№ 2009-0104

In the Supreme Court of Ohio

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.,

Plaintiff-Appellee,

v.

PARK-OHIO INDUSTRIES, INC., et al.,

Defendants-Appellants.

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SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE № CA-07-090619

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CONTINENTAL CASUALTY COMPANY

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I.
EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC OR GREAT GENERAL INTEREST

Six years ago, this Court decided *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 and held that when a continuous occurrence triggers coverage under multiple 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., ¶11. Under the "all sums" allocation method, this Court held that a targeted insurer may obtain contribution from "other applicable * * * insurance policies." Id.

In this case of first impression, the Eighth District attempted to apply the principles set forth in *Goodyear*. However, in determining what other insurance policies were "applicable," the appellate court ignored the fact that the policies of the non-targeted insurer Continental Casualty Company ("Continental") did not provide coverage for the insured's claim because the insured had violated the policy conditions requiring timely notice and prohibiting voluntary payments. Under the guise of "equity," the Eighth District rewrote Continental's policy to eliminate its rights to notice and to control the defense and settlement of the claim in order to allow the targeted insurer to obtain contribution. In so doing, the appellate court vastly and unfairly expanded the *Goodyear* holding and totally ignored Continental's rights by finding that:

- the insured had no duty to notify the non-targeted insurer of a claim or otherwise meet the conditions of the non-targeted insurer's policy (App. Op. at 13, Apx. p. 16);
- the targeted insurer seeking contribution from a non-targeted insurer is not required to assure that the non-targeted insurers are given notice of the claim or the right to participate in the defense of the claim (App. Op. at 15, Apx. p. 18);

- the non-targeted insurer has "no right to participate in the litigation and defense of [the underlying matter]" despite policy provisions that explicitly give that right to the insurer (App. Op. at 15, Apx. p. 18); and,

- the non-targeted insurer is required to provide coverage even when its policy terms have been violated.

Nothing in *Goodyear* allows this result and it is contrary to established Ohio law. Accordingly, Continental urges this Court to exercise its discretionary jurisdiction over this case because the issues raised herein are of great public interest and important to the insurance industry as a whole. These are recurring issues involving very significant exposures where Ohio courts have very little guidance. See, e.g., *Goodrich Corp. v. Commercial Union Ins. Co.*, Summit App. Nos. 23585 & 23586, 2008-Ohio-3200, disc. juris. denied, 2008-Ohio-6813. Given the volume of environmental and mass tort coverage cases in state and federal courts, there is a need for clarification of the standards applicable to contribution claims under *Goodyear*.

The first proposition of law involves the issue of whether a targeted insurer can obtain contribution from a non-targeted insurer whose policy is not "applicable" because the insured violated (i) the notice provisions by not providing timely notice, (ii) the voluntary payments provisions by settling without the insurer's consent, and (iii) the policy provisions giving the insurer both the *right* and the duty to defend. Continental submits that the answer to this question must be "no". An insurer's liability for a claim is predicated solely upon the terms and conditions of the contracted-for coverage and liability set forth in the policy of insurance. Here, the Eighth District improperly rewrote Continental's policies and imposed coverage and liability upon Continental without regard to, or (more precisely) in complete disregard to whether Continental had any coverage and liability for the underlying claim.

This issue is very significant. Insurance contracts are written to allocate risks. The insurer takes on the risk of an occurrence, but arms itself with certain important rights. Those rights include the right to obtain prompt notice so the insurer can investigate the claim, determine its insured's liability and preserve evidence. They include the right to control the defense and settlement of a claim so the insurer can limit its ultimate exposure – both for defense and indemnity – by deciding if and when a case should be settled and for how much. When a court ignores the insurer's contractual rights but imposes liability under the policy, it skews the balance by effectively rewriting the insurance contract.

Judicial enforcement of insurance policies is essential so that insurers who do business in Ohio can predict their losses and set reserves. If insurers are unable to forecast their risks and predict losses, the financial stability of the industry will be disrupted.[1] This is especially critical in cases involving the large exposures presented by environmental and mass tort cases, oftentimes involving long periods of possible coverage. When courts are permitted to simply rewrite the terms, conditions and exclusions found in insurance policies by ignoring those policies and imposing liability for a loss that does not otherwise exist – which is what the Eighth District has done here – insurers are likely to withdraw or cease doing business in the Ohio insurance market.

If the Eighth District's opinion is allowed to stand for the unprecedented concept that an insurer can be held liable on a claim despite the terms of its policy that otherwise serve to preclude such liability, courts throughout Ohio will be permitted to ignore the fundamental principle of insurance law that courts must look to the terms of

[1] One need only recall the havoc wrought in the wake of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292 until that situation was remedied by *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.

the insurance contract to determine whether or not an insurer has any liability. That sound principle should not be abandoned, as the Eighth District has done here, when one insurer is pursuing a claim for contribution from another insurer.

The second proposition addresses the important issue of what happens when an insured does not comply with the non-targeted insurer's policy terms and conditions and fails to give the non-targeted insurer notice, refuses to allow the non-targeted insurer to assume the defense and fails to obtain the non-targeted insurer's consent before settling. The question is whether the burden of that failure rests on the targeted insurer who *knows* about the claim, has an *ability* to find out the identity of non-targeted insurers, and can *utilize* its own policy provisions to require the insured to meet its obligations or whether the burden should unfairly rest on the non-targeted insurer who has *no knowledge* of the claim and *no way* to protect itself from the insured's actions.

The Eighth District held that the targeted insurer should suffer no consequence for failing to insist that the insured fulfill its contractual obligations to non-targeted insurers, or for failing to act diligently in preserving its own claim for contribution against those non-targeted insurers. The Eighth District opinion unjustly allows a targeted insurer – and the insured – to ignore other policies by sitting back, failing to put other carriers on notice and delaying pursuit of those carriers for contribution until after the underlying claim has been litigated or settled and the targeted insurer has paid the common insured's claim.[2] And, according to the Eighth District's flawed reasoning, when a contribution claim is eventually made (perhaps years or decades later), the non-targeted carrier is bound by the disposition of the underlying claim without having any

[2] Such an approach is clearly at odds with *Goodyear*'s express recognition at ¶12 that the rights and obligations of non-targeted insurers must be taken into consideration.

ability to participate or minimize its exposure. This outcome cannot be reconciled with either the policy language or precedent from this Court recognizing the importance of prompt notice. This appeal should be accepted in order to clarify that targeted insurers must act diligently and proactively – if the insured fails to do so – in order for a claim for contribution to be preserved against other non-targeted insurers.

The third proposition of law focuses upon the proper standard of review in contribution actions – the abuse of discretion standard. In this case, although the appellate court suggested that it was applying an abuse of discretion standard, it clearly substituted its judgment for that of the trial court. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision is unreasonable, arbitrary or unconscionable. Nowhere does the Eighth District articulate that the trial court abused its discretion under this well-established and deferential standard. Moreover, because the Eighth District largely skirted the standard of review issue, its opinion will lead to confusion and uncertainty by other courts. Accordingly, discretionary review is warranted on this ground as well.

II.
STATEMENT OF THE CASE AND OPINIONS BELOW

This appeal originates from a personal injury lawsuit filed in California by George DiStefano. DiStefano's March 2002 complaint alleged that he sustained bodily injury from exposure between 1961 and 1963 to an asbestos-containing product manufactured by Ohio Crankshaft, the predecessor to Park-Ohio Industries, Inc. ("Park-Ohio"). Appellee Pennsylvania General Insurance Company, formerly known as General Accident Insurance Company ("Penn General") insured Ohio Crankshaft or Park-Ohio from 1960 until 1968. In August 2002, Park-Ohio tendered the defense and indemnity

of the *DiStefano* suit to Penn General. The notice of suit did not indicate that Park-Ohio was notifying any other insurer of the *DiStefano* suit and, in fact, Park-Ohio did not notify any other insurers of the pendency of that lawsuit.[3]

Upon receipt of Park-Ohio's tender, Penn General began a preliminary investigation but it did not assume Park-Ohio's defense or issue Park-Ohio a reservation of rights letter setting forth Penn General's coverage position. Penn General did not seek any information regarding Park-Ohio's other possible insurers nor did it require Park-Ohio to cooperate by identifying other insurers. It did not exercise its right to defend or settle the *DiStefano* lawsuit, and it made no effort to obtain contribution from any other insurers.[4] Indeed, Penn General failed to respond to Park-Ohio's tender until a couple of weeks before the scheduled October 2002 trial date when it advised Park-Ohio that the case had just been assigned to a third party administrator. In September 2002, after receiving an evaluation of the case from Park-Ohio's lawyers setting forth settlement values and defense strategy, Penn General retained its own attorney, but still did not seek any information on other potential insurers or request that Park-Ohio give notice of the *DiStefano* litigation to such other insurers.

