

IN THE SUPREME COURT OF OHIO

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PENNSYLVANIA GENERAL INSURANCE )  
COMPANY )

*Plaintiff-Appellee* )

v. )

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

*Defendants-Appellants.* )

On Appeal From The  
Court of Appeals,  
Eighth Appellate District,  
Cuyahoga County, Ohio  
Case No. CA-07-090619

BRIEF OF AMICUS CURIAE COMPLEX INSURANCE  
CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF NEITHER PARTY

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## INTEREST OF AMICUS CURIAE

Pursuant to Ohio Supreme Court Rule VI, § 6, the Complex Insurance Claims Litigation Association (“CICLA”) files this amicus curiae brief. CICLA is a trade association of major property and casualty insurers.<sup>1</sup> CICLA members have entered into liability insurance contracts in Ohio and throughout the nation containing provisions similar or identical to those at issue in this appeal. Through amicus curiae participation, CICLA seeks to assist courts in resolving important questions relating to insurance contract interpretation and the obligations of policyholders and insurers alike.

CICLA respectfully submits that its unique perspective will aid this Court in resolving the problematic issues posed by this case. This case involves a dilemma likely to arise often under an “all sums” approach. Specifically, how can courts protect the contribution rights, contemplated under this approach, of an insurer targeted at the outset to pay the entire amount of the policyholder’s liability? Here, the policyholder not only targeted one insurer but refused to cooperate in providing information about other potentially applicable coverage. As a result, the other insurers have no coverage obligations because, in violation of their policies but through no fault of the targeted insurer, the other insurers never received notice of the claim and furthermore never agreed to the settlement between the policyholder and claimant. The targeted insurer’s contribution interests were therefore thwarted by the policyholder’s actions. Given the importance of preventing, as much as possible, unjust results flowing from the “all sums” method, CICLA is vitally interested in this case.

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<sup>1</sup> CICLA submits this brief on behalf of the following member companies: AIU Holdings, Inc.; Arrowpoint Capital Corp.; Chubb & Son – a Division of Federal Insurance Company; Liberty Mutual Insurance Company; Selective Insurance Company of America; and TIG Insurance Company. This brief is not submitted on behalf of member companies The Travelers Indemnity Company and Travelers Casualty and Surety Company, as Travelers was formerly a party to this matter.

## STATEMENT OF FACTS

The declaratory judgment action giving rise to this appeal followed the settlement of a lawsuit brought against, among other defendants, Park-Ohio Industries, Inc. (“Park-Ohio”), a policyholder of Pennsylvania General Insurance Company (“Penn General”) and Defendants-Appellants Nationwide Insurance Company (“Nationwide”) and Continental Casualty Company (“Continental”) (together, the “Non-Targeted Insurers”).<sup>2</sup> The plaintiff to the lawsuit, brought in state court in California on March 7, 2002, alleged bodily injury resulting from exposure to asbestos while working at various sites, including during the early 1960s while working with an asbestos-containing product manufactured by Park-Ohio. *See Pennsylvania General* at ¶ 2.

Five months later, in August 2002, Park-Ohio tendered the lawsuit to Penn General, but failed to notify any of its other insurers. *Id.* at ¶ 3; Memorandum in Support of Jurisdiction of Appellant Continental Cas. Co. at 5. At that point, the trial was set to begin approximately six weeks later. *Pennsylvania General* at ¶ 3. After receiving notice, Penn General began a claim investigation and requested Park-Ohio to provide it with information about other insurance policies, which Park-Ohio failed to do. *Id.* at ¶ 4; *Penn. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, No. CV-04-546323 (Ohio Ct. Common Pleas Oct. 4, 2007) (“Journal Entry & Op.”) at 3.

On October 6, 2002, Park-Ohio negotiated a \$1 million settlement with the underlying plaintiff without the knowledge or formal consent of any of its insurers. *Id.* at ¶ 6; Journal Entry

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<sup>2</sup> Penn General provided primary liability coverage to Park-Ohio from 1960 until 1968. Continental provided similar coverage from 1968 until 1975, and Nationwide from 1979 until 1988. *See Penn. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 179 Ohio App.3d 385, 2008-Ohio-5991, 902 N.E.2d 53, fn.1. A fourth insurer, Travelers, provided primary coverage from 1975 until 1979, but it reached a settlement with Penn General in this litigation and is not a party on appeal. *Id.* at fn.2. All of the insurers’ policies were triggered by the underlying plaintiff’s claim. *Id.* at ¶ 12.

& Op. at 3. Penn General issued a reservation of rights letter in February 2003 in which it informed Park-Ohio that it would pay Park-Ohio's post-tender defense costs and \$250,000 toward the settlement. *Pennsylvania General* at ¶ 10. In the letter, Penn General again requested "other insurance" information, which Park-Ohio again failed to provide. *Id.*

In September 2003, Park-Ohio filed an action in the Cuyahoga County Court of Common Pleas against Penn General seeking, inter alia, indemnification of the full settlement amount. *Id.* at ¶ 11.<sup>3</sup> On numerous occasions during that litigation, Penn General again requested information about Park-Ohio's other insurers. *Id.* at ¶ 12. Park-Ohio eventually produced thousands of pages of insurance policy-related documents in July 2004, following motions practice and the issuance of a court order. *Id.*; Journal Entry & Op. at 4. Prior to receiving these documents, Penn General did not know which other insurers had provided liability coverage to Park-Ohio during the relevant time period, and only Park-Ohio had control of this information. Journal Entry & Op. at 4-5.

