

No 2009-0104

In the Supreme Court of Ohio

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

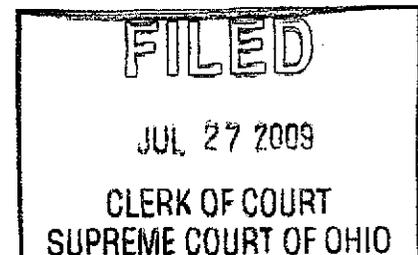
DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No CA-07-090619

BRIEF OF APPELLANT CONTINENTAL CASUALTY COMPANY

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I.

INTRODUCTION AND SUMMARY

In *Goodyear Tire & Rubber Company v. Aetna Casualty & Surety Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, ¶ 11 (“*Goodyear*”), this Court held that, “when a continuous occurrence . . . triggers claims under multiple primary 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. In such an instance, the insurers bear the burden of obtaining contribution from other applicable primary insurance policies as they deem fit.” In adopting this “all sums” rule, the Court stated that it was seeking to “promote[] economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible.” *Id.* at ¶ 11.

In practice, however, *Goodyear* has proven to be unworkable. It assumes that an insured that is permitted to recover “all sums” from one insurer’s policy will comply with all of the requirements of its other policies so as to preserve the targeted insurer’s contribution rights. But as this case demonstrates, an insured that is paid “all sums” by the targeted insurer has no incentive to comply with the provisions of its other insurance policies. Thus, in order to allow the targeted insurer to obtain contribution, courts are forced to ignore the contractual rights of the non-targeted insurers under their policies.

These practical consequences of *Goodyear* raise serious constitutional questions that warrant this Court’s reconsideration of the decision. As this Court recognized in *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at ¶ 9, “[t]he freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the

citizenry, so much so that the United States Constitution specifically protects against state encroachment upon contracts.” Indeed, *Goodyear* itself recognized the long-standing rule that in Ohio, “insurance policies should be enforced in accordance with their terms.” 95 Ohio St. 3d 512, 2002-Ohio-2842, at ¶ 8. But the *Goodyear* rule as interpreted by the Court of Appeals in this case effectively requires the abrogation of insurance contracts. The court below held that a non-targeted insurer is liable for payment of contribution claim to a targeted insurer even though the non-targeted insurer’s policy had admittedly been breached by the insured.

This situation is not only unconstitutional but also unworkable, creating uncertainty that makes it difficult for insurers to do business in Ohio. Predictable enforcement of insurance contracts is essential so that insurers can anticipate their losses and set reserves. If insurers are unable to forecast their risks and predict losses, the financial stability of the industry will be disrupted and jeopardized. *See Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at ¶ 39.

This Court therefore should reject *Goodyear*’s “all sums” approach and instead adopt a pro rata by time allocation, which is the rule increasingly adopted in other jurisdictions. Such a pro rata allocation would require each insurer to pay only for injuries during its own policy period, and thus would enable an insured to receive the benefits of each of its “available” policies in accordance with their terms. Such a rule would eliminate the need for contribution actions like the one at issue in this case because each insurer would be responsible only for its own share. Moreover, if an insured chose not to comply with the terms of its policy by, for example, failing to provide notice to an insurer or settling a case without an insurer’s consent, the insured would suffer the consequences of its own actions.

If such a rule were adopted in this case, the contribution claims of the selected insurer, plaintiff-appellee Pennsylvania General Insurance Company (“Penn General”), would be

rejected, with the admonition that in future cases, no insurer would be required to pay more than its pro rata share of the loss. Such a result would be equitable because Penn General chose to settle the bad faith claims of the insured, Park-Ohio Industries, Inc. (“Park-Ohio”), rather than enforcing its policy provisions that required the Park-Ohio to cooperate and “assist in enforcing any right of contribution or indemnity” against other insurers.

In the alternative, this Court should clarify *Goodyear* and confirm that contribution may not be obtained from any insurer whose policy is not “applicable,” and that, in order for a policy to be “applicable,” all conditions to coverage must be met, including the provisions related to notice, opportunity to defend, and the right to control settlement. This Court should make clear that the obligation to comply with all of the requirements imposed by the non-selected insurer’s policy is, in the first instance, the responsibility of the insured. If the insured does not comply with its obligations, it voids coverage under the non-selected insurer’s policy and no contribution from that non-selected insurer should be possible. In that circumstance, this Court should restrict the insured’s rights against a selected insurer to the selected insurer’s pro rata share of a loss and require the insured to pay the shares of the non-selected insurers.

This Court should also make clear that the selected insurer likewise has obligations to the non-selected insurers and rights with respect to the insured. This Court should require that, before a contribution claim may be pursued under *Goodyear*, a selected insurer must timely request that the insured provide notice to other carriers and comply with the other conditions of coverage. If the insured does not cooperate with the selected insurer’s efforts to enforce its contribution, indemnity and subrogation rights, the selected insurer’s recourse should include the right to deny coverage under the selected policy or to pay only its pro rata share of any

settlement or judgment – but *not* the right to seek payment from the non-selected insurer whose policy has been rendered “inapplicable” by the insured’s actions.

In this case, neither the insured nor the selected insurer provided defendant-appellant Continental Casualty Company (“Continental”) with timely notice, an opportunity to defend or the right to control the timing and amount of settlement. Thus, this Court should reverse the decision of the Court of Appeals for the Eighth Appellate District and reinstate the judgment of the Cuyahoga County Court of Common Pleas rejecting Penn General’s demand for contribution.

II.

STATEMENT OF THE CASE AND OPINIONS BELOW

This is an action brought by Penn General (formerly known as General Accident Insurance Company) seeking contribution for more than \$1 million Penn General had paid to its insured, Park-Ohio, in settlement of a personal injury case. In March 2002, George DiStefano sued Park-Ohio claiming injuries from exposure to asbestos-containing products manufactured by Ohio Crankshaft, a Park-Ohio predecessor company. (Supp. pp. 57-59). Several months later, Park-Ohio tendered the suit to Penn General, one of several companies that insured Park-Ohio. Park-Ohio had other policies from Continental, Nationwide, and Travelers, but it opted not to notify any insurers other than Penn General of the *DiStefano* action. In October 2002, Park-Ohio settled the *DiStefano* suit for \$1 million. Penn General did not formally consent to the settlement, but did not object to it. Park-Ohio did not notify any other insurer of the settlement, let alone seek its consent, and Penn General did not demand that it do so.

When Penn General refused to pay for the settlement, Park-Ohio sued Penn General for coverage and bad faith, claiming that Penn General had breached its contract and duty of good

faith because it improperly refused to defend Park-Ohio or pay the *DiStefano* settlement. See *Park-Ohio Industries, Inc. v. General Accident Insurance Co.*, Cuyahoga County Court of Common Pleas Case No. 511015. (Supp. pp. 123-129). Shortly thereafter, Penn General paid Park-Ohio's post-tender defense costs but only a portion of the \$1 million settlement.

During discovery in the bad faith action, Penn General obtained the names of Park-Ohio's other insurers and sent each of those insurers notice of the *DiStefano* claim. By then, more than two years had passed since Park-Ohio had settled the *DiStefano* claim. Continental advised Penn General that it would not pay the *DiStefano* claim because express provisions of its policies had been breached, including the provisions (i) requiring prompt notice of a suit, (ii) allowing Continental the right to defend and settle the action, (iii) requiring the insured's cooperation and assistance in the insured's defense, and (iv) precluding reimbursement of any voluntary payments made by the insured.

On October 27, 2004, Penn General filed this contribution action against Continental, Travelers and Nationwide. (Supp. pp. 1-9). On October 4, 2007, the trial court entered judgment in favor of Continental, denying Penn General's claim for contribution. (Apx. pp. 28-41; Supp. pp. 34-47). Penn General appealed the trial court's judgment to the Court of Appeals for the Eighth Appellate District, which reversed the trial court in an opinion journalized on December 1, 2008 and reported at 179 Ohio App. 3d 385. (Apx. pp. 5-28). Continental timely filed its notice of appeal to this Court (Apx. pp. 1-4), which allowed the discretionary appeals of both Continental and Nationwide, thereby accepting jurisdiction of this case. 121 Ohio St. 3d 1472, 2009-Ohio-2045.

III.

STATEMENT OF FACTS

A. The 2002 DiStefano Personal Injury Claim

In March 2002, George DiStefano filed a personal injury lawsuit against Park-Ohio and several other defendants in California, alleging that he sustained bodily injury as a result of his exposure to asbestos over the course of approximately 20 years, including exposure to an asbestos-containing product manufactured by Ohio Crankshaft. (Supp. pp. 57-79 and p. 48 at ¶¶ 1 and 3). In August 2002, Park-Ohio tendered the *DiStefano* suit to Plaintiff-Appellee, Penn General, the insurer at the time of the alleged asbestos exposure. (Supp. p. 48 at ¶6 and pp. 80-81).¹ The notice of suit did not indicate that Park-Ohio was notifying any other insurer of the *DiStefano* suit and in fact Park-Ohio did *not* notify any other insurer of the *DiStefano* suit. (Supp. pp. 80-81 and pp. 157-158, Answer to Interrogatory No. 5).

Although Penn General investigated the *DiStefano* claim, it did not seek any information regarding Park-Ohio's other insurers, request that Penn General notify any other insurer of the lawsuit, or request Park-Ohio's cooperation and assistance in the enforcement of any right of contribution. (Supp. p. 49 at ¶8, ¶9, and ¶11 to ¶16). Had it done so, it would have learned that Continental and Nationwide each had issued liability policies to Park-Ohio during the periods covered by the *DiStefano* claim.²

¹ The alleged exposure to Ohio Crankshaft's asbestos-containing product occurred between January 1961 and approximately June 1963, the period during which Penn General insured Ohio Crankshaft.

² Penn General insured Ohio Crankshaft and/or Park-Ohio from December 30, 1960 to December 30, 1968 (Supp. p. 52 at ¶¶ 45-52); Continental insured Park-Ohio from December 30, 1968 to January 1, 1975 (Supp. P. 53 at ¶¶ 55-56); and Nationwide insured Park-Ohio from January 1, 1980 to February 1, 1988 (Supp. p. 54 at ¶¶ 65-73). Travelers, f/k/a Aetna Casualty and Surety Company, which insured Park-Ohio from January 1, 1975 to January 1, 1979, was voluntarily dismissed as a defendant. (Supp. pp. 53 and 55 at ¶58 to ¶62 and ¶75).