On October 6, 2002, Park-Ohio settled the *DiStefano* suit for $1 million. Although Penn General did not formally consent to the settlement, it also did not object. A month later, Penn General's own counsel advised Penn General that it owed all of Park-Ohio's

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[3] Other insurers that had issued policies were: Continental from 1968 to 1975, St. Paul Travelers Companies from 1975 to 1979, and Nationwide Insurance Co. from 1980 to 1988.

[4] At the time of Park-Ohio's tender to Penn General, Ohio and California case law allowed Park-Ohio to argue that it could seek full indemnification and defense from Penn General while leaving it to Penn General to seek contribution from any other insurers. See, *Goodyear Truck Ins. Exchange v. Unigard Ins.* (2000), 79 Cal. App.4th 966, 94 Cal. Rptr.2d 516.

post-tender defense costs and the entire $1 million settlement. Nevertheless, in a belated "reservation of rights" letter authored on February 5, 2003 – four months *after* the settlement was consummated – Penn General offered to pay Park-Ohio's post-tender defense costs but only $250,000.00 of the $1 million settlement. In the same letter, Penn General asked *for the first time* that Park-Ohio put any other insurers on notice of the *DiStefano* suit. Apparently lost on Penn General was the immutable truth that, in light of the settlement, it was too late to put other insurers on notice of the claim.

After an exchange of correspondence in the following months failed to resolve the dispute with Penn General, Park-Ohio filed suit in September 2003 for coverage and bad faith, *Park-Ohio Industries, Inc. v. General Accident Insurance Co.*, Cuyahoga County Court of Common Pleas Case No. 511015. Shortly thereafter, Penn General paid Park-Ohio's post-tender defense costs but only $250,000.00 of the $1 million settlement. At the same time, Penn General asserted that it did not owe Park-Ohio any defense or indemnity for the *DiStefano* litigation, claiming its own coverage defenses, inter alia, that (1) Park-Ohio had failed to give timely notice to Penn General in accordance with the terms and conditions of its policies of insurance, (2) Park-Ohio's claims were barred by its failure to comply with the cooperation provisions of the policies, and (3) Park-Ohio's claims were barred or limited to the extent that they were seeking reimbursement of monies that were paid voluntarily or without Penn General's consent.

Discovery undertaken in July 2004 confirmed that Park-Ohio had not provided any insurer, other than Penn General, with notice of the *DiStefano* suit. Park-Ohio also made available to Penn General documents containing information about Park-Ohio's other insurers. It was only then that Penn General wrote Continental, Nationwide and

Travelers putting each on notice of the *DiStefano* litigation and settlement. In response to this initial notice – nearly two years after the *DiStefano* suit had been settled, Continental declined to reimburse Penn General for the amounts it had paid or might pay to Park-Ohio.[5] Continental maintained that there was no coverage under its policies because there was no compliance with its policy provisions requiring reasonable notice of any suit against one of its insureds, giving Continental the right to defend and settle the action, requiring the insured's cooperation and assistance in the insured's defense, and precluding reimbursement of any voluntary payments made by the insured.[6]

On October 27, 2004, Penn General filed this action against Continental, Travelers and Nationwide in response to their denial of Penn General's contribution claim. By agreement, the trial court decided Penn General's contribution claim based upon the stipulated facts and exhibits filed by the parties and their briefs. (App. Op. at 6, Apx. p. 9) On October 4, 2007, the trial court entered judgment against Penn General denying its claim to contribution. (JE/Op., Apx. pp. 24-37) Penn General appealed the trial court's judgment to the Eighth District Court of Appeals which, in an opinion journalized on December 1, 2008, reversed the trial court. (App. Op., Apx. pp. 1-23)

III.
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 unless its policy is "applicable." In order for the policy to be "applicable" to a claim, there must be full compliance with all

[5] It was not until November 2005 that Penn General paid the $750,000.00 balance of the $1 million settlement – three years after Penn General's own lawyer first advised that it owed the full amount of the settlement.

[6] Aside from late notice, these were the same policy defenses raised by Penn General. While ultimately electing to abandon its own policy defenses, Penn General had no justification or authority to relinquish the rights of Continental under its policy with Park-Ohio.

terms and conditions of coverage in the non-targeted insurer's policy.

Penn General brought this contribution action claiming to rely on certain dicta found in *Goodyear* suggesting that a targeted insurer may seek contribution from other insurers whose policies are "applicable." However, the Eighth District went far beyond *Goodyear* and found an unprecedented right by the targeted insurer to obtain contribution without regard to the terms and conditions of the non-targeted insurer's policy. If the Eighth District's opinion is permitted to stand, a seismic shift in Ohio's contribution jurisprudence will result for it allows contribution from an insurer which is not liable for the underlying claim or loss. That is *not* Ohio law. It is black letter law that contribution exists only when there is "common liability" for the underlying obligation, loss or claim. *Assets Realization Co. v. American Bonding Co. of Baltimore* (1913), 88 Ohio St. 216, 253; *Republic Steel v. Glaros* (1967), 12 Ohio App.2d 29, 33. In insurance law, an insurer who has paid the whole loss on a claim may, in equity, recover contribution only from those other insurers "who are also liable therefor." *Fire Insurance Co. v. Dennison* (1916), 93 Ohio St. 404, 410. Whether a particular insurer has "common liability" giving rise to contribution necessitates coverage first being owed by that insurer pursuant to the terms of its own policy. See, 15 Russ and Segalla, COUCH ON INSURANCE (3d Ed.2005), Section 218:17 at 218-24. Otherwise, the contribution claim is resolved in a vacuum.

In this case, the Eighth District dispensed with any need to inquire into the Continental policy as the prerequisite to "common liability." According to the Eighth District, contribution exists, not based upon "common liability" of all insurers, but irrespective of that concept. Nowhere is this more evident than in the Eighth District's

shocking statement that compliance with the terms and conditions of coverage in Continental's policy is unnecessary (and any breaches of the policy can and should be ignored) in cases of contribution. (App. Op. at 8, Apx. p. 11).

The Eighth District's opinion ignores the sound principles set forth in *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 291, 1998-Ohio-111 where this Court held that it is a fundamental principle of insurance law that courts must look to the terms of the insurance contract to determine whether or not an insurer has any liability. In *Heller v. Standard Acc. Ins. Co.* (1928), 118 Ohio St. 237, 242, this Court recognized how "extremely important" prompt notice of a claim is to an insurance company. Again in *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau*, 88 Ohio St. 3d 292, 302-303, 2000-Ohio-330, this Court upheld the importance and need for prompt notice to the insurer as a precondition to coverage. Even *Goodyear* espouses the importance of notice provisions in insurance contracts. 2002-Ohio-2842, at ¶14. Such requirements should not be overlooked or effectively written out of an insurer's policy in a case seeking contribution. *Lexington Ins. Co. v. Gen. Acc. Ins. Co. of Am.* (C.A.1, 2003), 338 F.2d 42, 50. But that is precisely what the Eighth District did here. This Court should reject the Eighth District's opinion and confirm that Ohio adheres to these fundamental insurance law and contract principles by accepting jurisdiction over this appeal and reversing the Eighth District's unprecedented expansion of contribution to an insurer on a claim without regard to the policy's terms and conditions of coverage.

<u>Proposition of Law No. II</u>: **To obtain contribution, a targeted insurer bears the burden to do what is necessary to secure contribution from other applicable insurance carriers, which includes the duty to diligently ascertain the identity of other insurers and to put those insurers on timely notice of the claim.**

Goodyear did not have to reach the very difficult question presented by this appeal.

Because of a factual question concerning whether Goodyear gave timely notice to its insurers, this Court did not address the question of what happens to a contribution claim when an insured does not comply with policy conditions of the non-targeted insurer. That question needs to be answered and clarification given to insurers and Ohio's courts.

