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IN THE SUPREME COURT OF OHIO  
CASE NO. 2009-0104

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Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. CA-07-090619

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.

Plaintiff-Appellee

v.

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

Defendants-Appellants

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MERITS BRIEF OF DEFENDANT/APPELLANT NATIONWIDE INSURANCE COMPANY

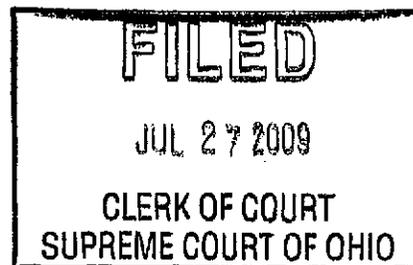
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**TABLE OF CONTENTS**

I. STATEMENT OF THE CASE AND FACTS..... 1

    A. Background..... 1

    B. Course of These Proceedings..... 9

    C. The Trial Court Properly Held that Penn-General is Not Entitled to Equitable Contribution..... 10

    D. The Appellate Court Mandates Nationwide Contribute, Notwithstanding the Express Terms of the Insurer’s Policies..... 10

II. LAW AND ARGUMENT ..... 11

    Proposition of Law I: No claim for contribution can be made against a nontargeted 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 terms and conditions of coverage in the non-targeted insurer’s policy. .... 11

    A. When a non-selected insurer’s pre-conditions for coverage have been violated, contribution is not available as a matter of law. .... 11

        1. A court cannot alter an otherwise unambiguous contract between private parties for the benefit of a third party. .... 17

        2. No Ohio court has given the Goodyear decision the eighth district’s overly broad and erroneous interpretation. .... 18

        3. In addition to the non-selected insurer’s right to have its policy language enforced, this Court should preserve the insured’s right to select one insurer over another to respond to a claim. .... 21

III. CONCLUSION..... 22

CERTIFICATE OF SERVICE ..... 23

APPENDIX..... 24

    Notice of Appeal of Nationwide Insurance Company ..... A-1

    Notice of Appeal of Continental Casualty Company ..... A-2

    Eighth District Court of Appeals Judgment dated December 2, 2008 ..... A-9

    Judge Eileen T. Gallagher’s October 4, 2007 Journal Entry and Opinion ..... A-32

## TABLE OF AUTHORITIES

### **Cases**

<u>Assets Realization Co. v. American Bonding Co. of Baltimore</u> (1913), 88 Ohio St. 216.....	12
<u>Employers' Liab. Assur. Corp. v. Roehm</u> (1919), 99 Ohio St. 343 .....	17
<u>Fidelity &amp; Casualty Co. v. Hartzell Bros.</u> (1924), 109 Ohio St. 566.....	17
<u>Fireman's Fund Insurance Co. v. Maryland Casualty Co.</u> (Cal. App. Ct. 1998), 65 Cal. App. 4th 1279.....	12
<u>Goodyear Tire &amp; Rubber Co. v. Aetna Cas. &amp; Sur. Co.</u> , 95 Ohio St. 3d 512, 769 N.E. 2d 835 (2002).....	3, 6, 10, 11, 12, 13, 15, 16, 17, 21
<u>Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.</u> (1999), 86 Ohio St.3d 270 .....	17
<u>Heller v. Standard Acc. Ins. Co.</u> (1928), 118 Ohio St.237 .....	16
<u>John Burns Constr. Co. v. Indiana Ins. Co.</u> (Ill. 2000), 727 N.E.2d 211 .....	18
<u>Miller v. Jones</u> (1942), 140 Ohio St. 408.....	16
<u>Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.</u> (Wash. 2008), 191 P.3d 866 .....	18, 21
<u>Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau</u> (2000), 88 Ohio St.3d 292 .....	16
<u>Republic Steel v. Glaros</u> (1967), 12 Ohio App.2d 29.....	12
<u>Safeco Ins. Co. of America v. Superior Court</u> (Cal App. Ct. 2006), 140 Cal. App. 4th 874 (2006).....	13
<u>Travelers Casualty &amp; Surety Co. v. Employers Ins. of Wausau</u> (Cal. App. Ct. 2005), 130 Cal. App. 4th 99.....	13
<u>Truck Insurance Exchange Co. v. Unigard Insurance Co.</u> (Cal. App. Ct. 2000), 79 Cal.App.4 <sup>th</sup> 966.....	20

### **Other Authorities**

1 Couch on Insurance 2d 838, Section 15:93 .....	17
30 Ohio Jurisprudence 2d 232, Insurance, Section 220.....	17

**Constitutional Provisions**

Section 10, Article I, United States Constitution..... 18

Section 28, Article II, Ohio Constitution..... 18

## I. STATEMENT OF THE CASE AND FACTS

### A. Background

On September 9, 2004, Nationwide received a letter from Penn-General that described the settlement of a California lawsuit captioned *DiStefano v. Georgia Pacific Corp et al.* in which Park Ohio was named as defendant – a lawsuit Nationwide knew nothing about. (Supp. 178, Ex. 32.) Continental received a similar letter. (Supp. 183, Ex. 33.) In the letter, Penn-General demanded “equitable contribution” from Nationwide to “reimburse it for any and all defense and indemnity amounts it has paid, or may pay, relative” to the *DiStefano* litigation. (Supp. 51, Stipulation ¶ 32.) Penn-General sought \$372,995 from Nationwide – a shocking amount considering that Nationwide had no involvement in, or knowledge of, the *DiStefano* lawsuit. Under Penn-General’s calculations, Nationwide bore the burden of paying the largest share of the settlement and litigation costs.