Penn General ignored the *DiStefano* claim until just before trial, when it learned that Park-Ohio was contemplating a settlement with DiStefano. Penn General then obtained a report about the claim and retained an attorney to advise it. (Supp. pp. 83-90). But Penn General failed to enforce its rights under its own policy to require Park-Ohio to cooperate and never sought any information about other insurance or requested that Park-Ohio provide notice to its other insurers.³

B. The *DiStefano* Settlement and Park-Ohio's Demand for Coverage

On October 15, 2002, with the trial date approaching, Park-Ohio settled with DiStefano for \$1,000,000. Despite the fact that Penn General's policies precluded Park-Ohio from settling without Penn General's consent, Penn General neither consented nor objected to the settlement. (Supp. pp. 189-190 at pp. 161-63). It did nothing for four more months, when it finally wrote to Park-Ohio to demand that Park-Ohio identify its other insurers and place those insurers on notice. (Supp pp. 117-118). At the same time, Penn General argued that its indemnity obligation was limited to \$250,000. (Supp. p. 112). Park-Ohio challenged that position, claiming that under *Goodyear*, it had the right to obtain the full \$1 million from Penn General and no obligation to identify any other insurers:

[Penn General's] position that [Penn General] 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 [Penn General] policies for payment. [Penn General's] right to seek contribution from other insurers cannot delay [Penn General's] payment to Park-Ohio. [Penn General] 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, [Penn General] will be able to avoid

³ Joint Exhibits 7, 9, 11 and 13 demonstrate that the only "other insurance" information Penn General originally sought from Park-Ohio related to Penn General's own policies of insurance and specifically "other insurance policies in effect for Ohio Crankshaft during the early 60's." (Supp. pp. 91-97, 107-111).

the daunting task of attempting to explain its numerous failures to properly handle this serious claim both before and after the *DiStefano* settlement. (Supp. p. 122).

C. Park-Ohio's Complaint Against Penn General for Coverage and Bad Faith

Penn General ignored Park-Ohio for several more months and failed to pay the claim, so on September 23, 2003, Park-Ohio filed suit in the Cuyahoga County Court of Common Pleas, Case No. 511015, asserting that Penn General had breached its contracts of insurance and its duty of good faith. (Supp. pp. 123-129). Penn General's answer asserted that it did not owe Park-Ohio any defense or indemnity because its policies were breached by Park-Ohio's failure to give timely notice and its lack of cooperation in providing information on other insurance policies. (Supp. pp. 139-140, 142, 143, Twelfth, Fifteenth, Twenty-Fifth, Thirty-Second, and Thirty-Fifth Affirmative Defenses). Nevertheless, a short time later, Penn General paid Park-Ohio's defense costs and \$250,000 of the \$1 million *DiStefano* settlement. (Supp. p. 50 at ¶¶ 24 and 25).

D. Notice to Continental and Nationwide of the Claim/Settlement

In discovery in the bad faith and coverage action, Park-Ohio identified its other insurers but confirmed that it had *not* provided notice to any insurer other than Penn General. (Supp. pp. 157-158, Answers to Interrogatory Nos. 5 and 6; and supp. pp. 169-177). Thereafter, in September 2004, Penn General wrote Continental and Nationwide about the *DiStefano* claim, stating: "We assume, but ask that you confirm, that Park-Ohio Industries, Inc. placed [the insurer] on notice of the [*DiStefano* suit]." (Supp. pp. 178, 183).⁴

⁴ The September 3, 2004 letters to each insurer are identical except for the information pertaining to the addressee's policy information, and in the letter to Continental, Continental is referred to as "CNA." (Supp. pp. 183-187).

In response to this initial notice – received nearly two years after the *DiStefano* suit had been settled – both Continental and Nationwide declined to reimburse Penn General for the claim. Continental explained that its policies had been breached because they contained express provisions requiring notice, giving Continental the right to defend and to settle the action, requiring the insured's cooperation and assistance in the insured's defense, and precluding reimbursement of any voluntary payments by the insured. Continental stated:

As Continental Casualty Company received no notice of this suit until years after it was settled, Continental Casualty Company is unable to ascertain that it has any potential liability for this claim. (Supp. p. 200).

The letter concluded that:

Continental Casualty Company has also looked at the pertinent law concerning [Penn General's] claim for contribution. According to our research, the current law on this subject is laid out in the case entitled *Truck Ins. Exchange v. Unigard Ins.*, 79 Cal. App. 4th 966 (2nd Dist. 2000). In that case, the appellate court held that a carrier who was not tendered timely notice of a claim had no contribution obligation when the claim was settled prior to the carrier's being placed on notice. As this case mirrors the facts in *Truck Ins. Exchange* case, we do not believe that a court would hold Continental Casualty Company has any contribution obligation to [Penn General] for the *DiStefano* claim.

While we understand from your letter that [Penn General] did not obtain the information about other potential coverage until July 30, 2004, that failure is not Continental Casualty Company's fault. We assume that the [Penn General] policies contained cooperation clauses that required the insured to provide the information on a timely basis so that the other insurers could be notified in time to allow them to properly investigate the claim. The insured's failure to provide information is not the fault of Continental Casualty Company and does not cure the prejudice to Continental Casualty Company. (Supp. p. 200).

E. Penn General's Contribution Action And the Decisions Below

On October 27, 2004, Penn General filed this action against Continental and Nationwide seeking equitable contribution. (Supp. pp. 1-9). A year later, Penn General settled the *Park-Ohio* bad faith claim by paying the remaining \$750,000 of the *DiStefano* settlement. (Supp. pp.

191-198). It then sought a total of \$246,527 from Continental and \$372,995 from Nationwide, plus pre-judgment interest from an unspecified date.

By agreement, the trial court decided Penn General's contribution claim based upon the stipulated facts and exhibits filed by the parties and their briefs. (Apx. p. 13; Supp. p. 33). On October 4, 2007, the trial court denied Penn General's claim for contribution. (Apx. pp. 28-41, Supp. pp. 34-45). The trial court, correctly noting that Continental and Nationwide had not been given notice until nearly two years after the case was settled, found that Park-Ohio breached the Defendants' policies by failing to comply with express provisions that gave each of the insurers the right and duty to defend, the right to written notice of an occurrence and suit, and protection against payments made without the insurer's consent. The court also found 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." (Apx. pp. 36, 37; Supp. pp. 42, 43). Moreover, the court held, "If there is no applicable coverage, then there can be no right of contribution for the Plaintiff, Penn General, either." (Apx. p. 39; Supp. p. 45). The court therefore entered judgment for Continental and Nationwide.

Penn General appealed the trial court's judgment to the Court of Appeals for the Eighth Appellate District, which reversed. (Apx. pp. 5-28). The Court of Appeals ruled that, under *Goodyear*, "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." (Apx. p. 22). It also found that *Goodyear's* "all sums approach anticipates" that the selected insurer will "impose its coverage, litigation and settlement decisions on . . . non-selected insurers" (Apx. p. 23), and that Penn General "adequately represented Nationwide and

Continental's interests" (Apx. p. 15). The court concluded 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) . . . cannot 'waive' any contribution rights that Penn General might have against those insurers." (Apx. pp. 19-20). As a matter of public policy, the Court of Appeals determined that the selected insurer must have recourse against the non-selected insurers, and therefore Penn General should be allowed to obtain contribution from Continental and Nationwide even though their policies had been breached. (Apx. pp. 25-26).

Continental timely filed its notice of appeal to this Court (Apx. pp. 1-4), which allowed the discretionary appeals of both Continental and Nationwide, thereby accepting jurisdiction of this case. 121 Ohio St. 3d 1472, 2009-Ohio-2045.

IV.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: This Court should overrule the holding in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, which held that an insured may recover "all sums" from a selected insurer that then bears the burden of obtaining contribution from other insurers, and recognize instead the more equitable and workable pro rata approach for allocating liability that has been increasingly adopted in other jurisdictions.

In *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, this Court adopted an "all sums" approach for allocating liability for long-term injuries extending across multiple insurance policy periods. Under this Court's approach, an insured may pick any one of dozens of potentially applicable insurance policies and assign to a single insurer for a single policy term all of the damage from a loss that may have spanned decades, leaving it to that insurer to obtain contribution from carriers of other applicable policies. This Court's approach in *Goodyear* is contrary to the approach increasingly adopted in other

jurisdictions holding that, in the case of bodily injury or property damage that extends over multiple years, the resulting loss should be allocated pro rata across each triggered insurance policy period.

This case demonstrates that the *Goodyear* rule is unworkable in practice and should be overruled in favor of the pro rata method of allocation, which would more equitably and efficiently allocate losses in accordance with the terms of insurance policies on which all parties have duly relied. Under *Goodyear* as interpreted by the appellate court, the insured is permitted to fulfill its contractual obligations of notice, opportunity to defend, and right to consent to settlement only to the selected insurer while ignoring the requirements of all of the non-targeted insurers' policies. The selected insurer is then permitted to seek contribution from other insurers even though those insurers were never notified of the claim or given an opportunity to defend or the right to decide whether a settlement should be reached. *Goodyear* thus invites insured parties to ignore their contractual obligations to any but the selected insurer and then places the lower courts in an impossible dilemma: either preclude a selected insurer from pursuing a contribution claim or abrogate the rights of non-selected insurers under their respective policies with the insured. Continental respectfully submits that this dilemma is unacceptable and that these practical consequences of *Goodyear*, which could not have been entirely foreseen at the time of decision, require this Court to revisit *Goodyear* and overrule its "all sums" approach.

A. The Opportunity To Overrule *Goodyear* Is Properly Before This Court

A "cause properly appealed to [the Supreme Court] is here for the proper determination of all questions *presented by the record.*" *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 280 n.1 (quoting *Winslow v. Ohio Bus Line Co.* (1947), 148 Ohio St. 101) (emphasis in original). The problems posed by *Goodyear* are fairly presented by the record in this case and

have been fully briefed. Thus, the issue of whether *Goodyear* should remain the standard in continuous injury cases (and the contribution actions they spawn) is properly before this Court. *Cf. Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at ¶ 72 (Resnick, J., dissenting) (noting that Court overruled decision even though argument for overruling had not been presented to court of appeals).

Moreover, this issue could not have been properly raised at an earlier stage of these proceedings. The trial and appellate courts were required to follow Supreme Court precedent. *See, e.g., State v. Worrell*, Franklin App. No. 06AP-706, 2007-Ohio-2016, at ¶ 10. Asking the lower courts to ignore binding precedent would have been futile. Accordingly, Continental should be allowed to raise this issue at this time because it could not have earlier raised the issue in the lower courts.