On September 3, 2004, Penn General wrote to the Non-Targeted Insurers (and the fourth insurer that subsequently reached a settlement with Penn General) seeking their participation in the payment of settlement and defense costs stemming from the underlying lawsuit. *Pennsylvania General* at ¶ 12. Those insurers declined to contribute, and Penn General shortly thereafter filed a declaratory judgment action seeking equitable contribution, which is the action giving rise to this appeal. *Id.* at ¶ 13. Following Penn General's settlement with Park-Ohio, in which Penn General paid the remaining \$750,000 of Park-Ohio's underlying asbestos settlement, a bench trial took place to resolve Penn General's allocation claims. *Id.* at ¶¶ 14-15.

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<sup>3</sup> Shortly after the coverage action commenced, Penn General paid Park-Ohio the post-tender defense costs and \$250,000 toward the settlement, which represented the limit of one of the four policies it issued to Park-Ohio. *Id.* at ¶ 11.

The Court of Common Pleas held that Park-Ohio had breached the terms of the Non-Targeted Insurers' policies relating to notice, cooperation, settlement without consent, and assignment of rights. Journal Entry & Op. at 6-9, 12. In particular, the court held Park-Ohio's failure to notify the Non-Targeted Insurers of the underlying suit and its eventual settlement without any prospect of participation by the Non-Targeted Insurers effectively prejudiced those insurers. *Id.* at 8. Park-Ohio's failure to abide by these provisions waived coverage under the Non-Targeted Insurers' policies and barred any right of contribution Penn General may have had against the Non-Targeted Insurers, the court held, noting that "[i]f there is no applicable coverage, then there can be no right of contribution." *Id.* at 9, 12. The court also held that Penn General did not take reasonable measures to preserve its contribution rights and that it should have made certain that other insurers had been notified before settlement of the underlying suit. *Id.* at 9-11.

The Eighth District Court of Appeals reversed. It held that Park-Ohio's breaching the Non-Targeted Insurer's policies did not affect Penn General's contribution rights, noting that Penn General brought a claim for contribution, not an action for breach of contract. *Pennsylvania General* at ¶ 26. The court also concluded that Penn General was diligent in seeking Park-Ohio's other insurance information and that Penn General exercised or reserved all of its policy rights and properly handled Park-Ohio's claim. *Id.* at ¶¶ 34-37. The court also held that, under *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, Park-Ohio did not have a duty to notify the Non-Targeted Insurers. *Pennsylvania General* at ¶ 27. It further held that the Non-Targeted Insurers were not prejudiced in receiving notice of the underlying suit long after its settlement.

Continental and Nationwide filed notices of appeal, and this Court accepted appeal as to Proposition of Law No. I. *See Penn. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 2009-Ohio-0104 (May 8, 2009 entry). That proposition asserts:

No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 2002-Ohio-2842, 95 Ohio St.3d 512 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.

### SUMMARY OF ARGUMENT

This case illustrates one of many types of difficulties that may arise when, under an “all sums” approach to determining an insurer’s liability for long-term injury or damage caused by its policyholder, an insurer seeks reimbursement from other insurers that have also issued policies triggered by such injury or damage. Here, the policyholder unilaterally settled a lawsuit filed against it and failed to notify the Non-Targeted Insurers about the suit or the settlement, in breach of policy provisions relating to voluntary payments and notice. Indeed, the Non-Targeted Insurers never learned about the suit or the settlement until nearly two years after the fact, when they were asked to provide contribution to the targeted insurer, Penn General. Because the terms and conditions to coverage in the Non-Targeted Insurers’ policies were not complied with, those insurers have no coverage obligations and, therefore, should not be forced to provide contribution to the loss.

Penn General, however, should not be left “holding the bag.” It would be inequitable not to allocate costs of defense and indemnity to the entire period of injury or damage. Penn General is not responsible for the breach of the terms and conditions of the policies issued by the Non-Targeted Insurers. That responsibility lies with the policyholder, the breaching party, which should bear the consequences of its breach—the amount Penn General would otherwise be able to recover from the Non-Targeted Insurers. Park-Ohio also should bear these costs because they

arose from its failure to provide Penn General with other insurance information, which was a breach of its obligation to cooperate with Penn General. For this reason as well, it should be required to compensate Penn General for the harm it caused, which is the amount that would be attributable to the Non-Targeted Insurers.

Finally, CICLA respectfully submits that in light of this and other impediments to achieving equitable allocation, the “all sums” approach should be reconsidered. At a minimum, where, as here, all the relevant insurers can be joined in a single coverage action, trial courts should be encouraged to allocate the parties’ respective liability for a long-term loss in the first instance.

### ARGUMENT

#### **I. REQUIRING AN INSURER TO CONTRIBUTE TO A LOSS WHEN THE TERMS AND CONDITIONS OF ITS POLICY HAVE NOT BEEN COMPLIED WITH VIOLATES THE CONTRACT, SETTLED LAW AND EQUITY.**

In *Goodyear*, this Court adopted an “all sums” approach to apportioning coverage where a loss triggers multiple insurance policies. Under this approach, the policyholder is at liberty to “pick and choose” a single triggered policy to respond to the loss in full (up to the policy’s coverage limits). *Goodyear* at ¶ 11. If the selected policy does not cover the entire claim, the policyholder may pursue other policies until full coverage is afforded. *Id.* at ¶ 12. The targeted insurer then “bear[s] the burden of obtaining contribution from other applicable primary insurance policies.” *Id.* at ¶ 11. Thus, this Court plainly contemplated that an equitable allocation ultimately would be reached, but believed it was simply deferring that task and shifting the process of achieving that allocation to the targeted insurer.