Two and a half years before the letter arrived, George DiStefano had, in fact, sued Park-Ohio in a California court on March 7, 2002 for alleged exposure to asbestos. (Supp. 48, Stipulation 1; Supp. 1, Comp.) In his complaint, DiStefano alleged his exposure to asbestos during the 1960s and 1980s lead to his diagnosis of mesothelioma. (Supp. 48, Stipulation 2; Supp. 1, Comp.) 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. (Supp. 48, Stipulation 3.) Nationwide insured Park-Ohio from January 1, 1979 to February 1, 1988. (Supp. 54, Stipulations at ¶¶ 65-73.) The Nationwide policies contained the same, or substantially similar, provisions regarding the insured’s obligations. (*See, e.g.*, Supp. 226-27.)

While the *DiStefano* litigation was unknown to Nationwide, Penn-General knew about the *DiStefano* asbestos claim almost two years before notifying Nationwide. (Supp. 48.) At the time, Penn-General knew in late August of 2002 the trial for the *DiStefano* suit was set for the end of September 2002 – approximately six weeks later. (Supp. 48, Stipulation 7.) Yet, Penn-General did not assume Park-Ohio’s defense or issue of reservation of rights letter at the time. (Supp. 49, Stipulation ¶¶ 9, 11-16.)

Insured Park-Ohio had “sole control” of the historical policy information that would have identified other insurers. (Supp. 50, Joint Stipulations at ¶ 22.) And, Penn-General’s policies with Insured Park-Ohio as well as with Nationwide and Continental all required that Park-Ohio turn over that information as a condition of coverage, namely the “cooperation clause” of the policy. (Supp. 214, at ¶ 4(c).)

Without taking any additional steps to notify other insurers and without submitting a reservation of rights letter at the time, Penn-General took a “hands-off” approach to the *DiStefano* litigation. Penn-General allowed Park-Ohio’s attorneys to litigate and settle the matter without Penn-General’s knowledge or authorization for \$1 million in exchange for a full release and a “with prejudice” dismissal of the lawsuit. (Supp. 49, Stipulation 10.) Penn-General did not contest at the time any of Park-Ohio’s conduct that would appear to fly in the face of numerous provisions of its own policies, such as notice requirements, prohibition on voluntary settlements without prior authorization, and others. (Supp. 214, at ¶ 4(a)-(c).)

After the settlement had been entered into on October 6, 2002, Henry Rome, Penn General’s hired legal counsel, in a October 15 letter opined 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. (Supp. 96, 107.)

On November 20, 2002, Park-Ohio told Penn-General that it owed post-tender defense costs of \$112,238.70 and the agreed settlement of \$1 million. (Supp. 112) Park-Ohio explained that under California law “there is a ‘continuous’ trigger of coverage for asbestos personal injury actions” and that “all policies of a manufacturer are triggered upon exposure to an asbestos-containing product up until the time the individual dies or obtains judgment!” (*Id.*) Park-Ohio’s letter concluded that because there were four Penn-General policies totaling \$1 million in coverage, “there is, indeed, \$1 million from which to pay the \$1 million settlement.” (*Id.*)

Nevertheless, in a purported “reservation of rights” letter authored on February 5, 2003, four months after the settlement was consummated, Penn-General offered only to pay Park-Ohio’s post-tender defense costs and \$250,000.00 of the \$1,000,000.00 settlement – “its appropriate share of the settlement amount,” noting that “[i]t is [Penn-General’s] position that under prevailing law, plaintiffs’ 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.” (Supp. 117.) Penn-General did not cite, or elaborate on, the “prevailing law” it referred.

In its February 5, 2003 letter, Penn-General inquired for the first time whether Park-Ohio “contend[ed] that more than a single policy year’s limits apply.” (Supp. 117-18, Joint Ex. 18 at 5-6.) While it knew, or should have known, that under Goodyear-Tire that Park-Ohio had no duty to notify anyone other than the selected insurer and that duty rested with it, Penn-General asked that Park-Ohio put its other insurers on notice of the *DiStefano* suit *if Park-Ohio had not already done so*. Penn-General stated that:

Even if [Penn-General] was obligated to indemnify Park-Ohio for the settlement under more than one policy, any such obligation would be subject to application of the ‘other insurance’ clause quoted above. Therefore, should Park-Ohio contend that more than a single policy year’s limits apply, in order to determine [Penn-General’s] appropriate contribution toward the settlement we would need to learn the identity of Park-Ohio’s general liability insurers from 1967, (the year Park-Ohio was created [pursuant] to a merger of Ohio Crankshaft and Park-Drop Forge) through and including October 2002 (when settlement of the Litigation was reached). We would need to know whether any of Park-Ohio’s policies have been exhausted through actual payment of judgment or settlement of other claims or suits, whether any of Park-Ohio’s policies are subject to self-insured retentions or deductibles (and, if so, the amount of such SIRs deductibles) and whether any of them contain “asbestos exclusions”

(Supp. 117-18, *Id.* at pp. 5-6).

Of course, it was too late to put Park-Ohio’s other insurers on notice of the claim. As Penn-General knew, the *DiStefano* suit had been settled four months earlier. (Supp. 49, Joint Stipulations at ¶10 and ¶ 13).

Penn-General also purported to “reserve[ ] all of its rights” despite the fact that the underlying case was settled and over. The February 5 letter noted that:

To the extent the notice conditions of the policies were not complied with by Park-Ohio, [Penn-General] may have no duty to defend or indemnify Park-Ohio for the Litigation.

To the extent the “assistance and cooperation”/voluntary payments provision of the policies, were not complied with by Park-Ohio, [Penn-General] reserves its rights to deny or limit any duty to defend or indemnify Park-Ohio for the Litigation.

To the extent that the “action against company” provision of the policies is applicable to the Litigation, [Penn-Genera] reserves its rights to deny or limit its obligations to defend or indemnify Park-Ohio for the litigation.