B. This Court's Holding in *Goodyear*

Goodyear involved an insurance coverage dispute regarding the costs of cleaning up twenty-two sites that had been polluted over many years. *Goodyear*, 95 Ohio St. 3d, at ¶ 1. The parties agreed that there was continuous pollution across multiple years, and further agreed as to which primary insurance policies were triggered by those claims. *Id.* at ¶ 6. The parties disagreed, however, as to the manner in which the loss should be allocated. The insured argued for an “all sums” approach in which it would be allowed to pick any one of the triggered policies and assign the entire loss (up to the policy limits) to that policy. *Id.* The insurers argued for a pro rata allocation that would assign a proportionate share of the loss to each triggered period. *Id.*

The Court adopted the “all sums” approach. In so doing, the Court focused on the policies’ insuring agreements, which obligated the insurers to “pay on behalf of the insured all

sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this policy applies caused by an occurrence.” *Id.* at ¶ 7. “Property damage” was defined as “injury or destruction of tangible property which occurs during the policy period . . .” *Id.* The Court held:

There is no language in the triggered policies that would serve to reduce an insurer’s liability if an injury occurs only in part during a given policy period. The policies covered Goodyear for ‘all sums’ incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence.

Id. at ¶ 9. Thus, the Court ruled that the insured “should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim.” *Id.* at ¶ 12. The Court recognized that “the question of what insurance may be tapped next is dependent upon the terms of the particular policy that is put into effect by Goodyear.” *Id.* Although the Court could not determine which policy Goodyear would invoke or whether the primary policy limits would be exhausted, it found that if the targeted policy does not have sufficient limits to cover the entire loss, the insured may pursue coverage under another primary or excess policy. *Id.* The targeted insurer then has the burden of pursuing contribution from “other applicable primary insurance policies.” *Id.* at ¶ 11.

The dissenting opinion argued that “this approach ignores the plain language of the insurance contract, flies in the face of the majority rule, and contravenes plain common sense.” *Id.* at ¶ 26. The dissent criticized the majority for “virtually ignor[ing] the requirement that the injury must occur during the policy period.” *Id.* at ¶ 28. The dissent also noted that the insured and the insurer “bargained for only a limited period of time for coverage for an injury that arose before the coverage and continued to exist after it, and the premium was therefore based upon

that bargained-for coverage.” *Id.* The dissent favored pro rata allocation, which “gives effect to all the language of the insurance contract and not just to the two isolated words ‘all sums.’” *Id.*

The dissent further acknowledged the fundamental unfairness in requiring the targeted insurer rather than the insured to pursue coverage under the non-targeted policies even though it had no prior dealings with the other insurers. “The insured, since it did choose the other carriers, should logically and in all fairness bear that burden of obtaining the proper share of coverage from each of the other carriers.” *Id.* at ¶ 30.

C. Goodyear Should Be Overruled Under The Criteria Set Forth in Galatis

This Court has adopted a three-part test for determining whether a prior decision of this Court should be overruled. A decision may be overruled if: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶ 48; *see also State ex rel. Advanced Metal Precision Prods. v. Indus. Comm’n*, 111 Ohio St. 3d 109, 2006-Ohio-5336, ¶¶ 18-20 (overruling past precedent under *Galatis* test); *State ex rel. Stevens v. Indus. Comm’n*, 110 Ohio St. 3d 32, 2006-Ohio-3456, ¶¶ 11-13 (same). Under this standard, *Goodyear* should be overruled, as it amply meets all three of the *Galatis* criteria.

1. Goodyear Was Wrongly Decided

a. Goodyear Was Wrong At The Time It Was Decided

Goodyear was wrongly decided in 2002. In *Goodyear*, the Court emphasized the significance of the policy’s “all sums” language, while ignoring or minimizing the import of other policy terms. Most insurance policies, like the ones at issue in this case, carefully balance

the rights and obligations of both parties. Thus, while insurers have the obligation to pay covered claims, they also have bargained for provisions (i) requiring timely notice and a right to participate in the defense of the claim, (ii) limiting liability when there is other available insurance, and (iii) requiring that the insured not make any payment without the insurer's consent. By focusing solely on the "all sums" language, *Goodyear* failed to consider such additional provisions and the effect the "all sums" ruling had on them. Instead, the Court inadvertently eliminated the rights non-targeted insurers have under other policy provisions.

This failure to enforce the terms of insurance contracts as a whole was contrary to long-standing Ohio law. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 2007-Ohio-4917 (reversing the 8th District for disregarding policy language, in violation of the rule that Ohio courts must "examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy"). It also raises serious constitutional questions by effectively requiring the abrogation of contracts. As this case demonstrates, an insured that is permitted to recover "all sums" from one policy has no incentive to provide notice to other insurers or to invite them to participate in the defense of the claim. Thus, by the time the contribution action that the *Goodyear* Court contemplated is commenced, the protections for the non-selected insurer contained in those provisions have been breached or rendered a nullity.

Goodyear also declined to give effect to the policy provision expressly limiting liability under the policy to the injury that occurred in the policy period. The language of the policies at issue in *Goodyear*, like the policies at issue in this case, plainly limited coverage to damage occurring *during the policy period*. Moreover, the Policy Period/Territory provision in each of the Continental policies states: "This insurance applies *only* to bodily injury or property damage which occurs during the policy period within the policy territory." (Supp. p. 223) (emphasis

added). Thus, by their very terms, the Continental policies do not even apply to injury that occurred during other periods. In addition, the Continental policies each define “Occurrence” to mean “an accident, including injurious exposure to conditions, which results, *during the policy period*, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” (Supp. p. 224) (emphasis added). Thus, the plain language of the policy provides that there can only be coverage for the bodily injury or property damage that occurs *during the policy period*. (*Id.*)⁵

The majority opinion in *Goodyear* effectively wrote the words “during the policy period” out of the policies.⁶ Under *Goodyear*, the insured is permitted to pick any policy it desires and attribute the entire injury (regardless of when it occurred) to that single policy period. Thus, *Goodyear* makes the targeted insurer liable for injury that did *not* take place during its policy period. For example, in this case, the claimant alleged exposure to asbestos over a twenty-year period from the 1960s through the 1980s. (Supp. p. 124 at ¶ 5). The Penn General policies were in effect from December 30, 1960 through December 30, 1968. (Supp. p. 124 at ¶ 4). The “all sums” rule permitted Park-Ohio to ignore the many years of asbestos exposure after 1968 and allocate all of the claimant’s injury to Penn General’s policy periods in the 1960s.

In adopting the “all sums” rule, this Court departed from other decisions at that time that had given effect to the policy language limiting coverage to bodily injury or property damage during the policy period by assigning a proportionate share of the bodily injury to each triggered policy period. For example, an earlier opinion of the United States Court of Appeals for the

⁵ Some of the Penn General policies have similar language. (Supp. pp. 214, 216, 218). The early policies provide that the policies apply to occurrences or accidents that happen during the policy period. (Supp. p. 211).

⁶ The language of the policy quoted in *Goodyear* included the restriction “during the policy period” in the definition of “property damage,” rather than in the definition of “occurrence.” See *Goodyear*, 95 Ohio St. 3d 512, at ¶ 7.

Sixth Circuit had predicted that Ohio would adopt a pro rata method of allocating injury in asbestos claims across multiple policy periods: “When the policyholder cannot demonstrate a discrete temporal moment of injurious transformation prior to or contemporaneous with the diagnosis, due to complex medical facts, the presumption is that the injury will be allocated equally over all triggered years.” *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 690 (6th Cir. 2000); see *GenCorp, Inc. v. AIU Ins. Co.*, 104 F. Supp. 2d 740, 752 (N.D. Ohio 2000) (“*GenCorp I*”) (adopting pro rata allocation in environmental case based on *Lincoln Electric*); see also *GenCorp, Inc. v. AIU Ins. Co.*, 297 F. Supp. 2d 995, 999 (N.D. Ohio 2003) (“*GenCorp III*”) (acknowledging that *Goodyear* “contradicted” *Lincoln Electric*). *Lincoln Electric*, like the dissent in *Goodyear*, acknowledged that insurance policies provide coverage only for limited periods of time:

Unless a policy or group of policies affirmatively and explicitly make assurances about absorbing the entire cost of a long-term exposure and delayed manifestation injury with exposure extending through a time period more extensive than the time period for that individual policy or constituent policy, [the district court should] assign a pro rata percentage of exposure value to each legal entity based upon the number of corresponding policy periods that the legal entity assumed.

Lincoln Elec. Co., 210 F.3d at 690-91 (emphasis added).

b. Other Jurisdictions Have Increasingly Rejected “All Sums” In Favor of Pro Rata Allocation.

Decisions since *Goodyear* by courts in other states have repeatedly rejected the “all sums” approach to allocation and increasingly adopted a pro rata method. This nationwide trend represents a change in circumstances that also justifies this Court’s reconsideration of *Goodyear*’s “all sums” holding. See *Galatis*, 100 Ohio St. 3d 216, at ¶ 48.

Pro rata allocation has been the increasing trend among courts ever since the theory was advanced in the seminal case of *Insurance Co. of North America v. Forty-Eight Insulations*, 633

F.2d 1212, 1224-25 (6th Cir. 1980). At the time *Goodyear* was decided, there were a number of decisions adopting a pro rata theory of allocation, as well as a number adopting an “all sums” allocation. Compare, e.g., *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994) (adopting pro rata allocation), with *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 253-54 (Wash. 1998) (adopting “all sums” allocation).

Since *Goodyear* was decided, however, there has been a pronounced trend in favor of the pro rata method of allocation. The highest courts of eight states have issued post-*Goodyear* opinions addressing the proper method of allocation in long-tail claims, and all but one of those courts rejected *Goodyear*’s “all sums” approach and adopted some form of pro rata allocation. See *Boston Gas Co. v. Century Indem. Co.*, No. SJC-10246, slip op. (Mass. July 24, 2009) (pro rata) (Apx. p. 42); *Towns v. Northern Security Ins. Co.*, 964 A.2d 1150, 1167 (Vt. 2008) (pro rata); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s, London*, 934 A.2d 517, 526 (N.H. 2007) (pro rata); *Aetna Cas. & Sur. Co. v. Commonwealth of Ky.*, 179 S.W.3d 830, 842 (Ky. 2005) (pro rata); *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107,116 (Conn. 2003) (pro rata); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1134 (Kan. 2003) (pro rata); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070, 1104 (Md. Ct. Spec. App. 2002) (pro rata); but see *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 (Wis. 2009) (“all sums”). Additionally, the highest court of New York rejected an “all sums” allocation in favor of a pro rata method of allocation in an opinion issued after *Goodyear* was argued, but shortly before the decision was issued. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-24 (2002).