In this case, there is no question that notice to Continental was not timely; it was not given until two-years after the *DiStefano* case was settled. The Eighth District dealt with this issue by stating that "under the all sums approach adopted by the Ohio Supreme Court in *Goodyear*, Park-Ohio had no duty to notify * * * Continental of the [underlying] claim." (App. Op. 13, Apx. p. 16). Nothing in *Goodyear* condones an insured's absolute failure to comply with policy conditions, and the appellate court's resolution of this issue was plainly wrong.[7]

The Eighth District compounded its error by finding that not only did Park-Ohio not have any obligation to notify the non-targeted insurers of the claim but Penn General was also relieved of any obligation to provide notice. Thus, the appellate court stripped Continental of its right to participate in the litigation and defense of the *DiStefano* action by holding that Continental was powerless to challenge the settlement or its amount because "the all sums approach anticipates this very result." (App. Op. at 15, 16, Apx. p. 18, 19). In effect, then, what the appellate court decided was that the burden of the insured's failure to comply with the policy terms and conditions should be placed squarely and fully upon the non-targeted insurer – *the only entity without fault.*

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[7] Importantly, while *Goodyear* may allow an insured to select and tender a claim to a targeted insurer, such selection of the targeted insurer does not absolve the insured of the obligations owed to all other non-targeted insurers arising under other triggered policies, *including the insured's contractual duty to give notice of a claim.* Thus, *Goodyear* should be clarified to confirm that whether the insured *selects* any particular insurer, the insured must still comply with all terms and conditions of coverage found in the policies of other non-targeted insurers whose policies may be triggered, including *giving timely notice* of the claim.

Continental submits that as between the targeted insurer and the non-targeted insurer, the burden of the insured's failure to comply with the policy terms, must be placed on the targeted insurer because "it is elementary that a right to contribution can rise no higher than the right of the alleged insured to compel his insurer to cover the loss." *Oregon Farm Bur. Ins. Co. v. Safeco Ins. Co.* (1968), 249 Ore. 449, 452-453, 438 P.2d 1018. It is the targeted insurer who has notice of the claim, who is involved in the defense of the matter, and who has the ability to force the insured to comply. As the trial court recognized, this is fair because it is the targeted insurer that may ultimately seek payment for the claim.

Goodyear made it clear that any insurer intending to seek contribution bears the burden to do whatever may be necessary in order to preserve its contribution claim. 2002-Ohio-2842, at ¶11. This is a duty imposed upon all insurers who may seek contribution. See, 15 Russ and Segalla, COUCH ON INSURANCE (3d Ed.2005), Section 218:20 at 218-26. Here, Penn General knew when it received notice of the *DiStefano* lawsuit that in order to preserve its contribution claim, Park-Ohio's other insurers must be notified of the lawsuit and its potential contribution claim. See, *Goodyear*, at ¶11; *Truck Ins. Exchange*, 79 Cal.App.4th at 978. Penn General did nothing to assure that Continental was put on notice of the *DiStefano* suit or Penn General's potential contribution claim, *until two years after the DiStefano suit was settled.* At that late date, the notice afforded Continental was worthless; the claim was over.

All the policies Penn General, Continental and Nationwide issued to Park-Ohio afford the insurer the right to participate in the insured's defense and contain prompt notice, cooperation and no-voluntary payment provisions. Penn General was well aware of those provisions, because it referenced them in response to Park-Ohio's claim for

coverage. Penn General, as a targeted insurer, also knew that, under its own cooperation clause, it had an ability to force Park-Ohio to comply with its obligations to other insurers. *Conold v. Stern* (1941), 138 Ohio St. 352, paragraph one of the syllabus. It also had the option of filing a declaratory judgment action to secure discovery of other policies and the identity of carriers or utilizing Fed.R.Civ.P. 27 to secure pre-litigation discovery and inspection of insurance documents from the insured in anticipation of making a contribution claim. By availing itself of none of these options, Penn General forfeited its claim to contribution. See, 15 Russ and Segalla, COUCH ON INSURANCE (3d Ed.2005), Section 218:20 at 218-27.

Contribution is an equitable remedy and equity does not favor an insurer seeking or obtaining contribution where that insurer did not require compliance with its own policy conditions or where the insurers from whom contribution is sought were not afforded notice of the underlying suit and a reasonable opportunity to investigate the underlying suit and potential contribution claim. In *Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.* (1952), 157 Ohio St. 385, 392, this Court recognized that an insurer would have no right of recovery against another insurer unless it took "all reasonable measures to preserve any right which it might have, through subrogation or otherwise," to compel other insurers to discharge their obligation. *State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.* (1970), 23 Ohio St.2d 45, 49; *Insurance Co. of North America v. Travelers Ins. Co.* (1997), 118 Ohio App.3d 302, 315 (recognizing the ancient maxim that "Equity rewards the vigilant, not those who slumber on their rights.") As this case demonstrates and the trial court appropriately held, Penn General failed to diligently act to preserve a claim for contribution. (JE/Op. at 10, Apx. p. 33) Under these circumstances, Penn General's contribution claim should not be allowed.

Proposition of Law No. III: Since contribution between insurers is based upon principles of equity, a trial court's decision is reviewed for an abuse of discretion. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court where there is some competent, credible evidence supporting the trial court's judgment.

Because Penn General's contribution action rests on principles of equity, *Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.* (1946), 147 Ohio St. 79, paragraph five of the syllabus; *Fire Insurance Co. v. Dennison* (1915), 93 Ohio St. 404, 410, the trial court had discretion in fashioning a resolution. *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 2002-Ohio-6435, at ¶61. See *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, at ¶14, "reaffirm[ing] that declaratory judgment actions are to be reviewed under an abuse-of-discretion standard." Because trial courts are given discretion when exercising their equitable jurisdiction, appellate review is narrow. When a trial court has exercised discretion, the test for finding an abuse of that discretion is more stringent than the test for finding an error of law. *Shesler v. Consol. Rail Corp.*, 151 Ohio App.3d 462, 2003-Ohio-320, at ¶51. Under an abuse of discretion standard, a reviewing court is not free merely to substitute its judgment for that of the trial court. *Grundy v. Dhillon*, Slip Opinion No. 2008-Ohio-6324.

Had the Eighth District applied the appropriate abuse of discretion standard, the trial court's judgment would not have been reversed. "Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When a trial court exercises its discretion, "[i]n order to have an 'abuse' in reaching such a determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 87. Nowhere does the Eighth District articulate that the trial court abused its discretion under this standard.

In this case, the parties agreed to have the case decided based upon stipulations and briefs. In its review, the court of appeals merely substituted its view of the facts and evidence to arrive at a conclusion that differed from that of the trial court. (App. Op. at 8, 12, 13-14, 17, Apx. p. 11, 15, 16-17, 20) But, that is not the proper function of an appellate court when reviewing the trial court's exercise of discretionary authority. See, *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587.

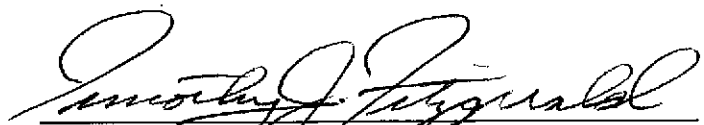
Here, the trial court properly determined that Penn General's claim for contribution should be rejected. It found that Penn General "did not take reasonable measures to preserve its contribution rights" and it allowed the *DiStefano* action to be settled without Continental's consent and in "clear violation" of its policy provisions. (JE/Op. at 9, Apx. p. 32). Noting that equity "does not favor contribution where the party seeking contribution did not require compliance with its own policy conditions and now seeks to impose that decision on other insurers through litigation," the trial court rejected Penn General's contribution claim because there was no "applicable coverage" under the Continental policies. (JE/Op. 10, 12, Apx. p. 33, 35). This ruling was not clearly erroneous. This Court should therefore accept this appeal and correct the appellate court's refusal to properly apply the abuse of discretion standard.

IV.
CONCLUSION

WHEREFORE, Defendant-Appellant Continental Casualty Company respectfully requests and moves the Supreme Court of Ohio to accept jurisdiction over this appeal.

Date: January 14, 2009.

Respectfully submitted,



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A copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant Continental Casualty Company* was sent by regular U.S. Mail, postage pre-paid, this 14th day of January, 2009 to the following:

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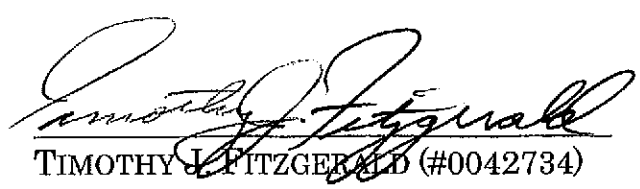

TIMOTHY J. FITZGERALD (#0042734)

APPENDIX

DEC 1 - 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90619

PENNSYLVANIA GENERAL INSURANCE CO.

PLAINTIFF-APPELLANT

vs.

PARK-OHIO INDUSTRIES, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-546323

BEFORE: McMonagle, J., Sweeney, A.J., and Stewart, J.