(Supp. 118.) The letter concluded that:

[P]lease confirm that Park-Ohio agrees that, as to indemnity, [Penn-General’s] obligation is limited to a single policy limit. As noted above, if Park-Ohio has a different position, please advise us of it and provide us with the information listed above regarding Park-Ohio’s own insurance in effect from 1967 to October 2002.

(Supp. 118.)

Park Ohio refused to “agree that, as to indemnity, [Penn-General’s] obligation is limited to a single policy limit.” On May 23, 2003, Park-Ohio’s Secretary and General Counsel Robert Vilsack wrote Penn-General that:

“Park-Ohio agrees that General Accident must reimburse [Park-Ohio’s] defense fees and costs, but disagrees with General Accident’s reservation of rights with respect to this duty.”

“Park-Ohio agrees that the settlement of the *DiStefano* case is covered by General Accident policies and that General Accident must indemnify Park-Ohio for the settlement.”

“Park-Ohio disagrees, however, with General Accident’s reservation of rights with respect to its duty to indemnify.”

“Moreover, Park-Ohio specifically objects to General Accident’s position that it is only obligated to pay a single \$250,000 per person limit of liability towards the \$1,000,000 that Park-Ohio paid to settle the case.”

(Supp. 120-22.) Robert Vilsack stated, “[General Accident’s] reservation concerning defense fees and costs is not authorized under any provision of the policies.” (Supp. 120.) He enclosed with his letter defense counsel invoices and other invoices dated from August 22, 2002 forward, reflecting defense fees and costs in the amount of \$112,238.70, and requested that Penn-General make payment of this amount directly to Park-Ohio. (*Id.*) He set forth why Park-Ohio was entitled to full indemnity under the Supreme Court of Ohio decision announced four months prior to the *DiStefano* settlement:

Park-Ohio agrees with your view that a continuous trigger theory is applicable to the *DiStefano* claim. However, as noted above, Park-Ohio disagrees with and objects to [General Accident’s] position that plaintiff’s claim “qualifies” as a single occurrence and that Park-Ohio is entitled to the limits of only one policy. [General Accident’s] discussion on these issues is wholly devoid of any legal citation and Ohio law runs contrary to your conclusions.

Almost four months before the *DiStefano* case was settled, the Supreme Court of Ohio held that in a continuous trigger situation, the policyholder may choose any triggered policy to respond up to its limits of coverage. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 769 N.E. 2d 835 (2002). More importantly, the Court ruled that where the limits of a single policy are not sufficient to cover an entire claim, the policyholder may pursue coverage under other insurance policies. Specifically, the *Goodyear* Court instructed that:

Goodyear should be permitted to choose, from the 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 Goodyear's entire claim, then Goodyear may pursue coverage under other primary and excess insurance policies. *Id.* at 517, 769 N.E. 2d at 841.

Applying the legal guidelines set forth in *Goodyear* to the *DiStefano* case, it is clear that Park-Ohio may recover the full \$250,000 per person limit under each of the four policies issued by General Accident.

(Supp. 121, *Id.* at p. 2). In addition, Park-Ohio asserted that:

[General Accident's] position that General Accident will not contribute to the settlement until it is provided information relating to other insurance is a flagrant violation of Ohio law. Under *Goodyear*, Park-Ohio has an absolute right to designate the General Accident policies for payment. [General Accident's] right to seek contribution from other insurers cannot delay [General Accident's] payment to Park-Ohio. General Accident must pay 100% of this claim immediately and cannot avoid tendering full payment on the basis that other applicable insurance policies may exist. By paying the full \$1 million settlement now, General Accident will be able to avoid the daunting task of attempting to explain its numerous failures to properly handle this serious claim both before and after the *DiStefano* settlement.

(Supp. 122, *Id.* at p. 3).

Penn-General did not respond to the May 23, 2003 letter.

On September 10, 2003, Park-Ohio's outside counsel wrote Penn-General and advised that Park-Ohio would file a complaint for declaratory judgment, breach of contract and bad faith against Penn-General if Penn-General did not pay Park-Ohio's defense costs and the full settlement amount by September 19, 2003. (Supp. 120.) When no substantive response was

received and payment was not made, Park-Ohio sued Penn-General on September 23, 2003. (Supp. 50, Joint Stipulations at ¶ 23.) Park-Ohio's suit, captioned *Park-Ohio Industries, Inc. v. General Accident Insurance Co.*, Cuyahoga County Court of Common Pleas Case No. 511015, asserted that Penn-General had breached its contracts of insurance and its duty of good faith.

A short time later, Penn-General paid Park-Ohio's post-tender defense costs and \$250,000 of the \$1 million *DiStefano* settlement. (Supp. 50.) However, Penn-General maintained in its subsequent answer to Park-Ohio's complaint that Penn-General did not owe Park-Ohio any defense or indemnity, claiming that:

"Plaintiff's claims are barred, in whole or in part, to the extent it failed to give timely notice to General Accident in accordance with the terms and conditions of the policies of insurance issued by General Accident";

"Plaintiff's claims are barred, in whole or in part, by reason of the existence of other insurance policies, including policies with respect to which General Accident's policies were previously, subsequently, or contemporaneously effective and by reason of any "other insurance" or similar clause contained or incorporated by reference in the insurance policies issued by General Accident";

"To the extent that there has been a failure to comply with the notice of occurrence/claim/loss/accident and cooperation provisions of the policies of insurance issued by General Accident, General Accident has no liability";

"Plaintiff has failed to perform all of its obligations under the policies issued by General Accident";

"Some or all of the claims for which Plaintiff is seeking coverage in this proceeding are barred or limited to the extent that they seek reimbursement of monies that have been or will be paid voluntarily or without the consent of General Accident."

(Supp. 139-43, Twelfth, Fifteenth, Twenty-Fifth, Thirty-Second, and Thirty-Fifth Affirmative Defenses). These positions were rather curious because Penn-General had *already paid* Park-Ohio's post-tender defense costs and \$250,000.00 of the \$1,000,000.00 *DiStefano* settlement.