Other post-*Goodyear* cases also demonstrate a strong shift towards a pro rata method of allocation. As to states in which the highest court has not yet determined the proper method of

allocation, several decisions have been issued by federal courts, lower state courts, or courts of one state interpreting another state's law.⁷ Those decisions likewise strongly favor the pro rata approach. See *Stryker Corp. v. Nat'l Union Fire Ins. Co.*, 2005 U.S. Dist. LEXIS 13113, at *18 (W.D. Mich. July 1, 2005) (predicting Michigan Supreme Court would adopt pro rata method of allocation); *John Crane, Inc. v. Admiral Ins. Co.*, 2006 WL 1010495, at *32 (Ill. Cir. Ct. Apr. 12, 2006) (finding pro rata time on the risk allocation among excess carriers appropriate for asbestos claims); *AAA Disposal Sys., Inc. v. Aetna Cas. & Sur. Co.*, 821 N.E.2d 1278, 1290-91 (Ill. App. Ct. 2005) (applying pro rata allocation among excess insurers in environmental coverage dispute); *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004) (applying pro rata allocation under Texas law based on "other insurance" clauses in policies); *California Ins. Co. v. Stimson Lumber Co.*, 2004 U.S. Dist. LEXIS 10098, at **37-40 (D. Or. May 26, 2004) (applying pro rata allocation under Oregon law in products liability case⁸); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 544-45 (W.D. Mich. 2003) (adopting pro rata allocation by addressing conflicting Michigan appellate authority and declining to follow case that had adopted "all sums" allocation in favor of case that had adopted pro rata allocation), *aff'd* 155 Fed. Appx. 833 (6th Cir. 2005).

⁷ There are also several recent cases that have applied either a pro rata or "all sums" allocation by following earlier authority from a particular state applying stare decisis. See, e.g., *Norfolk S. Corp. v. California Union Ins. Co.*, 859 So. 2d 167, 179 (La. Ct. App. 2003) (applying pro rata allocation based on *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1079 (La. 1992)); *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 70-72 (1st Cir. 2009) (applying "all sums" allocation under Rhode Island law, in part based on *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001)). Among cases determining the proper method of allocation without the benefit of previous authority from a particular state (i.e. those cases taking "new" positions), the trend is strongly in favor of the pro rata method.

⁸ Oregon has a statute requiring an "all sums" allocation only in the context of environmental pollution. Or. Rev. Stat. § 465.478.

The opinions issued after *Goodyear* was decided demonstrate that courts around the nation have increasingly acknowledged the problems inherent in an “all sums” allocation. Courts have recognized the fundamental unfairness of permitting insureds to recover under policies for injuries that clearly fall outside of the policy period of their contracts with respective selected and non-selected insurers. For example, the Supreme Court of Connecticut recognized that “[n]either the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage periods.” *Security Insurance Co.*, 826 A.2d at 121. Likewise, the Supreme Court of Kansas stated that the “all sums” method “clearly contradicts the fundamental insurance agreement to indemnify the insureds for injuries during a specified policy period.” *Atchison, Topeka & Santa Fe Ry. Co.*, 71 P.3d at 1134.

In a very recent opinion, the Supreme Judicial Court of Massachusetts held that the “all sums” method fails to comply with the parties’ understanding of the scope of coverage. “Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year.” *Boston Gas Co.*, slip op. (Apx. p. 51). In contrast, “a pro rata allocation of losses is consistent with, if not compelled by, the most reasonable construction of the policies at issue here.” *Id.* (Apx. p. 49). In rejecting the *Goodyear* analysis, the Court concluded: “[T]he pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result.” *Id.* (Apx. p. 46, 52).

Continental respectfully submits that the weight of recent authority from other jurisdictions illustrates the problems with *Goodyear*’s “all sums” holding and demonstrates a

pronounced jurisprudential shift away from that position. This Court should embrace that trend by overruling *Goodyear* and adopting a pro rata method of allocation based on time on the risk.

2. *Goodyear Defies Practical Workability*

Goodyear has also proven unworkable in practice. A decision may be practically unworkable if it generates a multitude of litigation on resulting issues, is widely criticized in other jurisdictions, creates conflicts in the lower courts or muddies an issue, converts simple cases into complex cases, or creates confusion. *Galatis*, 100 Ohio St. 3d 216, at ¶ 50. Although an “all sums” allocation seems simple on its face, in actuality it generates endless litigation. Instead of adopting a rule that “promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible,” as this Court intended, *Goodyear*, 95 Ohio St. 3d 512, at ¶ 11, *Goodyear* establishes an unfair and one-sided system where the insured is able to disregard its contractual obligations but still obtain the benefits of coverage, while the insurers’ rights under their policies are ignored.

Recent decisions from other jurisdictions recognize that the “all sums” approach does not reduce litigation, and only makes coverage litigation more complex and unmanageable. For example, in squarely rejecting an “all sums” approach, the New Hampshire Supreme Court noted that “it does not solve the allocation problem; it merely postpones it.” *EnergyNorth*, 934 A.2d at 526 (quoting Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257, 271 (1997)). The court also found that the “all sums” method “does not decrease litigation costs, does not give courts guidance as to how to allocate liability, and requires insurers to factor the costs of uncertain liability into their premiums.” *Id.* at 527 (internal citation and quotation omitted); accord *Boston Gas Co.*, slip op. (Apx. p. 51). The Supreme Court of Vermont recognized that, in contrast, a pro rata allocation provides many

practical advantages, including minimizing coverage litigation by “easily identifying each insurer’s liability through a relatively simple calculation, and reducing the necessity for subsequent indemnification actions between and among the insurers.” *Towns*, 964 A.2d at 1167.

This case provides a prime example of how the “all sums” approach increases the amount and complexity of coverage litigation. Permitting Park-Ohio to select only Penn General here has not avoided coverage litigation; it has merely removed Park-Ohio, which was in the best position to pursue coverage under its own insurance policies, from that dispute. Both the Penn General policies and the Continental policies require that the insured provide prompt notice of an occurrence and of a suit. In this case, Park-Ohio chose to give notice only to Penn General; no notice was given to Continental. Both the Penn General policies and the Continental policies provide that the insurers have both the right and duty to defend and to select defense counsel. Penn General was given those rights, but did not exercise them; Continental was not. Both insurers’ policies require that the insured not make any payment without the consent of the insurer. Park-Ohio gave Penn General an opportunity to object to the settlement, negotiate a different settlement or take the case to trial; Continental was given none of those opportunities.

As this case demonstrates, when the insured does not comply with its obligations under the non-selected insurer’s policy, the selected insurer has limited options under *Goodyear* as it has been interpreted by the appellate court. It can ask the insured to provide information concerning other insurance policies and demand that the insured put its other carriers on notice, but it has little ability to compel the insured to do either absent litigation. It can object to the insured’s settlement, but it cannot identify the coverage issues under policies issued by other insurers that it has never reviewed. It can deny coverage based on the insured’s lack of

cooperation or its abrogation of the selected insurer's subrogation rights, but it then risks being second-guessed by a court for not paying its share of the claim.

Given these problems, it makes much more sense for the insured to bear the burden of the contractual obligations it undertook in exchange for receiving the contractual benefits under its policies. The insured knows the identity of all of its insurers; it has copies of the policies and knows what its obligations are under those policies; it has the information on why a settlement would be appropriate; and it has the obligation to obtain the consent of all carriers to that settlement.

In addition, a pro rata allocation would preclude an insured from manipulating its coverage. Under *Goodyear*, an insured that opts to be self-insured for certain periods, to purchase policies with large self-insured retentions or deductibles, or to select financially unstable insurers that become insolvent is entitled to the same coverage for a claim as an insured that purchased more comprehensive coverage. See *Boston Gas Co.*, *slip op.* (Apx. p. 52) (noting that all sums creates a "false equivalence" between an insured that purchased coverage continuously for many years and an insured that purchased less coverage) (internal citations and quotations omitted). Furthermore, insurers who believed that they were insuring only the bodily injury or property damage that occurred during their policy period are now forced by *Goodyear* to pay for injury that occurred during other periods (perhaps many years earlier or later), when the insured was self-insured or when the insurer the policyholder chose is no longer financially viable. Such a system is not only inequitable, but also rewards the insured who chooses unwisely.

Goodyear also potentially permits the selected insurer to game discovery in the coverage case so as to best preserve its contribution rights. For example, where a non-selected insurer has

a unique coverage exclusion, the selected insurer could deliberately avoid adducing the facts needed to establish that the exclusion applies. Non-selected insurers thus bear the risk of having a court nullify their policy exclusions, as the court did here with Continental's notice provision, and they also may be faced with the factual inability to prove their exclusions. Moving to a pro rata allocation would remove both of these risks and provide both insurers and insureds with their contractually bargained-for rights.

Finally, the system adopted by *Goodyear* results in duplicative litigation. The insured selects an insurer and litigates its claims against it. When that litigation is concluded, the targeted insurer selects one or more additional insurers and then attempts to have them contribute. If additional insurers are located, additional contribution actions ensue. None of this would be necessary under a pro rata allocation. Under a pro rata allocation, the insured would give notice to all potentially applicable insurers and allow them the opportunity to participate in the defense and settlement of any claim. When a judgment is entered or a settlement is achieved, each insurer would pay its pro rata share for the injury that occurred during its policy period. For periods where there were insolvent insurers, inadequate insurance, large deductibles, or no insurance, the insured (which made those choices) would be responsible. Such an allocation scheme would give meaning to all terms in the insurance policies and require all parties to fulfill their obligations under all of the contracts.

The Court of Appeals did not dispute these practical and procedural difficulties, but determined that Continental was not prejudiced by Park-Ohio's and Penn General's actions because "the all sums approach adopted by the Ohio Supreme Court in *Goodyear* anticipates exactly this approach." (Apx. p. 21). The appellate court determined that, despite the clear contractual provisions allowing notice and an opportunity to participate in any claim under the

policies, this Court had determined in *Goodyear* that the “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.” (Apx. p. 22). Thus, the Court of Appeals understood that it was abrogating the rights non-selected insurers have under their policies; it simply believed that to implement *Goodyear*, such a ruling was required. There could be little clearer demonstration that *Goodyear* is practically unworkable and should be overruled by this Court.

3. Overruling *Goodyear* Will Not Disturb Any Reliance Interests

Overruling *Goodyear* also will not create undue hardship because no reliance interest will be jeopardized. The focus of the “undue hardship” inquiry is whether there has been reliance on the decision outside of the context of litigation. *See Galatis*, 100 Ohio St. 3d 216, at ¶ 59 (“there is no individual or societal reliance on *Scott-Pontzer* outside of the courtroom”). “The Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone’s expectations that to change it would produce not just readjustments, but practical real-world dislocations.” *Id.* at ¶ 58 (quoting *Robinson v. Detroit*, 613 N.W.2d 307 (Mich. 2000)); accord *Stoner v. Allstate Ins. Co.*, 116 Ohio St. 3d 1217, 2007-Ohio-6669, at ¶ 8 (O’Donnell, J., dissenting from *sua sponte* dismissal of cause as improvidently granted).