RELEASED: November 20, 2008

JOURNALIZED: DEC 1 - 2008

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FILED AND JOURNALIZED
PER APP. R. 22(E)

DEC 1 -- 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

NOV 2 0 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

Plaintiff-appellant, Pennsylvania General Insurance Company, appeals from the trial court's judgment denying its claim seeking equitable contribution from defendants-appellees, Nationwide Insurance Company and Continental Casualty Company. For the reasons that follow, we reverse and remand.

I. Factual History

A. The DiStefano Asbestos Bodily Injury Claim

This case arose out of a bodily injury suit filed on March 7, 2002 by George DiStefano against Pennsylvania General's insured, Park-Ohio Industries Inc., and a number of other defendants in California state court. DiStefano alleged mesothelioma due to asbestos exposure at various work sites in California between the 1960's and 1980's. During his deposition, DiStefano testified that he had worked with asbestos-containing coils manufactured by Ohio Crankshaft, the predecessor to Park-Ohio, from January 1961 through approximately June 1963, periods when Pennsylvania General insured Park-Ohio.

Upon being served with the complaint, Park-Ohio's risk manager and its current insurance agent initiated a search for applicable liability policies. Park-Ohio also retained a San Francisco law firm to represent its interests. Upon locating the Pennsylvania General policies five months later, in late August 2002, Park-Ohio notified Pennsylvania General of the DiStefano claim. When

Pennsylvania General received notice of the claim, the DiStefano trial was set for the beginning of October 2002–approximately six weeks later.

Upon receipt of the notice, Pennsylvania General began its claim investigation. It retained Henry Rome, a California attorney with expertise in asbestos matters, to assist its review and evaluation. It also inquired of Park-Ohio regarding "other insurance policies."

In September 2002, prior to trial, Park-Ohio's lawyers gave Pennsylvania General an evaluation of the case regarding settlement values and strategy. Counsel advised that coordinated medical counsel had advised that they saw no viable medical defense and opined that the case had a conservative verdict value of $5-6 million. Counsel stated that the current settlement demand was $3 million and advised engaging DiStefano's counsel in "meaningful settlement negotiations immediately."

On October 6, 2002, Park-Ohio, without the knowledge of Pennsylvania General, negotiated a settlement of the DiStefano claim for $1 million in exchange for a full release and dismissal with prejudice of the action. After the settlement, in a letter dated October 15, 2002, Mr. Rome advised Pennsylvania General that the settlement amount appeared to be in line with other mesothelioma cases in the San Francisco Bay Area, particularly where there was no other viable co-defendant–as in the DiStefano matter.

Mr. Rome further advised Pennsylvania General that, based on his experience, he believed Park-Ohio was well represented by the two law firms it had retained, both having excellent reputations in the defense of asbestos cases. Mr. Rome also advised Pennsylvania General that he agreed with the legal analysis of Park-Ohio's defense counsel, who had concluded that Park-Ohio would not likely mount a successful medical defense. Mr. Rome also agreed that Park-Ohio was the only viable defendant and conservatively faced multi-million dollar exposure at trial.

Mr. Rome further advised Pennsylvania General that he did not believe Pennsylvania General would be able to deny the DiStefano claim based on Park-Ohio's five-month delay in notifying Pennsylvania General, as there was no evidence of prejudice in light of the excellent asbestos litigation reputations of the defense firms Park-Ohio had retained.

Subsequently, in November 2002, Mr. Rome advised Pennsylvania General that under California law, there is a "continuous" trigger of coverage for asbestos personal injury actions such that all policies of a manufacturer are triggered upon exposure. Mr. Rome explained that because there were four Pennsylvania General policies, each with a $250,000 limit, there was $1 million available from which to pay the $1 million settlement.

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Nevertheless, in February 2003, Pennsylvania General informed Park-Ohio via a reservation of rights letter that it would pay $112,238.70 in post-tender defense costs and only $250,000 of the $1 million settlement. Pennsylvania General stated that it was its position "that under prevailing law, plaintiff's claim qualifies as a single occurrence, and, even under a continuous trigger, the insured is entitled only to the limits of a single policy; i.e. $250,000 per person for bodily injury." Pennsylvania General reserved all of its rights under the potentially applicable policies and again requested "other insurance" information from Park-Ohio. Despite Pennsylvania General's request, Park-Ohio did not provide the requested information.

B. Park-Ohio's Coverage Action Against Pennsylvania General

In September 2003, Park-Ohio filed a complaint for declaratory judgment against Pennsylvania General in the matter captioned *Park-Ohio Industries Inc. v. Gen. Accident Ins. Co.*, Court of Common Pleas, Cuyahoga County, Ohio, No. CV-03-511015 ("Park-Ohio suit"). Park-Ohio asserted claims for declaratory judgment, breach of contract and bad faith, and sought defense costs and indemnification of the full settlement amount in the DiStefano action from Pennsylvania General. In October 2003, Pennsylvania General paid $112,238.70 to Park-Ohio as reimbursement of post-tender defense costs incurred by Park-Ohio in the DiStefano suit, and in December 2003, Pennsylvania General paid

$250,000 to Park-Ohio as the full per person bodily injury limit of one of the policies at issue.

During litigation, Pennsylvania General, on numerous occasions, again requested information about Park-Ohio's "other insurers" from Park-Ohio. Pennsylvania General was unable to obtain this information from Park-Ohio until, after motion practice, the trial court ordered Park-Ohio to produce the information. In July 2004, Pennsylvania General finally received copies of "other insurance" related documents from Park-Ohio. Approximately seven weeks later, on September 3, 2004, Pennsylvania General wrote to Nationwide, Continental and St. Paul/Travelers[1] seeking equitable contribution for the DiStefano claim. None of these insurers agreed to contribute, although like Pennsylvania General, they were primary insurers of Park-Ohio, their policies were triggered by the DiStefano claim, and the essential terms, conditions and exclusions of their policies are nearly identical to those of Park-Ohio's policies with Pennsylvania General.

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[1]Continental insured Park-Ohio from December 30, 1968 to January 1, 1975; Travelers insured Park-Ohio from January 1, 1975 to January 1, 1979; and Nationwide insured Park-Ohio from January 1, 1979 to February 1, 1988.

C. Pennsylvania General's Equitable Contribution Action

In October 2004, before the Park-Ohio suit against it was resolved, Pennsylvania General filed this action for declaratory judgment seeking equitable contribution from Nationwide, Continental and St. Paul/Travelers[2] for settlement and defense costs of the DiStefano claim. Specifically, Pennsylvania General sought $246,527 from Continental and $372,995 from Nationwide, plus prejudgment interest from an unspecified date.

The action was subsequently stayed pending resolution of the Park-Ohio suit. In November 2005, Pennsylvania General settled the Park-Ohio suit by paying the remaining $750,000 of the DiStefano claim, for a total payment of $1 million.

Pennsylvania General, Nationwide and Continental subsequently agreed to a bench trial in this case, to be decided upon the briefs, joint stipulated facts, and joint exhibits. In a 15-page decision, the trial court found that Nationwide and Continental had no duty to indemnify or defend Park-Ohio because Park-Ohio had breached the notice provisions of their applicable policies and thus "waived" Pennsylvania General's right to contribution. The trial court further found that Pennsylvania General did not take reasonable measures to preserve

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[2]Pennsylvania General and Travelers subsequently agreed to a settlement and Travelers is not a party to this appeal.

its contribution rights because "it should have made certain the other insurers were notified before the DiStefano suit was settled" to allow them to participate in the defense and settlement of the suit. The trial court found "no equitable reasons for this court to endorse that failure" and, therefore, the trial court held that Nationwide and Continental did not owe Pennsylvania General any contribution for the defense and settlement of the DiStefano action. Pennsylvania General appeals from this judgment.

II. Law and Analysis

A. Standard of Review

The parties have made much over the appropriate standard of review in this case. Pennsylvania General argues that since the trial court reviewed this case upon stipulated facts and briefs, its decision is subject to review de novo as upon an error of law. See, e.g., *Mazza v. Am. Continental Ins. Co.*, 9th Dist. No. 21192, 2003-Ohio-350, affirmed *In re Uninsured and Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888. Nationwide and Continental claim that since the cause of action is equitable and not legal in nature (equitable contribution), the appropriate standard of review is abuse of discretion.

We find that the outcome is the same, no matter the standard of review. As explained below, the trial court's resolution of the controversy upon the basis of Park-Ohio's lack of notice to Nationwide and Continental was an error of law, as the contractual provision requiring notice existed only in the contracts between Park-Ohio and its insurers, and not between Pennsylvania General and Nationwide and Continental. Hence, Pennsylvania General's equitable claim of contribution cannot be invalidated as a result of alleged breaches of contracts to which Pennsylvania General was not a party.