Thereafter, in discovery between Park-Ohio and Penn-General, Park-Ohio confirmed that it had *not* provided any insurer other than Penn-General with any notice of the *DiStefano* suit, but offered to make available to Penn-General documents containing information about Park-Ohio's other insurers. (Supp. 157-58, Answers to Interrogatory Nos. 5 and 6.) Park-Ohio also set forth in response to Penn-General's interrogatories the facts supporting Park-Ohio's bad faith claim against Penn-General:

General Accident's unreasonable delay and failure to properly investigate the *DiStefano* claim;

General Accident's unreasonable delay in providing Park-Ohio with General Accident's coverage position in response to Park-Ohio's request that General Accident defend and indemnify it in the *DiStefano* case;

General Accident's unreasonable delay in paying Park-Ohio for defense costs, which General Accident had promised and agreed to pay;

General Accident's unreasonable delay in paying Park-Ohio a portion of the settlement amount in the *DiStefano* case, which General Accident had promised and agreed to pay;

General Accident's apparent destruction and/or concealment of highly relevant documents necessary for Park-Ohio to fully prosecute its coverage and bad faith claims;

General Accident's intentional failure to make Michael Basile (a key witness for General Accident who committed many of the alleged acts of bad faith described herein) available for deposition;

General Accident's wrongful withholding of claims file documents;

General Accident's intentional ignoring of case law requiring that it indemnify Park-Ohio fully for the *DiStefano* action;

General Accident's refusal to honor its obligations to pay the full *DiStefano* settlement amount in order to coerce Park-Ohio to acquiesce in General Accident's wrongful coverage position;

General Accident's unjustified and bad faith refusal to acknowledge that it issued Policy Number CG375333 to Ohio Crankshaft.

General Accident's misstatement and misrepresentation of prevailing law to Park-Ohio concerning the obligations of General Accident and the rights of Park-Ohio under the General Accident policies

(Supp. 164-65, Answer to Interrogatory No. 21.)

After Penn-General obtained the other insurance information it requested from Park-Ohio in the litigation, Penn-General wrote Continental and Nationwide. Although Park-Ohio had told Penn-General at least a month earlier that Park-Ohio had only notified Penn-General of the *DiStefano* suit (Supp. 151), Penn-General stated in its letters to Continental and Nationwide, "We assume, but ask that you confirm, that Park-Ohio Industries, Inc. placed [the insurer] on notice of the [*DiStefano* suit]" (Supp. 178, 183.)

In response to this initial notice – nearly two years after the *DiStefano* suit had been settled – Nationwide declined to reimburse Penn-General for the amounts it paid or might pay, as did Continental. In November 2005 and in the face of Park-Ohio's claims of bad faith and breach of contract, Penn-General settled the Park-Ohio (CV-03-511015) suit by paying the remaining \$750,000 balance for a total indemnity payment of \$1 million for the *DiStefano* claim. (Supp. 51, Stipulation 37.)

#### **B. Course of These Proceedings**

Penn-General sued Continental, Nationwide, and Travelers<sup>1</sup> insurance companies for a declaration that those insurers must "equitably contribute" to the settlement and defense costs. (Supp. 1, Comp.) The parties ultimately agreed to a bench trial to be decided upon the briefing and the record. The parties submitted a joint stipulation of facts (Supp. 48, Joint Stipulations) and

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<sup>1</sup> Travelers settled with Penn-General before the trial court issued an opinion. (Supp. 75.)

a series of exhibits (Supp. 57, Joint Ex.s) to assist the court. The parties also submitted trial briefs in support of their respective positions.

**C. The Trial Court Properly Held that Penn-General is Not Entitled to Equitable Contribution.**

On October 4, 2007, the trial court issued a 13-page opinion and judgment entry. (Appx. A-32, J. Entry and Opinion.) The court determined that Penn-General was not entitled to equitable contribution from Nationwide and Continental (Appx. A-44, Id.) The court explained that insured Park-Ohio failed to properly notify Nationwide of the underlying suit and breached the notice, cooperation, consent and assignment of rights sections of the policies. (Appx. A-43, Id.) The court concluded that “if there is no applicable coverage, then there can be no right of contribution” for Penn-General. (Id.) Penn-General appealed that decision.

**D. The Appellate Court Mandates Nationwide Contribute, Notwithstanding the Express Terms of the Insurer’s Policies**

Eschewing Nationwide’s policies, the eighth district court of appeals reversed the trial court. In doing so, the eighth district wrongly held that “Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the [underlying] matter” and “Pennsylvania General had no obligation to notify Nationwide and Continental of its potential equitable contribution claim prior to settlement.” (Appx. A-26, Op. at 15.) Attempting to apply the principles set forth in Goodyear, the court held that Park-Ohio had no duty to notify Nationwide and Continental of the [underlying] claim.” (Appx. A-27, Op. at 16.)

Continental and Nationwide appealed the decision, which this Court accepted under the following proposition of law. (Appx. A-1, A-5, Notices of Appeal.)

## II. LAW AND ARGUMENT

**Proposition of Law I:** No claim for contribution can be made against a nontargeted 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 terms and conditions of coverage in the non-targeted insurer’s policy.