Whatever reliance has developed based on *Goodyear* has developed solely in the context of litigation and not in “real-world” situations. In *Galatis*, this Court held there was no undue hardship created by overruling *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 85 Ohio St. 3d 660, 1999-Ohio-292, a case dealing with uninsured motorist coverage on automobile policies, because “the overwhelming majority of *Scott-Pontzer* cases are resurrected claims from the years prior to the *Scott-Pontzer* decision. Because no one was aware of this form of uninsured

motorist coverage before it was created by that decision, no one could have relied upon it.”

Galatis, 100 Ohio St. 3d at ¶ 59. The Court added that the potential that any person would have reduced his personal uninsured motorist coverage based on *Scott-Pontzer* was “practically nonexistent,” and thus there was no “individual or social reliance” outside of the context of litigation. *Id.*

Similarly, overruling *Goodyear* will not harm any reliance interest. The policies at issue here, as in most long-tail claims, were purchased decades ago. Coverage for asbestos-related injuries has been excluded from most general liability insurance policies for over twenty years, and asbestos use in the United States today is minimal. Asbestos claims involve past insurance coverage for injuries resulting from past conduct involving a product that, for the most part, is no longer used today. Only in 2002, when *Goodyear* was decided, did insureds in Ohio realize the insurance coverage they had purchased decades earlier provided them with an “all sums” allocation for long-tail claims. Thus, *Goodyear* could not have had any impact upon decisions insureds made decades before concerning their general liability insurance coverage.

Moreover, insureds should not have relied on *Goodyear* to avoid their obligations under the policies of the non-selected insurers. Insureds still had contractual obligations to notify all insurers of an occurrence or a claim involving asbestos and environmental liabilities. *Goodyear* did not eliminate those obligations. Moreover, general liability insurance policies (including those issued by Penn General and Continental here) typically include clauses requiring the insured to cooperate with the insurer and not to take any action to jeopardize subrogation rights the insurer may have against other parties. Thus, insureds should already be providing notice of claims under all of their triggered policies and selected insurers should be insisting that the

insured provide such notice. Accordingly, there is no reason to maintain an inequitable and unworkable rule which allows insureds to breach their insurance contracts with impunity.

For all of these reasons, this case specifically meets all three criteria set forth in *Galatis* warranting overrule of a prior decision of this Court. *Goodyear*'s "all sums" approach should therefore be rejected in favor of the majority trend toward pro rata allocation.

Alternative Proposition of Law: In the alternative, this Court should clarify that *Goodyear* does not permit any claim for contribution against a non-selected insurer unless the insured and selected insurer have fully complied with all terms and conditions of coverage in the non-selected insurer's policy.

If *Goodyear* is not overruled, it should be clarified to set forth the duties and responsibilities of the insured and the selected insurer toward the non-selected insurers so as to prevent the elimination of the non-selected insurers' rights under their policies. This Court should make clear that contribution is permitted only when two policies "apply" to a claim, and that, in order for a policy to be "applicable," all conditions to coverage must be met, including the provisions related to notice, an opportunity to defend, and the right to control settlement.

If the Court takes this approach, it should clarify specifically that, under *Goodyear*, the obligation to comply with the conditions of coverage lies in the first instance with the insured, and that the insured's failure to comply with its contractual obligations will void its coverage under a non-selected insurer's policy, bar any contribution from that non-selected insurer, and restrict the insured's rights against a selected insurer to a pro rata share of a loss. This Court should also make clear that the selected insurer, in order to bring a contribution claim under *Goodyear*, must request that the insured provide timely notice to other carriers and comply with the other conditions of coverage. If the conditions of coverage are not met, the selected insurer should have no right to seek payment from a non-selected insurer whose policy has been

rendered “inapplicable” by the insured’s actions. Instead it is permitted to deny coverage or to pay only its pro rata share of any settlement or judgment if the insured does not cooperate.

These clarifications are necessary, if this Court chooses not to overrule *Goodyear*, in order to avoid a serious constitutional question of whether Ohio, by adopting the *Goodyear* rule, has impaired existing contracts. As this Court recognized in *Galatis*, “[t]he freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against state encroachment upon contracts.” 100 Ohio St. 3d 216, at ¶ 9. In addition, the “Ohio Constitution also protects the freedom of contract,” which protection is “coextensive with that of the federal Constitution.” *Id.* at ¶ 10. But, as the appellate court conceded, *Goodyear* can be given effect only if the contractual rights of the non-selected insurers are ignored.

Clarification of non-selected insurers’ rights under their insurance contracts is particularly essential so that insurers who do business in Ohio can predict their losses and set reserves. If insurers are unable to forecast their risks and predict losses, the financial stability of the industry will be disrupted and jeopardized. *See Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at ¶ 39. This is critical in cases involving the large exposures presented by environmental and mass tort cases, oftentimes involving long periods of possible coverage. *See, e.g., Goodrich Corp. v. Commercial Union Ins. Co.*, Summit App. Nos. 23585 & 23586, 2008-Ohio-3200, disc. juris. denied, 2008-Ohio-6813; *GenCorp III*, 297 F. Supp. 2d at 998 (pollution case involving \$64 million in insurance coverage over 22-year period). When courts are permitted to simply rewrite the terms, conditions and exclusions found in insurance policies by ignoring those policies and imposing liability for a loss that does not otherwise exist – as the appellate court did here – insurers are likely to withdraw or cease doing business in the Ohio insurance market.

Thus, if the *Goodyear* decision is not overruled, it should at a minimum be narrowed to avoid abrogation of contractual protections for which insurers have duly bargained.

A. **Goodyear Should Be Interpreted To Allow Equitable Contribution Only Where All Policies Are “Applicable”**

While *Goodyear* provides that a selected insurer *may* obtain contribution from “other applicable primary insurance policies,” it does not mandate contribution. This Court should clarify that *Goodyear* did not disrupt the common law principle that, in order for there to be recovery on a claim of contribution, there must be common liability between the parties for the underlying loss. *Republic Steel v. Glaros* (1967), 12 Ohio App. 2d 29, 33. An insurer who has paid the whole loss on a claim may, in equity, recover contribution only from those other insurers “who are also liable therefor.” *National Fire Ins. Co. v. Dennison* (1916), 93 Ohio St. 404, 410.

Whether an insurer has common liability for a claim which gives rise to an equitable contribution claim depends on whether coverage is owed by that insurer pursuant to the terms of its own policy. See 15 Russ and Segalla, COUCH ON INSURANCE (3d Ed. 2005), Section 218:17 at 218-24. It is black-letter law that an insurer’s liability for a claim is predicated solely upon the terms and conditions of the contracted-for coverage set forth in its policy of insurance. *GenCorp III*, 297 F. Supp. 2d at 1007. Indeed, in *Goodyear* at ¶ 7, this Court correctly recognized that “the starting point for determining the scope of coverage is the language of the insurance policies.” And, this Court specifically limited the selected insurer’s right to contribution to “other *applicable* primary insurance policies.” *Goodyear*, 95 Ohio St. 3d 512 at ¶ 11 (emphasis added).

While rights to equitable contribution between insurers are not directly controlled by the language of the insurance policies issued to their insureds, courts have recognized that “absent

compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision of its insurance policy.” *One Beacon Am. Ins. Co. v. Fireman’s Fund Ins. Co.*, 2009 WL 1782979 (Cal. Ct. App. June 24, 2009), citing *Truck Ins. Exch. v. Unigard Ins. Co.*, (2000) 79 Cal. App. 4th 966, 974. Thus, in *Unigard*, the Court refused to allow an equitable contribution claim because the Truck Insurance Exchange gave notice to Unigard only after the underlying litigation was resolved, noting:

[T]he imposition of contribution on Unigard – a stranger to the litigation – would subject it to significant financial burden even though it did not enjoy any of the concomitant benefits, e.g., the right to participate and control the defense. Truck decided to investigate and settle the [underlying litigation] without Unigard’s involvement. Having done so, Truck should not be permitted to drag Unigard into the picture after the fact.

Unigard, 79 Cal. App. 4th at 979. In *One Beacon* and *Unigard*, the Court recognized that an insured’s failure to tender a claim would not be fatal if either the insured or the targeted insurer had provided the non-selected insurer with at least notice of the claim and an opportunity to defend. The Court refused to impose an obligation for equitable contribution, however, until the non-selected insurer was at least given notice of the claim.

Thus, this Court should make clear that, under *Goodyear*, contribution is permitted only when two policies “apply” to a claim, and that, in order for a policy to be “applicable,” all conditions to coverage must be met, including the provisions related to notice, an opportunity to defend, and the right to control settlement.

B. *Goodyear* Should Be Clarified to Hold That An Insured May Not Obtain “All Sums” From a Selected Insurer If It Has Not Complied With The Policy Provisions Of All Potentially Applicable Policies

Applying the above approach, this Court should clarify that *Goodyear* does not permit an insured to ignore its contractual obligations under its insurance contracts with non-selected insurers. *Goodyear* held that the insured could select one insurer from the triggered policies to

pay the entire claim and then leave that insurer to pursue a contribution claim from other insurers. It did *not* hold that the insured is free to breach the policies of the non-selected insurers with impunity, nor that insurers may be required to pay for a claim under the policies while being precluded from participating in the litigation or approving any settlement of that claim.

The reason is obvious: the only basis for requiring an insurer to contribute to a claim is that the claim is covered under a policy. It is not covered if the insured has not met the prerequisites to coverage. The Court may not rewrite the policies in order to enforce one part of a contract (the payments) and ignore the rest (the terms and conditions under which payment is available). Thus, if the right of contribution is to have any meaning, the insured at a minimum must comply with the notice, defense, settlement and payment provisions of all policies to assure that the selected carrier has the ability to pursue its contribution rights.

Furthermore, this Court should hold that, if the insured does not comply with all of the provisions of other potentially applicable policies, the insured – not the targeted insurer – should bear the consequences. If the selected insurer cannot obtain contribution because of the insured's actions, the insured should be made to take responsibility for the shares that might have been borne by the non-selected carrier had the insured complied with the policy. The selected insurer would then be required to pay a pro rata share, placing it in the same position it would have been in had the insured complied with the non-selected insurer's policy provisions.

