ohio St.3d 311, 1996-Ohio-393.

[17] Ohio was one of the nineteen states involved in the litigation. 509 U.S. at 770, FN 2. The litigation included issues directed to excess and umbrella insurance such as the NUFIC Policy. 509 U.S. at 777.

In *Graham*, this Court considered whether a mining company would be permitted to strip mine a parcel of property where the original conveyance granted the mining company:

> . . . ***all*** of the minerals of whatsoever nature and description, including oil, gas, salt water together with the right and privilege of entering in, on, or under said premises for purpose of exploring for, testing, mining and removing the same . . .

76 Ohio St.3d at 314 (emphasis added). This Court reversed the court of appeals, which had found the provision unambiguously granted the mining company the right to strip mine, and found "unpersuasive" arguments that: (1) "all means all"; and (2) "the dictionary definition of 'mining' at the time the deeds were drafted included strip mining." 76 Ohio St.3d at 316-317. Instead, this Court found that strip mining was inconsistent with the parties' intent, explaining:

> Though strip mining is undeniably a form of mining, and the deeds reserved to Cambria the right to mine and remove all the coal and other minerals, we find the dictionary definition to be far outweighed in our search for the intent of the parties by the weight of the deep-mining context and language of the reservation clauses and by the patent incompatibility of strip mining with separate ownership of the surface of the land.

76 Ohio St.3d at 317. The mining company's position was not absurd or even completely unreasonable, it was just that "the interpretation which makes a rational and probable agreement must be preferred.'" *Id*., at 316.

In this case, NUFIC issued Lubrizol an umbrella policy that did not provide first-dollar coverage for the Product Claims, but rather was only attached if all other applicable insurance was exhausted. The "other insurance" provisions of the NUFIC Policy render it excess to all other applicable insurance. If the NUFIC Policy is both attached and triggered, the unambiguous meaning of the language in the insuring agreement does not require NUFIC to pay Lubrizol "all sums" because of property damage that takes place during the policy period, but instead only

promises to pay "those sums" because of property damage that take place during the policy period. It is neither "rational" nor "probable" that either NUFIC or Lubrizol intended for the NUFIC Policy to be subject to "all sums" allocation under the foregoing circumstances. (*See also* NUFIC's Merit Brief, pp. 24-27). Accordingly, under the circumstances, the Certified Question should be answered in the negative.

CONCLUSION

Goodyear has, and will likely continue, to create questions for this Court. This is at least the fourth time in seventeen years that this Court has agreed to hear a case exploring the parameters of "all sums" allocation. *See Goodyear*, *supra*. (2002); *Pa. General*, *supra.* (2010); and *Lincoln Electric Co. v. Travelers Cas. & Sur. Co., et al*., Case No. 2013-1088 (2014).[18] It is unlikely to be the last. Nevertheless, OII does not advocate that *Goodyear* be overruled, just that it not be expanded beyond its limited historical and substantive context.

Historically, *Goodyear* addressed environmental contamination over decades with disputed policies going back into the 1940s. *See Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co*., 9th Dist. 19121, 2001 WL 57170, *1-11. It was very difficult to tell when injury began and ended. "All sums" allocation was seen as a practical way to manage such cases.

Substantively, *Goodyear* issued allocation rulings for primary general liability policies that included "all sums" language, but expressly declined to make allocation rulings with respect to excess policies like the NUFIC Policy. *Goodyear*, 2002-Ohio-2842, ¶12. It was very difficult to tell whether or how excess and umbrella policies would be implicated. Therefore, this Court

[18] *Lincoln Electric* was settled and dismissed after oral argument, but its extensive briefing and archived oral argument are still available on this Court's docket.

wisely withheld judgment on the issue.

Lubrizol's Products Claims lack either the historical or substantive context of *Goodyear*. If there is some common thread with *Goodyear*, Lubrizol has done a good job of hiding it. Simply put, other than to satisfy Lubrizol's wishes, there is no reasonable basis evident from the record to contend that *Goodyear* should be applicable to the NUFIC Policy. Accordingly, OII urges this Court to answer the Certified Question in the negative.

Respectfully submitted,

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