Unfortunately, the “all sums” approach of *Goodyear* does not always ultimately achieve an equitable allocation. Rather, the targeted insurer often can unfairly be left “holding the bag.” This is because insurance policies are not “applicable” when, as here, their terms and conditions

to coverage have not been fully complied with. Thus, in such instances, non-targeted insurers cannot be made to contribute to the targeted insurer required to pay "all sums." Contract terms, settled coverage law and equity all prohibit such a result.

Contribution is "the right of a person who has been compelled to pay what another *should pay* in part to require partial (usually proportionate) reimbursement." *Travelers Indem. Co. v. Trowbridge* (1975), 41 Ohio St.2d 11, 113, 70 O.O.2d 6, 321 N.E.2d 787 (emphasis added), overruled on other grounds, *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.* (1995), 73 Ohio St.3d 391, 653 N.E.2d 235. It is available from "the others equally bound" with the party that has paid. *Baltimore & O. R. Co. v. Walker* (1888), 45 Ohio St. 577, 581, 16 N.E. 475. Although contribution is based on equitable principles, "the law implies a contract to equalize the *common burden*." *Id.* (emphasis added); *see also* 59 Ohio Jur. 3d Insurance § 1253 ("The purpose of [the rule permitting an insurer that has paid an entire loss to obtain contribution from other insurers similarly bound] is to equalize the common burden by allowing reimbursement to the insurer paying the loss, for the excess paid over its share of the debt."). Contribution is to be provided in a fashion in which the common burden is "borne equally by all bound by the *common obligation*." *Baltimore*, 45 Ohio St. at 581. (emphasis added). Thus, there must exist "a *common liability* upon the same obligation." *Assets Realization Co. v. Am. Bonding Co. of Baltimore* (1913), 88 Ohio St. 216, 253, 102 N.E. 719 (emphasis added).<sup>4</sup>

These principles are widely recognized. Under California law, for example, in an insurer's contribution action, "the inquiry is whether the nonparticipating coinsurer 'had a *legal*

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<sup>4</sup> Contribution is based on the right to recover a share of an obligation that another is equally bound to satisfy. As this Court has explained: "In insurance law the term 'contribution' has a fixed, legal meaning. It is a principle sanctioned in equity, and arises between coinsurers only, permitting one who has paid the whole loss to obtain contribution from other insurers who are also *liable therefor*." *Nat'l Fire Ins. Co. v. Dennison* (1916), 93 Ohio St. 404, 410, 113 N.E. 260 (emphasis added).

obligation ... to provide [a] defense [or] indemnify coverage for the ... claim or action.” *Safeco Ins. Co. of Am. v. Super. Ct.* (2006), 44 Cal.Rptr.3d 841, 844, 140 Cal.App.4th 874 (quoting *Am. Cont’l Ins. Co. v. Am. Cas. Co.* (2001), 103 Cal.Rptr.2d 632, 638, 86 Cal.App.4th 929) (emphasis in original). Thus, courts “will not order a coinsurer to contribute to a loss that it had no obligation to pay under the terms of its policy.” *Id.* at 845. Where there is no “common obligation that is legally due from multiple insurers, then no basis for contribution exists.” *American Continental*, 103 Cal.Rptr.2d at 638; *see also* Allen D. Windt, *Ins. Claims & Disputes: Representation of Insurance Companies & Insureds* § 10:1 (5th ed.) (“[T]here cannot properly be contribution unless there is, in the first instance, a common obligation.”); Lee R. Russ, 15 *Couch on Ins.* § 217:4 (3d ed.) (“[T]he right to contribution in insurance is predicated upon the principle that all insurers are equally liable for the discharge of a common obligation.”).

Here, the policies issued by the Non-Targeted Insurers set forth a number of standard “CONDITIONS” to coverage that Park-Ohio breached. In the event of any “[o]ccurrence, [c]laim or [s]uit,” Park-Ohio or an agent was required to provide “written notice ... as soon as practicable.” *See* Journal Entry & Op. at 7. Instead, it failed to notify the Non-Targeted Insurers about the California asbestos suit at all.<sup>5</sup> Under the insurance policy terms, Park-Ohio also agreed not to “voluntarily make any payment, assume any obligation, or incur any expense.” *Id.* Instead, it settled the asbestos suit unilaterally. The policies are clear that these conditions must be complied with before the Non-Targeted Insurers can be held responsible for any coverage obligations. *Id.* (“No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of the policy.”).

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<sup>5</sup> Park-Ohio also pledged to “immediately forward to the company every demand, notice, summons or other process received,” which it also failed to do. *See* Journal Entry & Op. at 7.

Park-Ohio's failure to notify the Non-Targeted Insurers of the underlying claim (and its additional failure to timely provide Penn General with information regarding the Non-Targeted Insurers' existence) precluded them from deriving any of the benefits that notice provisions are designed to provide, such as a meaningful opportunity to investigate a claim and determine whether the allegations, if proven, would be covered. *See Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau* (2000), 88 Ohio St.3d 292, 302-03, 725 N.E.2d 646. The Non-Targeted Insurers were not even in a position to monitor the claim; they only learned of the underlying suit's existence when asked to contribute to its settlement nearly two years after the fact. Because Park-Ohio failed to meet its obligations under the Non-Targeted Insurers' policies, the Non-Targeted Insurers owe no coverage obligations to Park-Ohio for the asbestos suit. They cannot be required to contribute to a settlement reached in that suit, under the insurance contract terms, settled law and equity.