In applying Ohio law to address a related issue, the United States District Court for the Northern District of Ohio recognized that, when an insured compromises the availability of policy limits, it should take responsibility for those limits with respect to other insurers. *See GenCorp, Inc. v. AIU Ins. Co.*, 2003 U.S. Dist. LEXIS 27132 at * 11 (N.D. Ohio July 23, 2003) ("*GenCorp II*"). In *GenCorp II*, the insured settled with its primary carrier for less than the

primary policy limits, and sought a declaration that the policy was exhausted. *Id.* at *16. The court found that the insured's settlement with the primary insurer had extinguished all of the primary insurer's liability to any other carriers, recognizing that the insured "must absorb any shortfall in its insurance coverage caused by its settlements with primary insurers." *Id.* at * 11.

The United States Court of Appeals for the Third Circuit applied a similar rule in *Koppers v. Aetna Casualty & Surety Co.*, 98 F.3d 1440, 1453 (3d Cir. 1996). In *Koppers*, the insured had settled with several of its carriers. The other insurers sought contribution from those settling insurers, which the court denied, noting that it was immaterial that the insured had settled for less than the policy limits, because the insured would have to bear the burden of its bargain. The court held that, "by settling the policyholder loses any right to coverage of the difference between the settlement amount and the primary policy's limits." *Id.* at 1454.

A similar result should be reached in this case. If the selected insurer cannot obtain contribution because of the insured's actions, the selected insurer should be required to pay only its own pro rata share and the insured should be made to take responsibility for the shares that might have been borne by the non-selected carrier had the insured complied with the policies.

C. **Goodyear Should Be Clarified To Hold that A Targeted Insurer May Not Obtain Contribution If It Fails To Enforce Its Contractual Rights Against The Insured**

In addition to clarifying that *Goodyear* does not relieve the insured of its contractual obligations, this Court should clarify that *Goodyear* does not extinguish the selected insurer's contractual rights against the insured, including its rights to require the insured to cooperate. Enforcement of those rights should be an equitable prerequisite to contribution from non-selected insurers. As between the insured, the selected insurer, and the non-selected insurer, it is unjust to place the burden of the insured's non compliance on the non-selected insurer, which is the only

blameless party. When an insured fails to provide notice to all carriers, the selected insurer must enforce the cooperation clause of its policies with the insured in order to seek contribution. If the insured does not cooperate, this Court should make clear that the selected insurer has the right to deny coverage or to pay only its pro rata share.

A selected insurer also has the option of filing a declaratory judgment action to secure discovery of other policies and the identity of carriers. It might also invoke Rule 27 of the Federal Rules of Civil Procedure to secure pre-litigation discovery and inspection of insurance documents from the insured in anticipation of making a contribution claim. However, a selected insurer may not seek contribution from a non-selected insurer if it fails to avail itself of any of those remedies.

The reason again is obvious: Contribution is an equitable remedy, and equity does not favor those who ignore their own rights. This Court has long recognized that a contribution action between insurers requires that the insurer from which contribution is sought have reasonable notice of the claim. *See Aetna Cas. & Sur. Co. v. Buckeye Union Cas. Co.* (1952), 157 Ohio St. 385, 392 (insurer entitled to contribution because it “took all reasonable measures to preserve any right which it might have, through subrogation or otherwise, to compel [the other insurer] to discharge its obligation as primary insurer.”); *accord State Farm Mut. Auto. Ins. Co. v. Home Indem. Ins. Co.* (1970), 23 Ohio St. 2d 45, 49; *Insurance Co. of North America v. Travelers Ins. Co.* (1997), 118 Ohio App. 3d 302, 315 (“Equity rewards the vigilant, not those who slumber on their rights.”); *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 210 2002-Ohio-7217 (“courts place limits on their liberality with respect to excusing delayed notice by holding generally that ignorance of coverage is no excuse where the additional insured failed to exercise due diligence in investigating possible coverage, a caveat which is usually invoked

where the facts are such that the additional insured should have looked into the matter of coverage sooner than he did.”); *see also* 15 Russ & Segalla, COUCH ON INSURANCE (3d Ed. 2005), Section 218:20 at 218-26 (recognizing that insurer seeking contribution must do whatever is necessary to preserve its contribution claim).

This Court should rule, as did the trial court, that there is no basis in equity or in the policy language for allowing a selected insurer that neglects its rights against the insured to obtain contribution from another insurer that had no notice of the claim and no ability to secure compliance with its own policy terms and conditions. Having failed to exercise those rights, a selected insurer should bear the consequences.

D. Proper Interpretation Of Goodyear Requires Reversal and Reinstatement of the Trial Court Decision Here

Under the proper interpretation of *Goodyear* along the lines of clarification suggested above, the decision of the Court of Appeals should be reversed. In this case, there is no question that Park-Ohio did not comply with the requirements of the Continental policies: it did not give notice of the claim; it did not allow Continental to defend or control settlement; and it voluntarily settled the claim without Continental’s consent. Accordingly, the insured should be held responsible for the shares of the non-selected carriers, and the selected insurer should be required to pay only a pro rata share, placing it in the same position it would have been in had the insured complied with the non-selected insurer’s policy provisions.⁹

At the same time, Penn General also failed to undertake available steps entitling it to contribution from Continental. It made no effort to require the insured to give notice to other insurers until after the case settled, even though its policies required Park-Ohio to cooperate and

⁹ Because Penn General and Park-Ohio have settled, Penn General will bear Park-Ohio’s obligation here, but the Court should clearly announce rules requiring insureds to bear these costs in future cases.

take necessary steps to preserve Penn General's contribution and subrogation claims.¹⁰ Having slept on its rights to enforce its *own* policy provisions requiring cooperation from the insured, Penn General should now be deemed to have given up its contribution rights against the non-selected insurers. The decision of the trial court barring contribution should be reinstated.¹¹

1. The Notice Provisions Were Not Met

The Continental policies specifically provide that the insured must provide prompt notice:

4. Insured's Duties in the Event of Occurrence, Claim or Suit

- (a) In the event of any 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 insured 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 a 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.

¹⁰ See Supp. p. 216, Conditions § 4(c) ("The insured shall cooperate with the company and, upon the company's request, assist in making settlement, 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 bodily injury or property damage with respect to which insurance is afforded under this policy; . . ."); *Id.* § 7 ("In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.").

¹¹ Because Penn General's contribution action rests on principles of equity, *e.g.*, *Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.* (1946), 147 Ohio St. 79, paragraph five of the syllabus, the trial court had discretion in fashioning a resolution and appellate review is narrow. *McCarthy v. Lippitt*, 150 Ohio App. 3d 367, 2002-Ohio-6435, at ¶ 61 (standard of review for equitable claims is abuse of discretion). The trial court's decision was well-reasoned and well-supported by the record. The appellate court should not have reversed that decision, especially given the deferential abuse-of-discretion standard.

(Supp. p. 225). Park-Ohio, which never provided notice of this claim or the lawsuit filed against it, plainly did not comply with these provisions. Penn General, which provided notice *two years after the case was over*, did no better.

In *Heller v. Standard Accident Insurance Co.* (1928), 118 Ohio St. 237, 242, this Court recognized the importance of notice to an insurer:

It is extremely important to an insurance company, which assumes liability in case of accident, and reserves the right to defend or settle claims arising therefrom, that notice of such claim or suits instituted thereon should be served upon the company, in order that it may examine into the cause of the accident that it may determine whether liability exists on the part of the assured.

More recently, in *Ormet Primary Aluminum Corp. v. Employers Insurance of Wausau*, 88 Ohio St. 3d 292, 302-303, 2000-Ohio-330, this Court explained that:

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, maintain the proper reserves in its accounts and 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.

Here, Continental had no opportunity to obtain these benefits because by the time it got notice, the claim was over. And, contrary to the Court of Appeals' suggestion, Penn General did nothing to protect Continental's rights. It did not control the litigation or pursue any subrogation claims. It did no investigation and no analysis of the value of the claims until it received the analysis by Park-Ohio's counsel, less than two weeks before the case was settled. Indeed, Penn General did not even see Mr. DiStefano's deposition or interrogatory responses until *after* the case was settled. (Supp. p. 49 at ¶¶ 9-11). It made no choices concerning the amount offered in

settlement or the timing of offers. Instead, it simply ignored the claim until after it was settled -- protecting neither its own rights nor those of other insurers.

2. Continental Was Not Given The Right to Defend, Investigate and Determine Settlement

In addition, the Continental policies specifically provide that “the company shall have the right and duty to defend any suit against the insured seeking damages . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . .” (Supp. p. 222). Moreover, the Continental policies make clear that “[t]he 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.” (Supp. p. 225). Park-Ohio did not comply with either of these policy provisions. Continental had no opportunity to decide what counsel should be used, what strategy should be developed, what settlement should be proposed or when settlement should be broached.¹² It was given no opportunity to object to the settlement or decide that the case should be tried. In short, it received none of the protections contained in its contract of insurance.

Finally, the policies provide:

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. (Supp. p. 225).

¹² The Court of Appeals recognized that Park-Ohio was the sole remaining viable defendant by October 2002. (Apx. p. 24). One of the reasons for allowing an insurer to defend is to avoid precisely that situation. Thus, the issue is not simply whether the ultimate settlement was reasonable given the difficult position Park-Ohio was in on October 15, 2002; it is also whether an insurer who was paying attention could have avoided having Park-Ohio be the last defendant standing.

Once again, this provision was breached. Park-Ohio did not fully comply with the terms of the policies and there was no judgment against the insured or settlement agreed to by Continental. Instead, all of Continental's rights under the policies were ignored.

Nor did Penn General act to preserve Continental's rights. Penn General never agreed to defend until after the claim was over. Thus, it had little if any input into the settlement strategy. Indeed, Penn General did not even take a position on whether the settlement was reasonable at the time it was entered into or analyze the possibility of success if a settlement was not entered. Under these circumstances, it is apparent that Continental's rights were not considered, let alone preserved by Penn General.

3. **Because of These Breaches, the Continental Policies Were Not "Applicable"**

The trial court recognized that because there was no compliance with the terms and conditions of Continental policies, they were not "applicable" and Penn General could not obtain contribution.¹³ The trial court stated:

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.*"

(Apx. p. 39; Supp. p. 45) (emphasis added); *see also Foremost Ins. Co. v. Motorists Mut. Ins. Co.*, 167 Ohio App. 3d 198, 2006-Ohio-3022.