### A. **When a non-selected insurer’s pre-conditions for coverage have been violated, contribution is not available as a matter of law.**

This Court has recognized that a contribution action exists for coinsurers on identical risks in certain instances. *See Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512; 2002-Ohio-2842. In *Goodyear*, the Court 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.* at ¶ 11. The Court held that the targeted or selected insurer may obtain contribution from other “**applicable** primary insurance policies” of the non-selected insurers. *Id.*

The eighth district misapplied *Goodyear*. It erroneously concluded that Penn-General, a selected insurer, may obtain contribution even when the non-selected insurer’s policy is **not** “applicable.” In this case, Nationwide’s policies were not applicable because Park-Ohio violated myriad conditions contained in those policies. Park-Ohio did not notify Nationwide of the DiStefano litigation. The parties do not dispute that Park-Ohio settled the underlying claims for \$1 million in October 2002, almost two years before the first notice to Nationwide. Nationwide could not review and evaluate the underlying litigation. Nationwide had: 1) No opportunity to defend; 2) No information about the circumstances of Mr. DiStefano’s claimed injury; 3) No opportunity to control the litigation or settlement; 4) No information regarding demands; 5) No

opportunity to control defense costs and expenses; and 6) No opportunity to make the decision to go to trial.

Nevertheless, the eighth district held that “Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the [underlying] matter.” (Appx. A-26, Op. at 15.) The court also held that “Park-Ohio had no duty to notify Nationwide and Continental of the [underlying] claim.” (Appx. A-24, Op. at 13.) In sum, the appellate court completely disregarded the conditions to coverage expressly contained in the Nationwide’s policies.

This Court’s decision in Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., however, does not authorize a blanket disregard of Nationwide’s policy language. Contribution exists only when there is “common liability” for the underlying 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. The eighth district’s decision far exceeds any proper interpretation of the dicta contained in Goodyear Tire that insurers may “seek contribution from other responsible parties when possible” and “bear the burden of obtaining contribution from other **applicable** primary insurance policies as they deem necessary.” (Goodyear, supra, at ¶ 11.)

Equitable contribution is an insurer’s right to recover from a co-obligor that shares the same liability. Fireman’s Fund Insurance Co. v. Maryland Casualty Co. (Cal. App. Ct. 1998), 65 Cal. App. 4th 1279, 1293. “Where two or more insurers independently provide primary insurance on the same risk **for which they are both liable**, for any loss to the same insured, the insurance carrier who pays the loss or defends a lawsuit against the insured is entitled to equitable contribution from the other insurer. . . .” Id. at 1289 (emphasis added). But, there is no joint obligation and no right of contribution when there is no coverage under one policy because

of no tendered claim to the insurer, a **policy exclusion precluding coverage**, or lack of an occurrence. *See, Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* (Cal. App. Ct. 2005), 130 Cal. App. 4th 99, 108 (“courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy”). In an insurance contribution action, “the inquiry is whether the nonparticipating coinsurer ‘had a legal obligation ... to provide [a] defense [or] indemnity coverage for the ... claim or action prior to [the date of settlement],’ and the burden is on the party claiming coverage to show that a coverage obligation arose or existed under the coinsurer’s policy.” *Safeco Ins. Co. of America v. Superior Court* (Cal App. Ct. 2006), 140 Cal. App. 4th 874, 879 (2006) (citations omitted).

Nationwide’s policies expressly precluded liability. Accordingly, under *Goodyear*, Nationwide’s policies were not applicable. Nationwide issued Park-Ohio Industries, Inc. a series of policies in the 1980s all with substantially similar conditions for coverage. The policies contained the following provisions:

#### CONDITIONS

\* \* \*

#### 4. INSURED’S DUTIES IN THE EVENT OF OCURRENCE, 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.

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 suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Insured because of injury or 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 for 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 have been full compliance with all of the terms of this 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.

\* \* \*

#### 9. ASSIGNMENT

Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon ...

(*See, e.g.*, Supp. 226-27, Conditions Section, of Nationwide policy number 85-GA-955-514-0002, effective January 1, 1985 to January 1, 1986.)

The underlying DiStefano matter was settled on October 6, 2002, through settlement negotiations between counsel for Mr. DiStefano and corporate counsel for Park-Ohio. The parties do not dispute that Nationwide was not provided any notice of the claims until the letter of September 3, 2004 from Pennsylvania General's third-party administrator, which is also the time when Pennsylvania General announced its notice of contribution. The fact that Nationwide was not provided notice of the claims in a timely matter violated the terms of the applicable insurance contracts.

Similarly, Park-Ohio's breached Nationwide's cooperation and consent to settle provisions. Again, the underlying claims were settled without the consent of Nationwide, as well as without benefit of trial. Nationwide has no obligation for defense or indemnity for the underlying claims under the subject policies due to the failure of the insured, Park-Ohio, to

cooperate with Nationwide in any regard with respect to those underlying claims. As with notice provisions, the cooperation provisions of a liability policy are fundamental to the relationship between the insurer and the insured. A breach of the cooperation clause of an insurance policy relieves the insurer of any obligation under the policy.

The record makes it abundantly clear that the insured Park-Ohio has failed to cooperate with even the most basic requests of Nationwide. Nationwide has been absolutely denied the opportunity to gather evidence or compel the attendance of witnesses. And, in fact, any opportunity to do so was lost when the underlying claims were settled without Nationwide's consent, almost two years before Nationwide was even advised of the existence of those claims. As a result, Nationwide has been relieved of any obligation it may have had for defense and indemnity for the underlying claim due to the absolute failure of the insured to cooperate with Nationwide pursuant to the clear obligations of the policies at issue in this case.

There is no dispute that Park-Ohio had the Nationwide policies in its possession. Yet, for whatever reason, Park-Ohio "selected" Penn-General. Nationwide could not defend or participate in any aspect of the settlement, litigation, or management of the claim.

This Court specifically noted in the Goodyear case that:

The starting point to determining the scope of coverage is the language of the insurance policies.

\* \* \*

It is well settled that 'insurance policies' should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.

Id. at ¶ 7, ¶ 8.

The importance of notice and the prejudice that flows from the inability to be involved with the settlement and litigation is self-evident in this case.

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. In addition, it provides the insurer the ability to determine whether the allegations state a claim that is covered by the policy. It allows the insurer to step in and control the potential litigation, protect its own interests, maintain the proper reserves in its accounts, and pursue possible subrogation claims. Further, it allows insurers to make timely investigations of occurrences in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. [Citations omitted.]

Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau (2000), 88 Ohio St.3d 292, 302-03; see also Heller v. Standard Acc. Ins. Co. (1928), 118 Ohio St.237, 242 (it is “extremely important” for an insured to give prompt notice of a claim to an insurance company). Under Goodyear, the court determined that the insured could choose a single insurer to respond to a claim that spans multiple policy periods. In that case, Michigan authorities notified the insured of potential underground water pollution at one of its facilities in 1970. Goodyear monitored and investigated the issue. In 1983 to 1984, Goodyear in turn notified many of its insurers of the potential pollution problem even though the clean up did not occur until 1992. Goodyear at 518. In Goodyear, the insured timely gave notice to its insurers. Here, the parties do not dispute that Park-Ohio did not notify Nationwide until years after the underlying case had been settled.

The law is established that “the failure of an insured to comply with the provisions of a policy of indemnity insurance requiring the cooperation of the insured in the preparation and trial of any claim or suit against him, and not to make settlement thereof except at his own cost without the written authorization of the insurer, constitutes a good and valid defense in a supplemental proceeding to recover from the insurer pursuant to the provisions of Section 9510-3 and 9510-4, General Code.” See Miller v. Jones (1942), 140 Ohio St. 408 at syllabus, paragraph 1. The Court also held “the confession of judgment by a defendant in an action for damages over the objection and in disregard of the protest of the insurer constitutes such failure

of cooperation.” *Id.* at syllabus paragraph 2. The court held “it was not a mere settlement of the claim without consent, which in itself was prohibited by the terms of the insurance contract, but was a tender and confession of judgment for the full amount. He not only failed and refused to cooperate in the preparation and trial of the suit, but, by confession judgment, fully and completely precluded inquiry into or consideration of any question of law or fact.” *Id.* at 413.

The eighth district failed to recognize that Nationwide did not owe coverage and therefore its policies were not “applicable” under Goodyear.

**1. A court cannot alter an otherwise unambiguous contract between private parties for the benefit of a third party.**

The appellate court effectively re-wrote Nationwide’s policies to remove the conditions to coverage and then imposed liability for a loss that would not otherwise be covered. This decision should not stand.

Indeed, this Court held in Goodyear, “Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.” Goodyear, supra at ¶ 8. Ohio law is well established that a court cannot impose upon the insurer a liability it clearly excluded. *See Fidelity & Casualty Co. v. Hartzell Bros.* (1924), 109 Ohio St. 566; 30 Ohio Jurisprudence 2d 232, Insurance, Section 220; 1 Couch on Ins.2d 838, Section 15:93. The role of a court is to give effect to the intent of the parties to the agreement. Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos. (1999), 86 Ohio St.3d 270, 273, *citing Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, syllabus. Further, the right to contract is fundamental and the United States and Ohio constitutions protect interference with that right. Clause 1, Section 10, Article I, United

States Constitution (“No State shall ... pass any ... Law impairing the Obligation of Contracts ... .”); *see also* Section 28, Article II, Ohio Constitution.

Nationwide and Park-Ohio entered into an insurance contract. That contract does not authorize a third party to enforce that contract’s terms. In fact, the contract expressly prohibits such enforcement. (Supp. 227.) The court cannot create a contract that did not exist to allow a targeted insurer to obtain contribution.

**2. No Ohio court has given the Goodyear decision the eighth district’s overly broad and erroneous interpretation.**

But, the high courts of other states have held that an insured’s “selective tender” negates the right of the selected insurer to obtain contribution from the non-selected insurers. *See, e.g., Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.* (Wash. 2008), 191 P.3d 866; *see further, e.g., John Burns Constr. Co. v. Indiana Ins. Co.* (Ill. 2000), 727 N.E.2d 211, 215-27 (when an insured chooses to tender a claim to one of its insurers, that insurer becomes solely responsible for the requested coverage and may not seek contribution from the other insurers whose policies may apply to the loss).

For instance, the unanimous Supreme Court of Washington held that the insured’s selective tender of two insurers barred those insurers’ claims for equitable contribution to a third, non-selected insurer. *USF Inc. Co.* (Wash. 2008), *supra*. The court discussed the nature of equitable contribution, which “allows an insurer to recover from another insurer where both are independently obligated to indemnify or defend the same loss.” *Id.* at 872. The court noted that the duty to defend and indemnify does not become an obligation until a claim is tendered, and further, the insurer that seeks contribution does not sit in the place of the insured and cannot tender a claim to the other insurer. The court reasoned, “if the insured has not tendered a claim to

an insurer prior to settlement or the end of trial, other insurers cannot recover in equitable contribution against that insurer.” *Id.* at 873. The court favorably compared this rule to the “selective tender” rule, which “states that where an insured has not tendered a claim to an insurer, that insurer is excused from its duty to contribute to a settlement of the claim.” *Id.* In reinstating the decision of the trial court, the Supreme Court of Washington explained the “selective tender” rule and why it barred the equitable contribution action:

In deciding whether one insurer is liable for equitable contribution to another, “the inquiry is whether the nonparticipating coinsurer ‘had a legal obligation ... to provide [a] defense [or] indemnity coverage for the ... claim or action prior to [the date of settlement].’ ” [] Equity provides no right for an insurer to seek contribution from another insurer who has no obligation to the insured. []

\*\*\*

Thus, if the insured has not tendered a claim to an insurer prior to settlement or the end of trial, other insurers cannot recover in equitable contribution against that insurer. This rule is largely consistent with the “selective tender” rule employed by the trial court. That rule states that where an insured has not tendered a claim to an insurer, that insurer is excused from its duty to contribute to a settlement of the claim.[] We agree with USF that this rule has sound policy underpinnings. Selective tender preserves the insured’s right to invoke or not to invoke the terms of its insurance contracts. An insured may choose not to tender a claim to its insurer for a variety of reasons. Like a driver involved in a minor accident, an insured may choose not to tender in order to avoid a premium increase. The insured may also want to preserve its policy limits for other claims, or simply to safeguard its relationship with its insurer. Whatever its reasons, an insured has the prerogative not to tender to a particular insurer.