The Eighth District Court of Appeals stated that contribution rights between insurance companies are not based on the law of contracts and that, instead, any contribution rights or obligations between such companies "flow from equitable principles." *Pennsylvania General* at ¶ 25 (citing *Maryland Cas. Co. v. W.R. Grace & Co.* (C.A.2, 2000), 218 F.3d 204, 210-11). The court emphasized that "[t]his is not a contract action" but instead an equitable contribution claim that "does not arise out of the policies between Park-Ohio and Nationwide and Continental." *Id.* at ¶ 26. Thus, according to the court, Park-Ohio's conduct vis-à-vis those policies cannot affect any contribution rights Penn General might have against Nationwide and Continental. *Id.* The court's analysis is misplaced. Although this is not a contract action, the Nationwide and Continental policies are the basis under which Penn General has any potential right to contribution. *See, e.g., Truck Ins. Exch. v. Unigard Ins. Co.* (2000), 94 Cal.Rptr.2d 516, 525, 79

Cal.App.4th 966 (noting that courts “are supposed to consider the particulars of the policy in deciding whether equitable contribution is appropriate”). *As a matter of equity*, it is unfair to require Nationwide and Continental to contribute to the liability for the underlying claim, where agreed-to provisions in policies issued by those Non-Targeted Insurers have been ignored. *See Truck*, 94 Cal.Rptr.2d at 522 (“[A]bsent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.”). Park-Ohio breached various provisions under the Non-Targeted Insurers’ policies and therefore would not be entitled to coverage under those policies in a dispute between Park-Ohio and those insurers. Thus, the Non-Targeted Insurers do not share a common liability with the Targeted Insurer and, therefore, requiring them to pay would be unjust.

An insurer’s policy provisions simply cannot be ignored in determining whether, under equitable principles, that insurer can be made to contribute when another insurer has incurred the liability of a common policyholder. As the First Circuit has plainly stated: “[T]here is no support in the case law of any jurisdiction for the proposition that, in the absence of exceptional circumstances, the doctrine of equitable contribution can override explicit, unambiguous policy language.” *Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am.* (C.A.1, 2003), 338 F.3d 42, 50 (adding that this rule “is consistent with the hallowed principle that, absent some amphiboly, a court cannot, in the name of equity, rewrite the language of an insurance contract”). Thus, this Court and others look to, and defer to, insurers’ policy provisions when one insurer seeks contribution from another insurer. *See, e.g., Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.* (1946), 147 Ohio St. 79, 89-90, 33 O.O. 259, 67 N.E.2d 906 (refusing to allow an insurer that chose to pay the policyholder’s entire loss to obtain contribution from a coinsurer, where both insurers’ policies contained “other insurance” provisions limiting their indemnity

obligations to a proportionate share of the total amount of collectible insurance on a loss); *Westfield Nat'l Ins. Co. v. Farmers Ins. Exch.*, 169 Ohio App.3d 785, 2006-Ohio-6849, 865 N.E.2d 81, at ¶ 18 (examining effect of competing "other insurance" clauses in contribution action); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau* (2005), 29 Cal.Rptr.3d 609, 616-17, 130 Cal.App.4th 99 (holding that, where policy endorsement excluded coverage claims involving specific manufacturer's products, insurer owed no duty of equitable contribution to other primary insurer that defended and settled claim against policyholder involving such products); *Allstate Ins. Co. v. United Servs. Auto. Ass'n* (1995), 249 Va. 9, 10-14, 452 S.E.2d 859 (holding that, where policy provision conditioned coverage on existence of liability determination based on either a final judgment following trial or an agreement between the policyholder, claimant, and insurer, and where other insurer defended and settled wrongful death suit, insurer had no coverage obligations and therefore no "common obligation" with the other insurer that would afford the other insurer contribution); *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.* (1992), 80 N.Y.2d 992, 994, 592 N.Y.S.2d 648, 607 N.E.2d 795 (holding that insurer was not required to provide contribution to other insurer for settlement other insurer paid in a personal injury action brought by policyholder's employee, where insurer's policy contained exclusion for claims arising from bodily injury that policyholder's employees suffer on the job); *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002), 119 Cal.Rptr.2d 62, 69, 98 Cal.App.4th 86 (holding that insurer was not required to provide contribution to coinsurer where policyholder failed to meet conditions specified in endorsement); *Dairyland Ins. Co. v. Clementson* (Minn. Ct. App. 1988), 431 N.W.2d 895, 899 (holding that automobile insurer that settled uninsured motorist claim with policyholder could not obtain contribution from second insurer where policyholder did not notify second insurer of accident until six years after the fact and where second insurer's

policy included statutorily permitted endorsement requiring notice of an accident within six months); *IFA Ins. Co. v. Atl. Mut. Ins. Co.* (2000), 331 N.J. Super. 217, 219-21, 751 A.2d 610 (holding that automobile insurer could not obtain contribution from coinsurer for personal injury protection benefits it paid, where coinsurer's policy contained exclusion precluding such coverage when person to be paid is entitled to such coverage under another policy); *Employers Ins. of Wausau v. Am. Int'l Specialty Lines Ins. Co.* (N.D. Cal. May 23, 2005), No. C-02-04976, 2005 WL 1220945, at \*9-10 (holding that because there was no evidence showing that policyholder conducted requisite patent search and safeguarding steps as a condition precedent to coverage for a "covered infringement," patent infringement insurer owed no coverage obligations to policyholder and therefore liability insurer could not obtain contribution).