The Court of Appeals, by contrast, permitted the selected insurer to obtain contribution without regard to the terms and conditions of the non-selected insurers' policies, thus in effect rewriting those policies to eliminate rights to notice and to control the defense and settlement of

¹³ The trial court noted: "As the holding in *Goodyear* indicates, courts are to consider the particulars of the [defendants] (sic) polic[ies] in deciding whether contribution is appropriate." (Apx. p. 37; Supp. p. 43 (footnote omitted)).

claims. It dispensed with any need to inquire into whether there was a “common liability” between Continental and Penn General, finding that “Pennsylvania General’s equitable contribution claim does not arise out of the policies between Park-Ohio and Nationwide and Continental.” (Apx. p. 20). It ignored the fact that the policies were breached, finding that “Park-Ohio’s conduct with respect to those policies cannot ‘waive’ any contribution rights that Pennsylvania General might have against those insurers.” (Apx. p. 20). The appellate court reasoned that otherwise, the insured could “unilaterally extinguish all potential sources of contribution” and “render illusory the right of contribution established in *Goodyear*.” (Apx. p. 25).

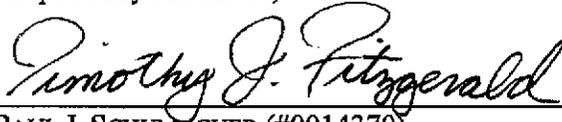
This Court should clarify that *Goodyear* does not require such a result, and hold that the Court of Appeals erred in imposing “equitable” obligations “that contravene provisions of [Park-Ohio’s] insurance policy.” *Unigard*, 79 Cal. App. 4th at 974. Because Park-Ohio did not meet any of the prerequisites for coverage, the Continental policies were not “applicable.” Park-Ohio chose to ignore its obligations under the non selected policies and thereby extinguished its rights under them. Having done so, there was no common liability to the insured and therefore Penn General had no right to equitable contribution under *Goodyear*. Thus, even if *Goodyear* is not overruled, its principles should be clarified so as to require reversal of the Court of Appeals decision and reinstatement of the trial court decision below.

CONCLUSION

WHEREFORE, Defendant-Appellant Continental Casualty Company respectfully requests that the Supreme Court of Ohio reverse the judgment of the Court of Appeals for the Eighth Judicial District and reinstate the judgment of the Cuyahoga County Court of Common Pleas.

Date: July 27, 2009.

Respectfully submitted,



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In the Supreme Court of Ohio

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

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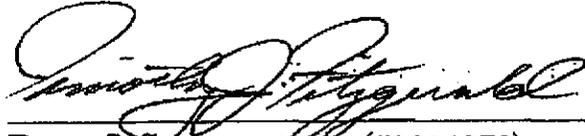
NOTICE OF APPEAL

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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PROOF OF SERVICE

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

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90619

PENNSYLVANIA GENERAL INSURANCE CO.

PLAINTIFF-APPELLANT

vs.

PARK-OHIO INDUSTRIES, INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

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

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

RELEASED: November 20, 2008

JOURNALIZED: DEC 1 - 2008

CA07090619

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VOL 670 NO 830

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

DEC 1 -- 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. E. Fuerst* DEP.

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

NOV 20 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *G. E. Fuerst* DEP.

CA07090619

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

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

CHRISTINE T. McMONAGLE, J.:

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

I. Factual History

A. The DiStefano Asbestos Bodily Injury Claim

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

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

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

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

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

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

Mr. Romé 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/Travelers¹ 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.

¹Continental 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/Travelers² 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

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

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

II. Law and Analysis

A. Standard of Review

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

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

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

B. The "All Sums" Approach

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

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

In short, each insurer on the risk between the initial exposure and the manifestation of disease or death is fully liable to the insured for indemnification and defense costs. In order to afford the insured the coverage promised by the insurance policies, the insured is free to select the policy or 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 Ohio 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.

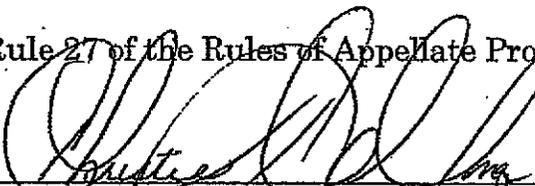
Appellant's assignments of error are sustained. The judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

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

JOURNAL ENTRY AND OPINION

I. OVERVIEW

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

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

II. FINDINGS OF FACT

A. The DiStefano Claim

On March 7, 2002, George DiStefano filed suit against Park-Ohio and a number of other defendants for alleged exposure to asbestos in the Superior Court of California.² Park-Ohio notified Penn General about the DiStefano asbestos bodily injury claim in late August 2002.³ Trial for the DiStefano suit was set for the end of September 2002 – approximately six weeks

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

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

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

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

B. Settlement of the DiStefano Claim

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

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

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

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

⁵ See Stipulation 10.

⁶ See Exhibits 11 and 13.

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

⁸ See Stipulation 24; Exhibit 24.

⁹ See Stipulation 22.

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

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

D. Penn General's Equitable Contribution Action

Park-Ohio finally produced thousands of pages of other policy related information to Penn General in late July 2004.¹⁴ On September 3, 2004, Penn General wrote to Nationwide, Continental, and Travelers regarding the DiStefano claim seeking equitable contribution from them.¹⁵ The Parties stipulate that until they received Park-Ohio's production of insurance-related documents in late July 2004, Penn General did not know which other insurers issued

¹⁰ See Stipulations 28 and 31; Exhibits 9, 27, 30 and 31.

¹¹ See Stipulation 24 and Exhibit 18.

¹² See Stipulation 25.

¹³ See Exhibit 19.

¹⁴ See Stipulations 28, 29 and 31 and Exhibits 27 and 28.

¹⁵ See Stipulation 32; Exhibits 32-34.

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

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

III. CONCLUSIONS OF LAW

A. Trigger of Coverage for the Underlying DiStefano Claim

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

¹⁶ See Stipulation 22.

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

¹⁸ See Stipulation 37.

¹⁹ See *Goodyear* at 840.

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

B. *Goodyear* and Equitable Contribution

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

1. Park-Ohio’s failure to notify the Defendants of the underlying DiStefano suit and 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:

²⁰ *Id.*

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

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

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

4. Insured's Duties in the Event of Occurrence, Claim or Suit:

- (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions, but such expense shall not be recoverable under this policy.
- (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of the suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury or property damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than first aid to others at the time of the accident.

5. Action Against Company: No action shall lie against the company unless, as a condition precedent thereto, there shall

²² Defendants' Joint Exhibit 48.

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

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

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

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

²³ Id.

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

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

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

The right of contribution do[es] not arise out of contract, for [the coinsurers] agreements are not with each other Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.***

Even so, absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.

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

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

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

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

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

²⁵ Plaintiffs Trial Brief at p. 18.

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

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

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

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

²⁷ Joint Ex. 18, 37, and 38.

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

period starting in 1982, Goodyear monitored and investigated the pollution problem. It was somewhere between 1983 and August or October of 1984 that it notified many of its insurers of the potential pollution problem even though the actual clean up did not occur until 1992.²⁹ In *Goodyear*, notice to the insurers was given in a timely and reasonable manner. Here, Plaintiff's notification to the Defendants was not. The facts in the captioned matter are more in line with the facts of *Ormet Primary Aluminum Corp. v. Employers Ins. Of Wassau (2000)*, 88 Ohio St. 3d 292 where the insured did not give notice to its affected insurers until six years after the EPA cited it as the responsible party for pollution and five years after the insured entered into a settlement agreement regarding the terms of the pollution cleanup. The Court in *Ormet* rejected the argument that the Plaintiff handled the underlying claim in the most efficient and cost-effective manner possible, and the insurers were indeed prejudiced by the delay in giving notice. Just as the insurers in *Ormet* were precluded from having any say in the terms of the settlement regarding cleanup, so were the Defendants in the captioned matter regarding the terms of settlement of the DiStefano lawsuit. "Notice provisions in insurance contracts are conditions precedent to coverage, so an insured's failure to give its insurer notice in a timely fashion bars coverage."³⁰ No one knows why Park-Ohio singled out Penn General to pay out the DiStefano bodily injury suit. However, by law it was their right to do so. The Court finds Park-Ohio waived coverage by the Defendants failing to timely notify them of the DiStefano suit and breached the applicable policies in regards to notice, cooperation, settlement without consent, and its assignment of rights provisions of their contracts. If there is no applicable coverage, then there can be no right of contribution for the Plaintiff, Penn General either.

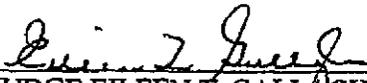
²⁹ *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur.Co.*, (2002) 95 Ohio St. 3d 512, 518.

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

IV. CONCLUSION

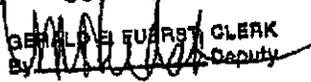
For the reasons stated above, the Court finds the Defendants are entitled to judgment as a matter of law and that they do not owe Plaintiff any contribution for the settlement of the DiStefano lawsuit.

IT IS SO ORDERED:

 10-3-07
JUDGE EILEEN T. GALLAGHER

RECEIVED FOR FILING

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

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BOSTON GAS COMPANY [FN1] vs. CENTURY INDEMNITY COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S LONDON & others, [FN2] third-party defendants.

SJC-10246

January 8, 2009. - July 24, 2009.

Insurance, Comprehensive liability insurance, Coverage, Construction of policy. *Contract*, Insurance, Indemnity, Construction of contract. *Environment*, Environmental cleanup costs. *Words*, "Joint and several," "Ultimate net loss," "Occurrence," "Pro rata allocation."

CERTIFICATION of questions of law to the Supreme Judicial Court by the United States Court of Appeals for the First Circuit.

Guy A. Cellucci, of Pennsylvania (*Shane R. Heskin* with him) for the defendant.

David L. Elkind, of the District of Columbia (*Ronald Macklin*, of New York, with him) for the plaintiff.

Jo-Ann Horn Maynard, of Washington, for the third-party defendants.

The following submitted briefs for amici curiae:

Eugene R. Anderson, *William G. Passannante*, & *Carrie Maylor*, of New York, & *Amy Bach*, of California, for United Policyholders.

Richard Neumeier for Continental Casualty Company.

Martin F. Gaynor, III, & *Nicholas D. Stellakis* for A.W. Chesterton Company.

William F. Greaney, *Deanna M. Wilcox*, & *Gregory M. Lipper*, of the District of Columbia, & *Francis J. Sally* & *Andrea Peraner-Sweet* for The Gillette Company.

Peter G. Hermes, *Kevin J. O'Connor*, & *Michael S. Batson* for America Insurance Company.

Laura A. Foggan, *Paul A. Dame*, & *Parker J. Lavin*, of the District of Columbia, & *Richard Riley* & *William P. Mekrut* for The American Insurance Association & others.

Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

CORDY, J.