Reviewed on the basis of abuse of discretion, we likewise reverse and remand. The record is uncontroverted that the DiStefano settlement was equitable, the attorney fees were reasonable, counsel chosen by Park-Ohio was competent, Pennsylvania General adequately represented Nationwide and Continental's interests, and Nationwide and Continental received reasonable notice of Pennsylvania General's contribution claim. We discern no prejudice whatsoever to Nationwide and Continental. Under such circumstances, to relieve them of the obligation of contribution, and leave Pennsylvania General with the entire obligation, was an abuse of discretion.

B. The "All Sums" Approach

In *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶6, the Ohio Supreme Court noted that Ohio follows the

"all sums" approach to allocation of insurance coverage responsibility where a claimed loss involving long-term exposure and delayed manifestation injury (such as an asbestos-related claim) implicates numerous insurance policies over multiple policy periods. The *Goodyear* court explained that in such situations, because the insured expected complete security from each policy that it purchased, "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 limits of coverage. In such an instance, the insurers bear the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary." Id. at ¶11.

In short, each insurer on the risk between the initial exposure and the manifestation of disease or death is fully liable to the insured for indemnification and defense costs. In order to afford the insured the coverage promised by the insurance policies, the insured is free to select the policy or polices under which it is to be indemnified. "This approach promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible." Id. at ¶11.

C. Equitable Contribution in General

Contribution is the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate)

reimbursement. *Travelers Indemn. Co. v. Trowbridge* (1979), 41 Ohio St.2d 11, paragraph two of the syllabus, overruled on other grounds *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.* (1995), 73 Oho St.3d 391. The general rule of contribution is that "one who is compelled to pay or satisfy the whole to bear more than his or her just share of a common burden or obligation, upon which several persons are equally liable *** is entitled to contribution against the others to obtain from them payment of their respective shares." 18 American Jurisprudence 2d (2004), Contribution, Section 1. The doctrine "rests upon the broad principle of justice, that where one has discharged a debt or obligation which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him a ratable proportion." *Baltimore & Ohio R.R. Co. v. Walker* (1888), 45 Ohio St. 577, 588. Since the doctrine of contribution has its basis in the broad principles of equity, it should be liberally applied. Id. Equity "cannot be determined by any fixed rule, but depends upon the peculiar facts and equitable considerations of each case[.]" *Tiffin v. Shawhan* (1885), 43 Ohio St. 178, paragraph one of the syllabus.

D. Application of These Principles to This Case

Pennsylvania General asserts four assignments of error. Briefly summarized, Pennsylvania General argues that it should not be penalized

because its insured, Park-Ohio, did not comply with contractual provisions of contracts to which Pennsylvania General was not a party. It argues further that the overwhelming equities favor Pennsylvania General's contribution claim, because Pennsylvania General resolved the DiStefano claim in accordance with the terms and conditions of its policies and applicable law: it honored its contractual obligations to its policyholder, complied with the letter and spirit of *Goodyear* by paying the entirety of the claim, and then timely pursued its equitable contribution claim against the non-selected insurers.

Nationwide and Continental respond that they owe no coverage to Park-Ohio, because Park-Ohio failed to give them prompt notice of the DiStefano claim and settled without their approval in violation of their policy provisions. Therefore, they contend, they share no common liability with Pennsylvania General which would give rise to an equitable contribution claim. They argue further that it is not equitable to allow Pennsylvania General to obtain contribution, because Pennsylvania General did not give them reasonable notice of the DiStefano suit or its potential contribution claim, which prejudiced their ability to participate in the defense and settlement of the DiStefano suit.

We begin by observing that, despite the trial court's finding to the contrary, *Goodyear* is not the controlling authority in this matter. Although *Goodyear* indicates that Ohio follows the all sums approach in apportioning

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available insurance coverage when multiple policies are triggered to cover the same long-term injury or loss, it does not address the issue presented by this case: may one insurer, who was selected by the insured to indemnify its loss and who paid the entire settlement amount to the insured, recover by contribution from other insurers who were similarly liable on the claim but not selected by the insured, and who had no knowledge of the loss or payment until the demand for contribution was made? We hold, on these facts, that it may.

At the outset, we recognize that "[c]ontribution rights, if any, between two or more insurance companies insuring the same event are not based on the law of contracts. This follows from basic common sense, because the contracts entered into are formed between the insurer and the insured, not between two insurance companies. Accordingly, whatever rights the insurers have against one another do not arise from contractual undertakings. *** Instead, whatever obligations or rights to contribution may exist between two or more insurers of the same event flow from equitable principles." *Maryland Cas. Co. v. W.R. Grace and Co.* (2000), 218 F.3d 204, 210-211.

Thus, we reject Nationwide and Continental's argument, and the trial court's finding, that Park-Ohio's policy breaches (specifically, its failure to give Nationwide and Continental timely notice of the DiStefano suit, failure to assist and cooperate with a defense, and voluntary payment) somehow preclude

Pennsylvania General's contribution claim against them. This is not a contract action: Pennsylvania General's equitable contribution claim does not arise out of the policies between Park-Ohio and Nationwide and Continental, so Park-Ohio's conduct with respect to those policies can not "waive" any contribution rights that Pennsylvania General might have against those insurers.

Further, under the all sums approach adopted by the Ohio Supreme Court in *Goodyear*, Park-Ohio had no duty to notify Nationwide and Continental of the DiStefano claim. As set forth in *Goodyear*, Park-Ohio could, as it did, select one insurer from the triggered policies to pay the entire claim and then leave that insurer to pursue a contribution claim from Park-Ohio's other insurers.

Applying equitable principles, we are similarly unpersuaded by Nationwide and Continental's argument that Pennsylvania General is not entitled to contribution because it failed to timely notify them of the DiStefano matter and its potential contribution claim and failed to insist on compliance with its policy terms (which are nearly identical to the policies Park-Ohio had with Nationwide and Continental) to void coverage.

With respect to notice, the stipulated facts demonstrate that despite repeated requests for "other insurance" information from Park-Ohio, Pennsylvania General was unable to obtain information regarding other insurers from Park-Ohio until finally, after motion practice, the court ordered Park-Ohio

to produce the information. Pennsylvania General then contacted the other insurers within weeks of learning of their existence and sought contribution for the DiStefano claim. On these facts, any argument that Pennsylvania General was not diligent in pursuing other insurance information and preserving its equitable contribution action is without merit.

Further, applying equitable principles to these facts, we cannot discern, nor have Nationwide and Continental demonstrated, any prejudice arising from Pennsylvania General's notice. Nationwide and Continental argue, and the trial court agreed, that Pennsylvania General's failure to notify them of the DiStefano matter in the six weeks between Pennsylvania General's learning of the case and Park-Ohio's early settlement prejudiced them, because they were unable to participate in the defense and settlement of the lawsuit. But the all sums approach adopted by the Ohio Supreme Court in *Goodyear* anticipates exactly this approach.

Under the all sums approach, only the insurer selected by the insured defends the insured and participates in the underlying tort claim litigation. *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C. 1981), 667 F.2d 1034, 1051 (cited with approval in *Goodyear*). The duty of that insurer is to defend the insured, not to minimize its own liability. Id. Any disputes about insurance coverage are to be resolved separately from the underlying tort claim to minimize undue

inconvenience to the victim and to avoid the possibility that the victim's tort suit becomes "an unwieldy spectacle" in which groups of insurers pursue disputes with each other. Id.

In light of *Goodyear* and *Keene*, Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the DiStefano matter, so they could not have been prejudiced by Pennsylvania General's failure to notify them of the suit and allow their participation in it.

Likewise, Pennsylvania General had no obligation to notify Nationwide and Continental of its potential equitable contribution claim prior to settlement of the DiStefano matter. A cause of action for equitable contribution arises only after one under a legal duty has been compelled to pay more than his or her share of a common burden. 18 American Jurisprudence 2d (2004), Contribution Section 9. Thus, Pennsylvania General was not required to seek contribution from Nationwide and Continental until the DiStefano claim was fully and finally resolved in November 2005. Nevertheless, Pennsylvania General did more than what was required to preserve and pursue its equitable contribution claim. Within weeks after learning of Park-Ohio's other insurers, it notified Nationwide and Continental of its intention to seek contribution for monies paid to Park-Ohio in September 2004, more than a year before it made its final payment to

Park-Ohio. We fail to discern any prejudice to Nationwide and Continental by this timely notice.