Indeed, the Court of Appeals, despite its admonition that "[t]his is not a contract action," expressly acknowledged that the Non-Targeted Insurers' contract provisions are central to determining any right of contribution that Penn General might have had. In holding that Penn General could recover from the Non-Targeted Insurers, the court noted that both of the Non-Targeted Insurers "conceded that their policies were triggered by the [underlying] claim, and that the essential terms, conditions, and exclusions of the Nationwide, Continental, and Pennsylvania General policies are nearly identical." *Pennsylvania General* at ¶ 38. It was, therefore, apparent to the Court of Appeals that at least *some* policy provisions must be taken into account before an insurer can be made to contribute. Under the Court of Appeals' decision, provisions pertaining to "trigger" (i.e., insuring agreement provisions) and applicable exclusions must be considered, but those pertaining to notice and voluntary payments were disregarded. There is no principled basis for this distinction; fairness requires that all contractual conditions to coverage be honored—as well as all other terms and conditions—before a non-targeted insurer is made to

contribute to a policyholder-related loss. See *State of New York v. Blank* (C.A.2, 1994), 27 F.3d 783, 793 (finding that district court erred in holding that a cause of action against an insurer for contribution will lie “even where the insured has not complied with conditions of the policy”); *Safeco*, 44 Cal.Rptr.3d at 845 (“[A] nonparticipating coinsurer ... retains its right to raise ... coverage defenses as affirmative defenses in a contribution action.”); see also 46A C.J.S. Insurance § 1990 (“The right to contribution is subject to any defenses which may be raised against the insured.”); Lee R. Russ, 15 Couch on Ins. § 218:17 (“As the right to contribution arises because both the entity seeking contribution and the entity from whom it is sought are liable for the underlying obligation, it stands to reason that any fact or circumstance which would allow the latter entity to avoid liability for the obligation would preclude contribution.”); Appleman, Ins. L. & Prac. § 4921 (1981) (“[I]f one policy is ... unenforceable because of a failure to give notice of the accident or suit, a lack of cooperation, or any one of many other possible exceptions or policy defenses, contribution cannot be compelled by the one insurer which is still liable against the other.”). As one court explained:

Consideration of notice in a contribution action ... comports with the ever present specter of fairness subsumed in equity. It is unfair to ask co-insurers to contribute to a completed settlement when these carriers have been given absolutely no prior opportunity to participate in or simply monitor the lawsuit or the settlement proceedings, regardless of the participation of counsel for or agents of the settling insurer.

*United Nat'l Ins. Co. v. Admiral Ins. Co.* (E.D. Pa. Aug. 19, 1992), No. 90-7625, 1992 WL 210000, at \*6-7 (holding that settling insurer could not obtain coverage from coinsurer that did not receive notice of the underlying claim until five days after the claim had been settled and that, as a matter of law, an insurer is prejudiced when “notice is first supplied when the insured’s liability is a *fait accompli*”); see also *Am. Int’l Specialty Lines Ins. Co. v. Cont’l Cas. Ins. Co.* (2006), 49 Cal.Rptr.3d 1, 20, 42 Cal.App.4th 1342 (“Insurers on the risk with notice of a claim

are in a position to protect their rights, whereas insurers on the risk without notice have no opportunity to protect their rights. Absent compelling equitable considerations to the contrary, it is unfair and inequitable to saddle insurers on the risk with contribution sans notice of potential liability for contribution.”).<sup>6</sup> Thus, courts find it inequitable to require insurers to contribute to settlements or judgments they learn about only after they are a “done deal,” in violation of the insurers’ right to notice under their policies.<sup>7</sup>

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<sup>6</sup> See also *Blank*, 27 F.3d at 794 (noting that notice provisions enable insurers to make timely investigations of relevant events, exercise early control over a claim, undertake settlement efforts before litigation, take steps to eliminate the risk of similar future occurrences, establish more accurate renewal premiums, and maintain adequate reserves); *Truck*, 94 Cal. Rptr. 2d at 525 (noting that imposing a contribution obligation on an insurer that did not receive notice of the underlying claims until after they were resolved “would subject it to a significant financial burden even though it did not enjoy any of the concomitant benefits”). In *Truck*, the court held that the selected insurer “should not be permitted to drag [the non-selected insurer] into the picture after the fact” and noted that the lack of notice precluded any opportunity for the non-selected insurer to participate in the underlying litigation and also unnecessarily “spawned a second round of litigation.” *Truck*, 94 Cal. Rptr. 2d at 525-26. In *Blank*, the court held that the insurer seeking contribution had failed to provide “a valid excuse for its delay” when it waited ten months to notify a coinsurer of the underlying claim after learning that the coinsurer had possibly issued a responsive policy, which notice arrived one month after settlement of the claim. *Blank*, 27 F.3d at 795-97. Other courts have admonished insurers seeking contribution for not attempting to discover whether other applicable insurance exists. See *Am. Star Ins. Co. v. Allstate Ins. Co.* (1973), 12 Ore.App. 553, 557, 508 P.2d 244 (noting that the policyholder’s neglect in failing to notify non-selected insurer was compounded by the tendered insurer’s failure to inquire into the possibility of other insurance).