\*\*\*

In sum, because Dally chose not to tender to USF, USF had no legal obligation to defend or indemnify Dally at the time of the settlement. Accordingly, we hold that MOE and CUIC do not have a right to equitable contribution from USF. [Citations and footnotes omitted.]

*Id.* at 872-73. Here, Park-Ohio never tendered a claim to Nationwide. In fact, Park-Ohio settled the case without notifying Nationwide of the underlying claim. (Supp. 98, Settlement and General Release Agreement.) Thus, Park-Ohio’s failure to tender the claim should bar Penn-General’s equitable contribution claim.

Other courts have also rejected the eighth district's improperly broad claim that a non-selected insurer's policies had no effect on a selected insurer's contribution claim. See Truck Insurance Exchange Co. v. Unigard Insurance Co. (Cal. App. Ct. 2000), 79 Cal.App.4<sup>th</sup> 966. The basic facts are materially identical to those in Unigard. In Unigard, an insured faced with a lawsuit tendered the defense of the action to one of its insurers. After paying defense costs and indemnity, the selected insurer looked to an alleged co-insurer for equitable contribution. Like here, the co-insurer refused to contribute because it had not been asked to participate in the litigation. While the trial court ruled that the co-insurer must contribute, the appellate court reversed that decision, holding:

The insured-insurer relationship is based on the premise that, in the event of a claim, occurrence, or suit, the insured will tender the defense to the insurer, which will provide a defense and control the litigation with the full cooperation of the insured. "When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense ...."

Applied, Inc., Unigard's insured, tendered the defense of the Cimarron cases to Truck, not Unigard. Absent tender, it is difficult to understand what, if anything, Unigard was supposed to do. Although the defense was tendered to, and accepted by, Truck, Unigard did not receive notice of its potential liability for contribution until after the Cimarron cases were resolved.

Under these circumstances, the imposition of contribution on Unigard—a stranger to the litigation—would subject it to a significant financial burden even though it did not enjoy any of the concomitant benefits, e.g., the right to participate in and control the defense. Truck decided to investigate and settle the Cimarron cases without Unigard's involvement. Having done so, Truck should not be permitted to drag Unigard into the picture after the fact. [Citations omitted.]

(Id. at 979.)

The issue before this Court is whether Nationwide must "equitably contribute" in the absence of notice to Nationwide and in the violation of the provisions of Nationwide's policies. Under these circumstances and in the language of the Unigard court, the eighth district's

imposition of equitable contribution on Nationwide – “a stranger to the litigation” – subjects it to a significant financial burden even though it did not enjoy the right to participate and control the defense. Moreover, Nationwide would be subject to that burden despite its policy language that expressly prohibited such liability and an insured that did not select it. Here, Penn-General and its insured Park-Ohio investigated and settled the asbestos case without Nationwide’s involvement. Penn-General should not be able to obtain “equitable” relief in this circumstance and the trial court correctly rejected Penn-General’s claim.

**3. In addition to the non-selected insurer’s right to have its policy language enforced, this Court should preserve the insured’s right to select one insurer over another to respond to a claim.**

The eighth district expressed concern that allowing Park-Ohio to select Penn-General over Nationwide to respond to the DiStefano suit would “discourage the prompt settlement of insurance claims.” (Appx. A-29-30, Op. 18-19.) This is not correct. Under Goodyear, an insured is entitled to select an insurer to pay to the full limits of its policy. Goodyear, *supra*, at ¶ 11. Park-Ohio was fully compensated. And, Penn-General had a contractual obligation to **timely** pay under its policy. The eighth district’s concern is unwarranted because the insured should obtain coverage of those insurers it selects to respond.

Moreover, the appellate court’s policy concern certainly does not authorize the disregard of Nationwide’s policy language in the face of Park-Ohio’s selection of Penn-General. Indeed, this Court should protect an insured’s right to select a certain insurer to respond. There are several reasons an insured may select one insurer over another to pay a claim. For instance, an insured may choose not to select an insurer to protect its relationship with its current insurer, to avoid premium increases, to protect policy limits to pay other claims, or for other reasons. *See Mut. Of Enumclaw Ins. Co.* (Wash. 2008), 191 P.3d at 873. Allowing equitable contribution in

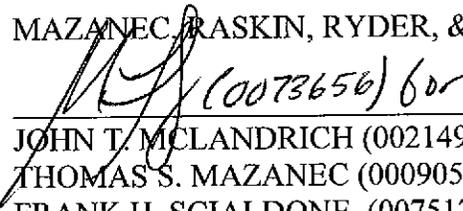
this circumstance defeats the insured's right to choose a specific insurance company that will respond to a claim.

### III. CONCLUSION

Nationwide respectfully requests that this Court reverse the judgment of the court of appeals and reinstate the trial court's order declaring that Nationwide does not owe contribution to Pennsylvania General.

Respectfully submitted,

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## **APPENDIX**

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IN THE SUPREME COURT OF OHIO  
CASE NO. 2009-0104

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Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. CA-07-090619

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.

Plaintiff-Appellee

v.