Likewise, we are not persuaded by Nationwide and Continental's argument that Pennsylvania General is not entitled to contribution because it failed to insist on compliance with the notice, cooperation, and voluntary payment provisions of its policies. In short, Nationwide and Continental argue that it is not equitable to allow Pennsylvania General to impose its coverage, litigation and settlement decisions on them as non-selected insurers. But, as already discussed, the all sums approach anticipates this very result.

Further, the stipulated facts in the record demonstrate that Pennsylvania General exercised or reserved all of its policy rights. When Pensylvania General was presented with Park-Ohio's claim in late August 2002, the DiStefano matter was set for trial approximately six weeks later. Pennsylvania General immediately begin its investigation of the claim and sought information about its own alleged policies; the policies of other potential insurers of Park-Ohio; the viability of any defenses of Park-Ohio to the plaintiff's claim; the range of monetary exposure of Park-Ohio; the competence of underlying defense counsel for Park-Ohio; whether and, if so, to what extent coverage might be owed to Park-Ohio; and the viability of any possible defenses to coverage. To assist in

its evaluation of the DiStefano claim of Park-Ohio, Pennsylvania General hired Henry Rome, an attorney experienced in asbestos matters.

As a result of its investigation, Pennsylvania General determined that Park-Ohio's underlying defense counsel were experienced and well-respected; Park-Ohio did not have strong defenses to the DiStefano claim; Park-Ohio was the sole remaining viable defendant; the case presented a "dangerous multi-million dollar exposure" to Park-Ohio; and the $1 million settlement amount was in line with similar cases in the jurisdiction. In addition, Mr. Rome counseled Pennsylvania General that there was not a strong basis upon which to assert a late-notice defense. Pennsylvania General heeded its counsel's advice regarding the futility of pursuing a late-notice defense and challenging the amount of the settlement, although prior to its issuance of any payment to Park-Ohio, Pennsylvania General reserved all of its rights under its policies.

The stipulated facts demonstrate that Pennsylvania General appropriately investigated, handled and resolved the DiStefano claim in accordance with the terms and conditions of its policies. We find nothing to indicate that the fact or amount of the settlement would have been any different if Nationwide or Continental, with policies nearly identical to Pennsylvania General's, had been selected by Park-Ohio and presented with the DiStefano claim, as there simply were not any viable defenses to coverage.

Neither Nationwide nor Continental has asserted any exclusion that would preclude coverage under their policies to Park-Ohio. Both have conceded that their policies were triggered by the DiStefano claim, and that the essential terms, conditions, and exclusions of the Nationwide, Continental, and Pennsylvania General policies are nearly identical. Therefore, the equities demand that Nationwide and Continental, as co-insurers who shared a common liability with Pennsylvania General and who lost no rights nor suffered any prejudice by resolution of the DiStefano claim, pay Pennsylvania General their respective pro rata shares of defense costs and indemnity paid by Pennsylvania General on behalf of Park-Ohio in the DiStefano matter. To rule otherwise would allow Nationwide and Continental to be unjustly enriched at the expense of Pennsylvania General.

Public policy also demands this result. To allow the insured to unilaterally extinguish all potential sources of contribution renders illusory the right of contribution established in *Goodyear*. We do not believe it was the intention of *Goodyear* to condition a targeted insurer's right to contribution on the action or inaction of the insured and leave the targeted insurer without recourse. Further, we do not want to discourage the prompt settlement of insurance claims. To hold that Pennsylvania General should not have made any payments to Park-Ohio unless and until all other potentially triggered insurers had been

identified and notified of the DiStefano claim would discourage the prompt resolution of these claims by the insurers. In future cases, the targeted insurer would be reluctant to resolve the claim until all other potentially triggered insurers had been identified and notified about the claim. This would delay or prevent settlements that would otherwise occur, contrary to the intent of *Goodyear* and the all sums approach.

The Ohio Supreme Court requires insurers to be vigilant in recognizing and fulfilling their contractual obligations. See, e.g., *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339. Pennsylvania General did just that. It investigated, handled and resolved the DiStefano claim in accordance with the terms and conditions of its policies, and, in compliance with *Goodyear*, paid the entirety of the claim and timely pursued its equitable contribution claim against the non-selected insurers. It should not be penalized for doing so.

Because the trial court did not agree that Pennsylvania General was entitled to equitable contribution, it did not reach the issue of what share of the DiStefano claim should be assigned to Nationwide and Continental. Pennsylvania General asks this court to apply its chosen method of allocating loss and determining prejudgment interest and order Nationwide and Continental to pay a sum certain as calculated by Pennsylvania General. As the

trial court did not decide this issue, we do not address it for the first time on appeal. *Republic Steel Corp. v. Hailey* (1985), 30 Ohio App.3d 103, 108.

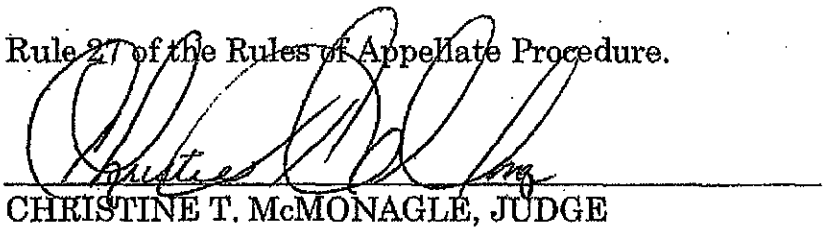
Appellant's assignments of error are sustained. The judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, A.J., and
MELODY J. STEWART, J., CONCUR

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COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

PENNSYLVANIA GENERAL INSURANCE COMPANY Plaintiff, v. PARK-OHIO INDUSTRIES, INC., et al., Defendants.	CASE NO. CV-04-546323 JUDGE EILEEN T. GALLAGHER

JOURNAL ENTRY AND OPINION

I. OVERVIEW

This declaratory judgment for equitable contribution was brought by plaintiff Pennsylvania General Insurance Company (hereinafter "Penn General") against the Defendants to recover monies for their respective proportional share of the defense and indemnity payments associated with Penn General's resolution of an underlying asbestos bodily injury lawsuit filed by George DiStefano against the Parties common insured, Park-Ohio Industries ("Park-Ohio"). Each of the insurers involved in this equitable contribution action issued primary, comprehensive, general liability insurance policies to Park-Ohio. The parties do not dispute that based upon the dates of his exposure to Park-Ohio's asbestos-containing products through the date of his diagnosis with mesothelioma, Mr. DiStefano's bodily injury claim "triggered" each of the policies at issue in this lawsuit. Plaintiff Penn General, however, was the only insurer selected by Park-Ohio to respond to

the bodily injury lawsuit filed by Mr. DiStefano. Penn General submits that it is entitled to equitable contribution from the Defendants because, as the sole insurer selected by Park-Ohio to pay for the DiStefano claim, it was compelled to pay a disproportionate share when other triggered, applicable coverage was available.[1] Defendants contend that the insured, Park-Ohio, breached their applicable policies in regards to notice, cooperation, settlement without consent, and its assignment of rights by settling the underlying DiStefano claim without the requisite notice. Therefore no coverage applies and Plaintiff is not entitled to contribution. The parties agreed to resolve this matter by way of submissions of Trial Briefs and Joint Stipulations of Fact and Documents. For the reasons that follow, this Court finds in favor of the Defendants and holds they have no obligation to indemnify or defend Park-Ohio from the underlying claims because of the breach of the notification provisions of their policies. Furthermore, Defendants are under no obligation to indemnify or reimburse Plaintiff for any monies paid in regards to the DiStefano lawsuit.

II. FINDINGS OF FACT

A. The DiStefano Claim

On March 7, 2002, George DiStefano filed suit against Park-Ohio and a number of other defendants for alleged exposure to asbestos in the Superior Court of California.[2] Park-Ohio notified Penn General about the DiStefano asbestos bodily injury claim in late August 2002.[3] Trial for the DiStefano suit was set for the end of September 2002 – approximately six weeks

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[1] Defendant Travelers (fka The Aetna Casualty and Surety Company) settled with the Plaintiff before these briefs were submitted to the Court. Nationwide's cross claim against Park-Ohio was voluntarily dismissed as well.

[2] *See* Stipulation 1, Exhibit 1, DiStefano Complaint. In his complaint, DiStefano alleged his exposure to asbestos during the 1960s and 1980s lead to his diagnosis of mesothelioma. *See* Stipulation 2, Exhibit 1. DiStefano testified to working with or around an asbestos-containing product, "Tocco Coils," manufactured by Ohio Crankshaft, Inc. (the predecessor to Park-Ohio), from January 1961 through approximately June 1963. *See* Stipulation 3, Exhibit 2, DiStefano Transcript. DiStefano was not diagnosed with mesothelioma until 2001. *See* Stipulation 4, Exhibit 2.