<sup>7</sup> See *Blank*, 27 F.3d at 796-97 (barring contribution when insurer was notified of underlying judgment against policyholder by other insurer thirteen months after underlying action commenced and a month after judgment was entered); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.* (2008), 164 Wash.2d 411, 421, 191 P.3d 866 (holding that because “duties to defend and indemnify do not become *legal obligations* until a claim for defense or indemnity is tendered,” where a policyholder has not tendered a claim to an insurer before settlement or the end of trial, other insurers cannot recover contribution from that insurer); *American International*, 49 Cal.Rptr.3d at 11, 18-20 (denying contribution claim against insurer where policyholder settled underlying suit without notifying insurer of the suit or settlement, in violation of notice and voluntary payment provisions); *Cas. Indem. Exch. Ins. Co. v. Liberty Nat’l Fire Ins. Co.* (D. Mont. 1995), 902 F.Supp. 1235, 1239 (holding that insurer could not be made to contribute to settlement of an underlying claim where policyholder did not tender claim to insurer until after the settlement had been negotiated by the insurer seeking contribution); *American Star*, 12 Ore.App. at 556 (holding that insurer was not obligated to make any contribution to other insurer

The Court of Appeals stated that its decision was also motivated by public policy concerns, including fairness to the targeted insurer seeking contribution. *Pennsylvania General* at ¶ 39. According to the court, “[t]o allow the insured to unilaterally extinguish all potential sources of contribution renders illusory the right of contribution established in *Goodyear*.” *Id.* *Goodyear*, the court stated, was not intended “to condition a targeted insurer’s right to contribution on the action or inaction of the insured and leave the targeted insurer without recourse.” *Id.* CICLA respectfully submits that the Court of Appeals correctly recognized the inequity of leaving a targeted insurer “holding the bag” without the ability to achieve an equitable allocation. However, the Court of Appeals took an erroneous approach to resolving that inequity. Rather than multiply the inequity by imposing liability in direct contravention of other insurers’ policy terms, the court should have required Park-Ohio to take responsibility for its actions in waiving coverage from the Non-Targeted Insurers and refusing to cooperate with Penn General.<sup>8</sup> Here, it would be unfair, as discussed, to require non-targeted insurers to contribute when their policies have not been complied with, and yet it is also unfair to leave the targeted insurer saddled with the entire amount of the policyholder’s loss and unable to recover under other, triggered policies. As discussed in the following section, in a case such as this one, where a policyholder’s actions needlessly prevent a targeted insurer from obtaining contribution from non-targeted insurers, an otherwise unfair result can be overcome by requiring the

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where it received notice of one claim three years after accident and a year and a half after settlement, and notice of other accident two and a half years after accident and ten months after settlement).

<sup>8</sup> There are a variety of ways in which a policyholder might “unilaterally extinguish” a targeted insurer’s potential sources of contribution. The policyholder might, for example, purchase a policy with a non-targeted insurer that contains an applicable exclusion. Indeed, a policyholder may target a particular insurer precisely because it cannot recover from others. As discussed, even the Eighth District Court of Appeals would recognize that contribution would not be available in such a case.

policyholder bear the cost of its failure to cooperate. As discussed in section III, CICLA further submits that the risk of an unfair “all sums” result can also be lessened when circumstances permit allocation in the first instance.

**II. WHERE A POLICYHOLDER THWARTS A TARGETED INSURER’S ABILITY TO OBTAIN CONTRIBUTION FROM NON-TARGETED INSURERS, THE POLICYHOLDER SHOULD BE REQUIRED TO BEAR THE CONSEQUENCES.**

Here, Penn General diligently sought to discover which other insurers had issued potentially triggered policies. After receiving notice of the asbestos suit in August 2002, Penn General, as part of its claim investigation, inquired about other insurance policies issued to Park-Ohio. Park-Ohio failed to provide the requested information. Meanwhile, unbeknownst to Penn General, Park-Ohio settled the suit just six weeks after informing Penn General of the suit’s existence. In a reservation of rights letter that followed, Penn General again sought other insurance information from Park-Ohio, and Park-Ohio again failed to provide such information. Park-Ohio then sued Penn General nearly a year after its unilateral settlement, and during the litigation, it again repeatedly failed to respond to Penn General’s entreaties for other insurance information. Park-Ohio finally produced policy-related documents in July 2004, only after being compelled to do so by court order following motions practice. A little more than a month later, Penn General wrote to the Non-Targeted Insurers seeking equitable contribution. Thus, Penn General did everything in its power to learn about, and notify, coinsurers potentially liable on the underlying asbestos claim. When it finally pried such information out of Park-Ohio, it promptly notified the Non-Targeted Insurers of the underlying suit and settlement, and requested contribution.

Thus, while it would be unfair to require contribution from the Non-Targeted Insurers where, because of the policyholder’s various breaches, they have no coverage obligations, it also is inequitable to leave Penn General “holding the bag” under the *Goodyear* “all sums” approach

when it was not responsible for the policyholder's breaches and in fact undertook to ascertain the identities of the Non-Targeted Insurers and provide notice on its own. Where, as here, the policyholder is responsible for foiling any claim by the targeted insurer to recover contribution from coinsurers, the policyholder should bear the cost of its actions. Here, equity demands that the policyholder make the targeted insurer whole by paying the contribution amounts it forfeited.

The whims of the policyholder should not dictate the rights insurers have against each other. *See Centennial Ins. Co. v. U.S. Fire Ins. Co.* (2001), 105 Cal.Rptr.2d 559, 565, 88 Cal.App.4th 105 ("Although insurers must respond in full to a contractual policyholder's tender of defense, their respective obligations for contribution to other *insurers* for the costs of defense are entirely separate from their obligation to their insured and are adjusted equitably on the basis of all the circumstances of the case.") (emphasis in original). The right to equitable contribution "is predicated upon the common sense principle that where multiple insurers or indemnitors share an equal contractual liability for the primary indemnification of a loss or the discharge of an obligation, the selection of which indemnitor is to bear the loss should not be left to the often arbitrary choice of the loss claimant." *Fireman's Fund Ins. Co. v. Md. Cas. Co.* (1998), 77 Cal.Rptr.2d 296, 304-05, 65 Cal.App.4th 1279.