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

Defendants-Appellants

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NOTICE OF APPEAL OF NATIONWIDE INSURANCE COMPANY

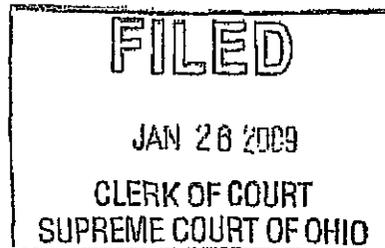
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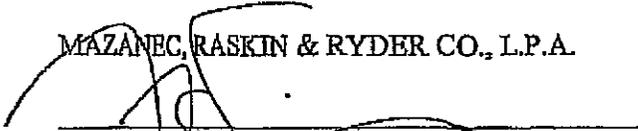
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Pursuant to Supreme Court Rule II § 2(A)(2), Appellant/Defendant Nationwide Insurance Company, hereby gives notice of appeal to the Supreme Court of Ohio from the opinion and journal entry of the Eighth District Court of Appeals entered in Case No. CA-07-090619 and journalized on December 1, 2008. A copy of the court of appeals decision is attached to this Notice. (See Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

  
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**In the Supreme Court of Ohio**

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***PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.,***

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

**FILED**  
JAN 15 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**NOTICE OF APPEAL OF APPELLANT  
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**NOTICE OF APPEAL**

---

Defendant-Appellant Continental Casualty Company hereby gives notice of its appeal to the Supreme Court of Ohio from the decision and journal entry of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Case No. CA-07-090619 and filed for journalization on December 1, 2008.

This case raises issues that are of public or great general interest.

Date: January 14, 2009.

Respectfully submitted,



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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 90619

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**PENNSYLVANIA GENERAL INSURANCE CO.**

PLAINTIFF-APPELLANT

VS.

**PARK-OHIO INDUSTRIES, INC., ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:  
REVERSED AND REMANDED**

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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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NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED



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.

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<sup>1</sup> 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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<sup>1</sup>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<sup>2</sup> 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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<sup>2</sup>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.*, 9<sup>th</sup> 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 policies 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

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 Pennsylvania 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.

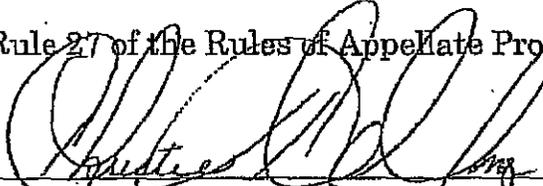
Appellant's assignments of error are sustained. The judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

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

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

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**JOURNAL ENTRY AND OPINION**

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**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.<sup>1</sup> 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.<sup>2</sup> Park-Ohio notified Penn General about the DiStefano asbestos bodily injury claim in late August 2002.<sup>3</sup> Trial for the DiStefano suit was set for the end of September 2002 – approximately six weeks

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> See Stipulation 6, Exhibit 3. For purpose of continuity, General Accident will be referred to Penn General throughout this opinion.

later.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> Park-Ohio did not provide Penn General with “other insurance” information as requested by Mr. Rome or Mr. Basile.<sup>9</sup>

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

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<sup>4</sup> See Stipulation 7, Exhibit 5 at ¶1 and Exhibit 6 at ¶3

<sup>5</sup> See Stipulation 10.

<sup>6</sup> See Exhibits 11 and 13.

<sup>7</sup> See Exhibits 7, 9, 11 and 13; see also Stipulation 18; Exhibit 18.

<sup>8</sup> See Stipulation 24; Exhibit 24.

<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

#### 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.<sup>14</sup> On September 3, 2004, Penn General wrote to Nationwide, Continental, and Travelers regarding the DiStefano claim seeking equitable contribution from them.<sup>15</sup> 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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<sup>10</sup> See Stipulations 28 and 31; Exhibits 9, 27, 30 and 31.

<sup>11</sup> See Stipulation 24 and Exhibit 18.

<sup>12</sup> See Stipulation 25.

<sup>13</sup> See Exhibit 19.

<sup>14</sup> See Stipulations 28, 29 and 31 and Exhibits 27 and 28.

<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup>

### 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.*<sup>19</sup> If the claim is not satisfied by a single policy, then

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<sup>16</sup> See Stipulation 22.

<sup>17</sup> See Stipulations 35, 36 and 38; Exhibits 37, 38, 40 and 44.

<sup>18</sup> See Stipulation 37.

<sup>19</sup> See *Goodyear* at 840.

the insured may select additional triggered policies to respond to the claim.<sup>20</sup> 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.<sup>21</sup> 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 its 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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<sup>20</sup> *Id.*

<sup>21</sup> 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 ...<sup>22</sup>**

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**

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<sup>22</sup> 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.<sup>23</sup>

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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<sup>23</sup> 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.<sup>24</sup>

Other courts have also delineated the standards for equitable contribution. In *Truck Ins. Exchange v. Unigard Ins. Co.*, (2000), 79 Cal. App. 4<sup>th</sup> 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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<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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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<sup>25</sup> Plaintiffs Trial Brief at p. 18.

<sup>26</sup> See *Goodyear Tire & Rubber Co.*, supra and *Truck Ins. Exchange v. Unigard Ins. Co.* (2000), 79 Cal. App. 4<sup>th</sup> 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.<sup>27</sup> 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."<sup>28</sup>

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

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<sup>27</sup> Joint Ex. 18, 37, and 38.

<sup>28</sup> 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.<sup>29</sup> 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."<sup>30</sup> 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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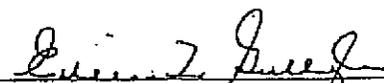
<sup>29</sup> *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, (2002) 95 Ohio St. 3d 512, 518.

<sup>30</sup> *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

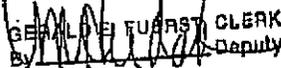
For the reasons stated above, the Court finds the Defendants are entitled to judgment as a matter of law and that they do not owe Plaintiff any contribution for the settlement of the DiStefano lawsuit.

IT IS SO ORDERED:

 10-3-07  
JUDGE EILEEN T. GALLAGHER

RECEIVED FOR FILING

OCT 04 2007

GERALD E. FUERST, CLERK  
By  Deputy

**Certificate of Service**

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