[3] *See* Stipulation 6, Exhibit 3. For purpose of continuity, **General Accident will be referred to Penn General throughout this opinion.**

later.[4] It is undisputed that Park-Ohio sought 100% of its defense and indemnity costs from Penn General under the policies issued in the early 1960s.

B. Settlement of the DiStefano Claim

In October 2002, Park-Ohio (without the formal consent of Penn General) negotiated a settlement of the DiStefano lawsuit for $1,000,000.00 in exchange for a full release and a "with prejudice" dismissal of the lawsuit.[5] Henry Rome, Penn General's counsel, advised them that the settlement amount agreed to by Park-Ohio appeared to be in line with others involving living mesothelioma cases in the San Francisco Bay Area, particularly where there was no other viable co-defendant – as was the case in the DiStefano matter.[6]

From the outset of his investigation of the DiStefano matter, Henry Rome sought out "other insurance" information from Park-Ohio. Mr. Rome was not provided with the requested information. In February 2003, Penn General's claims representative, Michael Basile, sent a Reservation of Rights letter to Ms. Elizabeth Boris of Park-Ohio wherein he reserved all of Penn General's rights under the potentially applicable policies and requested "other insurance" information from Park-Ohio.[7] At the time of Mr. Basile's request and issuance of its formal Reservation of Rights letter, Penn General had not yet paid any monies to Park-Ohio for the DiStefano claim.[8] Park-Ohio did not provide Penn General with "other insurance" information as requested by Mr. Rome or Mr. Basile.[9]

C. The Coverage Action of Park-Ohio Against Penn General

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[4] *See* Stipulation 7, Exhibit 5 at ¶1 and Exhibit 6 at ¶3

[5] *See* Stipulation 10.

[6] *See* Exhibits 11 and 13.

[7] *See* Exhibits 7, 9, 11 and 13; *see also* Stipulation 18; Exhibit 18.

[8] *See* Stipulation 24; Exhibit 24.

[9] *See* Stipulation 22.

In September 2003, Park-Ohio filed a complaint for declaratory judgment, breach of contract, bad faith, and request for defense and indemnity payments against Penn General for the underlying DiStefano suit in Cuyahoga County Case No. CV-03-511015. During litigation, Penn General requested, on numerous occasions, information about Park-Ohio's "other insurers" of Park-Ohio.[10]

Penn General paid Park-Ohio $112,238.70 on October 28, 2003 per its Reservation of Rights letter sent in February 2003 for reimbursement of post-tender defense costs incurred by Park-Ohio in the DiStefano suit.[11] In December 2003, Penn General paid $250,000.00, the full per-person bodily injury limit, to Park-Ohio as allowed by one of its policies at issue.[12] However, Park-Ohio asserted that under Ohio law, it was entitled to collect the *entire amount* of the DiStefano claim from Penn General because it triggered multiple Penn General primary policies.[13]

D. Penn General's Equitable Contribution Action

Park-Ohio finally produced thousands of pages of other policy related information to Penn General in late July 2004.[14] On September 3, 2004, Penn General wrote to Nationwide, Continental, and Travelers regarding the DiStefano claim seeking equitable contribution from them.[15] The Parties stipulate that until they received Park-Ohio's production of insurance-related documents in late July 2004, Penn General did not know which other insurers issued

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[10] *See* Stipulations 28 and 31; Exhibits 9, 27, 30 and 31.
[11] *See* Stipulation 24 and Exhibit 18.
[12] *See* Stipulation 25.
[13] *See* Exhibit 19.
[14] *See* Stipulations 28, 29 and 31 and Exhibits 27 and 28.
[15] *See* Stipulation 32; Exhibits 32-34.

comprehensive general liability coverage to Park-Ohio during the time period in question. The Parties also stipulate that Park-Ohio was in sole control of this information.[16]

Each of the Defendants declined to contribute to the resolution of the DiStefano claim stating Park-Ohio breached their applicable policies in regards to notice, cooperation, settlement without consent, and its assignment of rights by settling the underlying DiStefano claim as required.[17] In October 2004, Penn General filed this action against the Defendants seeking equitable contribution, indemnification and/or a declaratory judgment. In November 2005, Pennsylvania General settled the *Park-Ohio* (CV-03-511015) suit by paying the remaining $750,000.00 balance for a total indemnity payment of $1 million for the DiStefano claim.[18]

III. CONCLUSIONS OF LAW

A. Trigger of Coverage for the Underlying DiStefano Claim

The Defendants do not dispute Plaintiff's contention that under Ohio law, all policies in effect from initial exposure, until diagnosis or death, are triggered, and each triggered policy may be obligated to pay the claim in full. Therefore, this Court finds that each of the policies placed at issue in this case are "triggered" by the DiStefano claim. Additionally, the parties acknowledge that *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* 769 N.E.2d 835, 841 (Ohio 2002) is the controlling authority in this matter. In *Goodyear*, the Ohio Supreme Court determined that Ohio is an "all sums" jurisdiction – meaning that an insured may designate a policy of its choice to respond "in full" to a claim triggering multiple policies. In this "all sums" jurisdiction, the insured is permitted to seek full coverage for its claims from *any single triggered policy, up to that policy's coverage limits.*[19] If the claim is not satisfied by a single policy, then

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[16] *See* Stipulation 22.

[17] *See* Stipulations 35, 36 and 38; Exhibits 37, 38, 40 and 44.

[18] *See* Stipulation 37.

[19] *See Goodyear* at 840.

the insured may select additional triggered policies to respond to the claim.[20] It is undisputed that Park-Ohio correctly exercised its right to select and secure coverage from a single insurer of its choice (in this case Penn General) from multiple triggered primary insurers to respond, in full, to the DiStefano asbestos bodily injury claim.

B. *Goodyear* and Equitable Contribution

In the instant case, Penn General contends it is entitled to equitable contribution because the Parties all issued primary general liability policies to Park-Ohio during the relevant trigger dates (from initial exposure in January 1961 through February 1988). Penn General states it was compelled to pay a disproportionate share of the claim. Plaintiff argues that *Goodyear* instructs the "selected" insurer to seek recourse, after being compelled to pay a disproportionate share of a claim, for equitable contribution from the "non-selected" triggered insurers.[21] This Court does not disagree with Penn General's analysis of *Goodyear* nor does it disagree that there is a public policy argument that would require equitable contribution from the Defendants. However, Plaintiff cannot overcome the fact that there are distinguishing factors in the captioned matter that overcome its public policy argument and the application of *Goodyear*.

1. Park-Ohio's failure to notify the Defendants of the underlying DiStefano suit and it subsequent settlement breached the terms of their insurance policy contracts and waived any rights of contribution Penn General may have had.

Defendants' policies issued to Park-Ohio contain standard language regarding the right to participate in an insured's defense and prompt notice provisions:

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[20] Id.

[21] *See Goodyear* at 841; *see also Brush Wellman, Inc. v. Certain Underwriters at Lloyds, et al.* CCP of Ottawa County, Ohio, Case No. 03-CVH-089 (August 30, 2006) at pp. 43-44.

> **[T]he company shall have the right and duty to defend any suit** against the insured seeking damages on account of [bodily injury to which this insurance applies]... and the company ... may make such investigation and settlement of any claim or suit as it deems expedient ...[22]

Furthermore, the Continental policy, for example, provides for prompt notice, cooperation, and a no-voluntary payment under its "CONDITIONS" provision:

> **4. Insured's Duties in the Event of Occurrence, Claim or Suit:**
>
> (a) In the event of an occurrence, **written notice** containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, **shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.** The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.
>
> (b) If claim is made or suit is brought against the insured, **the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.**
>
> (c) The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of the suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. **The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than first aid to others at the time of the accident.**
>
> **5. Action Against Company: No action shall lie against the company unless, as a condition precedent thereto, there shall**

[22] Defendants' Joint Exhibit 48.

> **have been full compliance with all the terms of the policy,** nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.[23]

There is no question that the Defendants' policies required the insured to put them on notice of any suits before coverage would apply. The standard notice provisions as set forth by the Defendants' policies are integral parts of their contracts. The duty of the insured to notify its carrier is absolute, and a material breach of these provisions waives any coverage. In *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St. 3d 292, 2000 Ohio 330, the Ohio Supreme Court stated:

> Notice provisions in insurance contracts serve many purposes. Notice provisions allow the insurer to become aware of occurrences early enough that it can have a meaningful opportunity to investigate. *Ruby v. Midwestern Indemn. Co.* (1988), 40 Ohio St. 3d 159, 161, 532 N.E.2d 730, 732. In addition, it provides the insurer the ability to determine whether the allegations state a claim that is covered by the policy. See *In re Texas E. Transm. Corp. PCB Contamination Ins. Coverage Litigation* (E.D. Pa. 1992), 870 F. Supp. 1293. It allows the insurer to step in and control the potential litigation, protect its own interests, pursue possible subrogation claims. See *Am. Ins. Co. v. Fairchild Industries, Inc.* (E.D.N.Y. 1994), 852 F. Supp. 1173, 1179. Further, it allows insurers to make timely investigations of occurrences in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims.