If this Court leaves the targeted insurer without recourse as a result of the policyholder's breach of the notice and other conditions of the Non-Targeted Insurers' policies, then it has allowed the whims of the policyholder to control over the equitable rights and obligations of the co-insurers. Instead, this Court should insist that the policyholder bear the consequences of its actions in failing to give notice to the Non-Targeted Insurers and in refusing to promptly identify them to Penn General. Because the policyholder's actions have thwarted Penn General's contribution claims, Park-Ohio should be required to bear the cost of the contributions the Non-

Targeted Insurers would otherwise pay. Other courts have made clear that a policyholder must allow a targeted insurer to pursue contribution from other insurers, and that a policyholder cannot thwart those rights and interests at its whim. *See, e.g., Cargill, Inc. v. Ace Am. Ins. Co.* (Minn. Ct. App. 2009), 766 N.W.2d 58, 65-66 (holding that whenever a primary insurer with a duty to defend offers to tender a defense on behalf of an insured, the insured has a reciprocal duty to allow the insurer to seek contribution from other primary insurers with a similar duty to defend, and that, in the event an insured declines to enter into such an arrangement, a district court may order the insured to preserve the insurer's opportunity to seek an equitable apportionment of liability for defense costs among insurers with such an obligation).

Indeed, many courts—including this Court in *Goodyear*—that have adopted an “all sums” scheme do so with an understanding that the targeted insurer will have the ability to later recover from co-insurers the disproportionate amount it pays out to the policyholder. *See, e.g., Goodyear* at ¶ 11; *State of California v. Cont'l Ins. Co.* (2009), 88 Cal.Rptr.3d 288, 301, 169 Cal.App.4th 1114 (“[W]hen there is a continuous loss spanning multiple policy periods, any insurer that covered any policy period is liable for the entire loss, up to the limits of its policy. The insurer's remedy is to seek contribution from any other insurers that are also on the risk.”) (emphasis in original); *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C. 1981), 667 F.2d 1034, 1050 (“[An ‘all sums’ scheme] does not mean that a single insurer will be saddled with full liability for any injury. When more than one policy applies to a loss, the ‘other insurance’ provisions of each policy provide a scheme by which the insurers’ liability is to be apportioned.”); *J.H. France Refractories Co. v. Allstate Ins. Co.* (1993), 534 Pa. 29, 42, 626 A.2d 502 (“[Adopting an ‘all sums’ scheme] does not alter the rules of contribution or the provisions of ‘other insurance’ clauses in the applicable policies. There is no bar against an insurer obtaining a share of

indemnification or defense costs from other insurers under ‘other insurance’ clauses or under the equitable doctrine of contribution.”); *Rubenstein v. Royal Ins. Co. of Am.* (1998), 44 Mass.App.Ct. 842, 852, 694 N.E.2d 381 (“Of course, there is no bar against an insurer [that is targeted to pay the entire claim] obtaining a share of indemnification or defense costs from other insurers under the doctrine of equitable contribution.”), *aff’d* (1999), 429 Mass. 355, 708 N.E.2d 639. When a policyholder withholds from the targeted insurer information about additional insurance policies that also cover the claim, it thwarts one of the primary assumptions courts rely on in determining that “all sums” is a satisfactory approach. Here, Park-Ohio deliberately withheld from Penn General “other insurance” information until it was forced to provide it by court order. In conducting itself in this fashion, it subverted any viable equitable contribution claims Penn General would have had against the Non-Targeted Insurers, thus contravening this Court’s expressed intent in *Goodyear* that a targeted insurer be able to seek contribution following a disproportionate “all sums” payment. Park-Ohio should not be permitted to purposefully frustrate the intent of *Goodyear* and Ohio law.

Furthermore, the policyholder’s actions in this case also represent a breach of its contractual obligations to “cooperate with [Penn General] and, upon [Penn General’s] request, assist in making settlements, in the conduct of the suits and in enforcing any right of contribution or indemnity against any other person or organization who may be liable.” *See* Journal Entry & Op. at 7 (App. at 30). Thus, Park-Ohio not only breached the Non-Targeted Insurers’ rights by failing to give proper notice, but also violated Penn General’s rights by failing to disclose the details of other insurance. Courts recognize that an insured, as a part of its contractual duty to cooperate, has an affirmative obligation to preserve the insurer’s opportunity to obtain contribution from other primary insurers. *See, e.g., Cargill*, 766 N.W.2d at 65. The recourse

here, therefore, should be to hold the policyholder liable for breaching its obligation to cooperate with Penn General and for the damages resulting from that breach—namely, the amount in contribution that Penn General would otherwise have been able to recover from the Non-Targeted Insurers.

**III. COURTS SHOULD BE ENCOURAGED, WHEN POSSIBLE, TO ALLOCATE LIABILITY AMONG ALL TRIGGERED POLICIES IN THE FIRST INSTANCE AND THEREBY AVOID AN UNNECESSARY AND OFTEN UNPRODUCTIVE SECOND ROUND OF LITIGATION OVER CONTRIBUTION RIGHTS.**

CICLA respectfully submits that, as many courts have held, the “all sums” approach often unfairly enriches the policyholder at the expense of a targeted insurer and that, instead, a method allocating liability for long-term injury or damage across all triggered periods is a better approach. *See, e.g., Wrecking Corp. of Am., Va., Inc. v. Ins. Co. of N. Am.* (C.A.D.C. 1990), 574 A.2d 1348, 1351 (“[T]he policy is limited to damage occurring while the policy is in effect.”); *N. States Power Co. v. Fid. & Cas. Co. of N.Y.* (Minn. 1994), 523 N.W.2d 657, 662 (“[E]ach insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period.”); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.* (2003), 275 Kan. 698, 754, 71 P.3d 1097 (“[Failing to allocate] clearly contradicts the fundamental insurance agreement to indemnify the insured for injuries during a specified policy period.”); *Pub. Serv. Co. v. Wallis & Cos.* (Colo. 1999) (en banc), 986 P.2d 924, 940 (“[W]e hold that where property damage is gradual, long-term, and indivisible, the trial court should make a reasonable estimate of the portion of the ‘occurrence’ that is fairly attributable to each year.”); *Consol. Edison Co. v. Allstate Ins. Co.* (2002), 98 N.Y.2d 208, 224, 746 N.Y.S.2d 622, 774 N.E.2d 687 (“[T]he policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside the period.... Proration of

liability among the insurers acknowledges the fact that there is uncertainty as to what actually transpired during any particular policy period.”).

Under an “all sums” approach, an insurer targeted to pay “all sums” for policyholder-caused injury or damage spanning multiple policies will often, through no fault of its own, not be able to recoup its overpayment from the non-targeted insurers. As discussed, breach of conditions precedent to coverage or the presence of relevant exclusions, for example, could prevent the targeted insurer from obtaining contribution. Here, as discussed, Penn General is a victim of the policyholder’s failure to abide by the notice and voluntary payment provisions of policies issued by the Non-Targeted Insurers. Thus, the prospect of a separate contribution claim will often do little to ease the inequity of imposing upon a single insurer the responsibility of covering an entire loss, regardless of how much of the loss actually occurs during the time period covered by that insurer.<sup>9</sup>

Furthermore, obligating a targeted insurer to launch a separate contribution action to make itself whole unnecessarily wastes both private and judicial time and resources. Requiring a single insurer to pay “all sums” spawns additional, separate litigation by that insurer to recover its overpayment from liable insurers that the policyholder did not select to pay. This Court contemplated such actions in *Goodyear*. See *Goodyear* at ¶ 11. It did not, however, foresee the

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<sup>9</sup> In other situations, the policyholder might select the targeted insurer to pay for the entire period of harm it caused precisely because its policy lacks a relevant exclusion, avoiding other triggered policies affording more limited coverage. The insurers whose policies contain relevant exclusions would have a defense against the policyholder and, therefore, against the targeted insurer in a contribution action. The targeted insurer would unfairly be left paying for the entire loss. In addition, the targeted insurer has no control over which other insurers the policyholder chooses to contract with. Requiring the targeted insurer to seek contribution forces that insurer to bear the risk of another insurer’s default. See *Olin Corp. v. Ins. Co. of N. Am.* (C.A.2, 2000), 221 F.3d 307, 323 (“Allocation results in the insured bearing the risk of any of its insurers’ inability to pay.... There is logic in having the risk of such defalcation fall on the insured, which purchased the defaulting insurer’s policy, rather than on another insurer which is a stranger to the selection process.”).

extensive waste of public and private resources involved in such follow-on litigation. Rather than expedite resolution of insurance disputes, “all sums” serves only to multiply them.

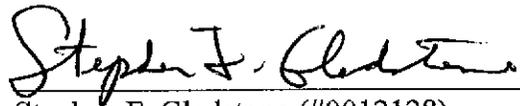
In light of these concerns, CICLA respectfully suggests that this Court reconsider the “all sums” approach to resolving admittedly difficult issues relating to coverage for long-term injury or damage that triggers multiple policy periods. Even if the “all sums” approach is maintained, CICLA submits that trial courts should be encouraged to allocate liability among all insurers that have issued triggered policies in the first instance, when possible. When all of the relevant actors can be brought before the trial court in a single proceeding, the court and the parties can more efficiently “settle up” the parties’ liability responsibilities and, in the process, prevent the need for additional litigation. As Ohio courts have noted, joining related parties and claims preserves judicial resources and provides for efficient dispute resolution. *Dice v. White Family Cos., Inc.*, 2nd Dist., No. 20491, 2005-Ohio-2861, at ¶ 31 (“Joinder promotes judicial economy, trial convenience and expedites the final determination of disputes.”) (quoting *State of Ohio v. Louis Trauth Dairy, Inc.* (S.D. Ohio 1994), 856 F.Supp. 1229); *Vickers v. Howe* (1998), 123 Ohio App.3d 456, 463, 704 N.E.2d 344 (“[J]udicial economy is enhanced when all possible parties are joined and claims are litigated in one proceeding.”). Here, Park-Ohio, which instituted a coverage action against Penn General, was in possession of information relating to its other insurers. The Non-Targeted Insurers could have been joined in that action, allowing for prompt and straightforward resolution of all of the insurers’ coverage responsibilities. Such a step would have avoided not only the extra round of litigation respecting Penn General’s contribution rights, but also the inequities presented with respect to the insurers’ participation here. In this case, the only equitable result is to hold Park-Ohio responsible for the “missing” contribution shares. In

future cases, these issues can be herded off by encouraging joinder of all responsible parties and addressing allocation issues from the start.

**CONCLUSION**

For all of the foregoing reasons, CICLA respectfully requests that this Court reverse the decision of the Eighth District Court of Appeals and remand this case for further proceedings in the Cuyahoga County Court of Common Pleas.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of this Brief of Amicus Curiae Complex Insurance Claims Litigation Association in Support of Defendants-Appellants Continental Casualty Company and Nationwide Insurance Company has been served this 24<sup>th</sup> day of July, 2009 by U.S. Mail, postage prepaid, upon the following:

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