The Defendants were not provided with notice of the DiStefano suit until nearly two years after the case was settled. The Defendants were effectively prejudiced by Park-Ohio's failure to notify them of the DiStefano suit, and its eventual settlement resulted in a complete denial of the Defendants' right to evaluate those claims and participate in the litigation and/or settlement.

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[23] Id.

Park-Ohio's breach bars any right of contribution that the Plaintiff may have had against the Defendants in the current matter.

In *Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.* (1952), 157 Ohio St. 385, 392, the Ohio Supreme Court indicated that an insurer would have no right of recovery against another carrier absent reasonable notice. The court found that plaintiff, Aetna, was entitled to recover from defendant Buckeye Union only after Aetna took all reasonable measures to preserve any rights it might have, through subrogation or otherwise, to compel Buckeye to discharge its obligation as the primary insurer.[24]

Other courts have also delineated the standards for equitable contribution. In *Truck Ins. Exchange v. Unigard Ins. Co.*, (2000), 79 Cal. App. 4th 966, 974, the court recognized that:

> The right of contribution do[es] not arise out of contract, for [the coinsurers] agreements are not with each other .... Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.***
>
> Even so, absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.

The Court finds that Penn General did not take reasonable measures to preserve its contribution rights as Defendants were not permitted to defend this action or control any settlement discussions. The entire DiStefano action was settled without Defendants' consent in clear violation of their policy provisions – in short, the Defendants' policies were not considered at all.

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[24] *See also, State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins.* Co. (1970), 23 Ohio St. 2d 45, 49; *Panzica Construction Co. v. Ohio Cas. Ins. Co.* (May 16, 1996), Cuyahoga County Court of Appeals Case No. 69444, unreported (1996 Ohio App. LEXIS 1975); and *Allstate Indem. Co. v. Grange Mut. Cas. Co.* (September 10, 1992), Franklin County Court of Appeals Case No. 91 AP-1453, unreported (1992 Ohio App. LEXIS 4668 at *20) where Grange was properly notified, but was dilatory in processing [the insured's] claim.

Plaintiff asserts that the duty to notify rests on the insured, not the co-insurer, and only those who are parties to the contract are liable for their breach.[25] However, Defendants do not argue that Penn General breached the notice, cooperation, and no-voluntary provisions of the applicable policies. Defendants argue instead that it is inequitable to allow a contribution claim when there was no effort by either the insured or the targeted insurer to comply with the policy provisions. As the holding in *Goodyear* indicates, courts are to consider the particulars of the [defendants] polic[ies] in deciding whether contribution is appropriate.[26]

Equity does not favor contribution where the party seeking contribution did not require compliance with its own policy conditions and now seeks to impose that decision on other insurers through litigation. Clearly the duty to notify rested on the insured, Park-Ohio. Clearly, Park-Ohio is the party that breached the Defendants' policies. Plaintiff argues that it made several discovery requests to Park-Ohio during the companion civil case CV-03-511015 regarding other insurance policies in effect during the DiStefano coverage period, and it did not receive such information until July 2004. According to Plaintiff, the delay of notifying the other insurers was not of their own volition because the duty rested on the insured, Park-Ohio. Plaintiff argues that it handled the DiStefano claim in the most efficient and cost-effective manner possible under the circumstances. The Court cannot excuse Penn General's delay, however, because it did not take reasonable steps to preserve its contribution rights.

In August 2002, Plaintiff knew (or should have known) that Park-Ohio had other insurers who should be notified of the DiStefano suit if Penn General was to seek contribution. Under the "Assistance And Cooperation Of The Insured" provision of its policies, Park-Ohio agreed to

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[25] Plaintiffs Trial Brief at p. 18.

[26] See Goodyear Tire & Rubber Co., supra and Truck Ins. Exchange v. Unigard Ins. Co. (2000), 79 Cal. App. 4th 966, 978, 94 Cal. Rptr. 2d 516.

cooperate with the company and, upon the company's request, ... assist in effecting settlements, securing and giving evidence ... in connection with the subject matter of this insurance.[27] The record shows that Penn General did not even request these insurers be put on notice until four months after the settlement occurred. By February 2003, Penn General was aware that a number of other insurers would potentially be triggered, but it nevertheless paid Park-Ohio's defense costs and settlement in October and December 2003, before obtaining *any* information on other insurers. This eliminated any defense based on the late notice and voluntary payments provisions that Penn General might have had. Plaintiff should not have waited until it was sued for breach of contract and bad faith to seek other insurance information from Park-Ohio. Instead, Plaintiff should have made certain the other insurers were notified before the DiStefano suit was settled. Its failure to do so provides no equitable reason for this Court to endorse that failure. "[I]n Ohio there is no burden to show that a voluntary payment or settlement made by the insured, in violation of a term in the insurance contract, prejudiced the insurer before a ruling can be made that a material breach of the contract occurred which relieves the insurer of the obligation to make payment."[28]

2. Goodyear is distinguishable from the captioned matter because timely notice was never given to the Defendants.

When the Ohio Supreme Court issued its "joint and several liability/pick and choose" decision in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St., 3d 512, 769, it was legally determined that the insured was entitled to choose a single insurer to respond to a claim that spans multiple policy periods. Goodyear first received notice from Michigan authorities of potential underground water pollution at one of its facilities in 1970. For a ten year

[27] Joint Ex. 18, 37, and 38.

[28] See, *Champion Spark Plug v. Fidelity and Cas. Co. of New York* (Lucas Cty. 1996), 116 Ohio App. 3d 258, 271.

period starting in 1982, Goodyear monitored and investigated the pollution problem. It was somewhere between 1983 and August or October of 1984 that it notified many of its insurers of the potential pollution problem even though the actual clean up did not occur until 1992.[29] In *Goodyear*, notice to the insurers was given in a timely and reasonable manner. Here, Plaintiff's notification to the Defendants was not. The facts in the captioned matter are more in line with the facts of *Ormet Primary Aluminum Corp. v. Employers Ins. Of Wassau (2000), 88 Ohio St. 3d 292* where the insured did not give notice to its affected insurers until six years after the EPA cited it as the responsible party for pollution and five years after the insured entered into a settlement agreement regarding the terms of the pollution cleanup. The Court in *Ormet* rejected the argument that the Plaintiff handled the underlying claim in the most efficient and cost-effective manner possible, and the insurers were indeed prejudiced by the delay in giving notice. Just as the insurers in *Ormet* were precluded from having any say in the terms of the settlement regarding cleanup, so were the Defendants in the captioned matter regarding the terms of settlement of the DiStefano lawsuit. "Notice provisions in insurance contracts are conditions precedent to coverage, so an insured's failure to give its insurer notice in a timely fashion bars coverage."[30] No one knows why Park-Ohio singled out Penn General to pay out the DiStefano bodily injury suit. However, by law it was their right to do so. The Court finds Park-Ohio waived coverage by the Defendants failing to timely notify them of the DiStefano suit and breached the applicable policies in regards to notice, cooperation, settlement without consent, and its assignment of rights provisions of their contracts. If there is no applicable coverage, then there can be no right of contribution for the Plaintiff, Penn General either.

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[29] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur.Co.*, (2002) 95 Ohio St. 3d 512, 518.

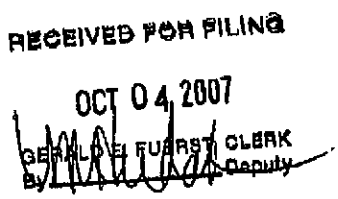
[30] *Id.* at 517, citing *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.* (C.P. 1995), 74 Ohio Misc.2d 183, 203, 660 N.E.2d 770.

IV. CONCLUSION

For the reasons stated above, the Court finds the Defendants are entitled to judgment as a matter of law and that they do not owe Plaintiff any contribution for the settlement of the DiStefano lawsuit.

IT IS SO ORDERED:

JUDGE EILEEN T. GALLAGHER



Certificate of Service

A copy of the foregoing was served October 4th, 2007 via facsimile and US Regular mail, postage pre-paid to the following:

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