In connection with an appeal pending before it, the United States Court of Appeals for the First Circuit has certified the following questions to this court, pursuant to S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981):

"1. Where an insured protected by standard CGL [FN3] policy language incurs covered costs as a result of ongoing environmental contamination occurring over more than one year and the insurer provided coverage for less than the full period of years in which contamination occurred, should the direct liability of the sued insurer be pro rated in some manner among all insurers 'on the risk,' limiting the direct liability of the sued insurer to its share but leaving the insured free to seek the balance from other such insurers?"

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"2. If some form of pro rata liability is called for in such circumstances, what allocation method or formula should be used?

"3. If a single insurer in such circumstances is subject to liability under more than one policy and each policy has a separate deductible or self-insured retention, should the insured be able to collect covered losses from a single policy subject only to that policy's deductible or self-insured retention, or should liability be reduced by the sum of the applicable self-insured retentions, effectively allocating total liability across the policies of that insurer in effect during the contamination period?"

Boston Gas Co. v. Century Indem. Co., 529 F.3d 8, 24 (1st Cir.2008).

We answer the certified questions as follows with respect to the policies at issue. As to the first certified question, we respond that liability should be prorated. As to the second certified question, we respond by adopting the time-on-the-risk method of prorating liability in the absence of evidence more closely approximating the actual distribution of property damage. Our answers to the first two certified questions obviate the need to answer the third certified question. [FN4]

Facts. We summarize the background facts and procedural history set forth in the opinion accompanying the certification order, *id.* at 10-23, supplemented by additional undisputed facts from the record.

Background. Boston Gas Company (Boston Gas) is the largest provider of natural gas in the New England area. Before natural gas became New England's primary energy source, Boston Gas produced gas fuel at facilities called manufactured gas plants (MGPs). The MGPs created gas by heating coal in large ovens, generating gas that was then purified and piped out for use. This process produced a variety of byproducts, including ash, drip oil, tar, and coke. Many of these byproducts are nonbiodegradable and some are deemed carcinogenic. These byproducts now contaminate the ground and water around many former MGP sites. Contamination has been discovered at twenty-nine former Boston Gas MGPs. This case concerns only one of those sites, located in Everett.

Boston Gas operated the Everett MGP from 1908 until about 1969. The Everett MGP produced manufactured gas and processed coke oven gas purchased from a nearby coke plant. In 1995, a routine investigation uncovered contamination at the Everett site. The primary contaminant in this case was tar, which is the main liquid byproduct of manufactured gas production. [FN5] Although the site had been sold to a new owner (DOMAC, LLC) in 1970, Boston Gas was strictly liable under Massachusetts law for all costs associated with the investigation and cleanup of the contamination caused by the Everett MGP's operations.

[FN6]

The Century policies. Boston Gas purchased CGL insurance policies from several different insurers during its operation of the Everett MGP. During the period from December 1, 1951, through December 1, 1969, three different first-layer excess CGL policies were issued by Century Indemnity Company (Century) to Boston Gas which provided coverage for, among other things, operations at the Everett MGP. [FN7] The policies were occurrence based, meaning that (subject to any self-insured retention, [FN8] policy limits, and other terms and conditions) Century would indemnify Boston Gas for its "ultimate net loss" for liabilities stemming from, among other things, property damage caused by an "occurrence." The definitions of "ultimate net loss" and "occurrence" varied slightly among the policies. Other terms of the policies varied as well.

1. *1951-1960.* The first Century policy, XPL-3392, was in effect during the years from 1951 to 1960. This policy was lost, but a jury hearing the case in the Federal District Court found that the policy had a \$1 million policy limit in 1951 and from 1955-1960, and a limit of \$500,000 from 1952 to 1954. The jury did not determine the amount of the lost policy's self-insured retention. The jury did not determine the other terms of this policy, nor are they apparent from the record, but the parties do not dispute that they were occurrence-based policies.

2. *1960-1966.* The second Century policy, XPL-5607, was in effect during the years 1960 to 1966. This policy had a per occurrence limit of \$1 million and a self-insured retention of \$100,000. In the insuring agreement, Century agreed:

"[T]o indemnify [Boston Gas] for *ultimate net loss* in excess of the retained limit ... which [Boston Gas] may sustain by reason of the liability imposed upon [it] by law, or assumed by [it] under contract or agreement ... [f]or damages because of injury to or destruction of property, including the loss of use thereof, caused by an

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occurrence as defined herein" (emphasis added).

The policy defined "occurrence" as:

"[E]ither an accident happening during the policy period or a *continuous or repeated exposure to conditions* which unexpectedly and unintentionally *causes injury to or destruction of property during the policy period*. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence." (Emphasis added.)

The policy defined "ultimate net loss" as:

"[T]he *sum actually paid in cash in the settlement or satisfaction of losses for which [Boston Gas] is liable*, either by adjudication or compromise with the written consent of [Century], after making proper deductions for all recoveries and salvages collectible, and for other insurance that is in excess of the retained limit, but shall exclude all salaries of employees and office expenses of [Boston Gas] incurred in investigation, adjustment and litigation" (emphasis added).

In a section of the insuring agreement entitled, "Policy Period, Territory," the policy stated that it "applie[d] only to occurrences which happen during the policy period within the United States of America, its territories or possessions, or Canada." Finally, the policy contained the following "[o]ther insurance" clause:

"If other collectible insurance with any other insurer is available to [Boston Gas] covering a loss also covered hereunder (except insurance purchased to apply in excess of the limit of liability hereunder), the insurance hereunder shall be in excess of, and not contribute with, such other insurance. If collectible insurance under any other policy of [Century] is available to [Boston Gas], covering a loss also covered hereunder (other than underlying insurance of which the insurance afforded by this policy is in excess), [Century's] limit of liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy."

3. 1966-1969. The third Century policy, XCP-3547, was in effect during the years 1966 to 1969. This policy had a per occurrence limit of \$17 million and a self-insured retention of \$100,000. The insuring agreement provided:

"[Century] will indemnify [Boston Gas] for ultimate net loss in excess of the retained limit hereinafter stated which [Boston Gas] shall become legally obligated to pay as damages because of ... property damage ... to which this policy applies, caused by an occurrence."

The policy defined "[o]ccurrence," with respect to property damage, as "an accident, including injurious exposure to conditions, which results, during the policy period, in property damage neither expected nor intended from the standpoint of [Boston Gas]." "Property damage" was defined as "injury to or destruction of tangible property." The policy defined "ultimate net loss" as:

"[T]he sum actually paid or payable in cash in the settlement or satisfaction of losses for which [Boston Gas] is liable either by adjudication or compromise with the written consent of [Century], after making proper deduction for all recoveries and salvages collectible, but excludes all loss expenses and legal expenses (including attorneys' fees, court costs and interest on any judgment or award) and all salaries of employees and office expenses of [Boston Gas], [Century] or any underlying insurer so incurred."

In a section entitled, "Policy Period, Territory," the policy stated that it "applie[d] to personal injury, property damage or advertising offense which occurs anywhere during the policy period." Additionally, in the section setting forth the policy limits and Boston Gas's self-insured retention, the policy stated: "For the purpose of determining the limit of [Century's] liability, all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." Finally, the policy contained two "[o]ther insurance" clauses. The first, entitled "Other Insurance with [Century]," provided:

"If collectible insurance under any other policy of [Century] is available to [Boston Gas], covering a loss also covered hereunder, [Century's] total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy provided, however, this does not apply to insurance

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with [Century] which is written as underlying insurance or which is written as excess insurance over the limit provided in this policy."

The second, entitled, "Other Insurance Not with [Century]," provided:

"If collectible insurance with any other insurer is available to [Boston Gas] covering a loss also covered hereunder the insurance hereunder shall be in excess of, and not contribute with such other insurance, provided, however, this does not apply to insurance which is written as excess insurance over the limit provided in this policy."

Procedural history. On August 4, 1995, after it had investigated and begun to clean the Everett site, Boston Gas wrote to Century placing it on notice that it might seek indemnification for the costs associated with its investigation and cleanup of the contaminated soils and groundwater at and near the Everett site. Century "reserved its rights," and on October 22, 2002, Boston Gas filed a diversity action against Century in the United States District Court for the District of Massachusetts. Boston Gas sought a declaratory judgment as to Century's obligations under the insurance policies and damages for Century's breach of the policies. Century counterclaimed and brought third-party claims against other Boston Gas insurers. A three-week jury trial between Boston Gas and Century ensued, which focused on the Everett site. [FN9]

In the Federal District Court proceeding, Boston Gas argued that to recover under the insurance policies, it had to prove only that an occurrence had caused some off-site property damage during the policy periods. [FN10] Boston Gas claimed that various "leaks and spills" of tars and oils caused "continuous contamination" of the Everett site (an "occurrence"), which led to off-site property damage. Such off-site property damage, according to Boston Gas, required Century to indemnify Boston Gas for all of its liabilities (its "ultimate net loss," in the language of the policies) connected to the occurrence. Century countered by arguing that various exclusions in the policies precluded or limited indemnification. The jury ultimately found Century liable, and awarded Boston Gas \$ 6,227,327.90 in damages for the costs it incurred in the investigation and cleanup of the environmental contamination at the Everett site. [FN11]

The issue that remained was whether and how those damages were to be allocated among the various insurers whose policies had been triggered by the environmental contamination at the Everett site. Boston Gas argued that under Massachusetts law Century was liable to Boston Gas for the entire damages award, and would then be entitled to seek contribution from Boston Gas's other insurers. See *Rubenstein v. Royal Ins. Co.*, 44 Mass.App.Ct. 842, 852 (1998), *S. C.*, 429 Mass. 355 (1999) (applying joint and several allocation method). See also *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646, 648, 654-661 (2003) (applying joint and several allocation method under Illinois law). Century argued that the damages should be prorated among all of the insurers who provided coverage for the risk over the life of the Everett site, and sought certification of the allocation question to this court. See *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 506 & n. 3 (2005) (noting that Appeals Court adopted "all sums" over "pro rata" approach in two cases, but reserving issue for future decision because neither party challenged "all sums" approach). The Federal District Court judge denied Century's request for certification, concluding that "*Rubenstein* [FN12] and its progeny ... compel me to adopt the 'all sums,' joint-and-several allocation method." The judge also reasoned that certification was not appropriate because Century's ability to "effectively allocate liability among all triggered insurers via a contribution claim" meant that the allocation issue was not outcome-determinative. See S.J.C. Rule 1:03 (providing for certification of "questions of law of this State which may be determinative of the cause").

The judge then entered separate and final judgment as to the Everett site under Fed.R.Civ.P. 54(b). Applying the joint and several allocation method, the judge ruled that Boston Gas was entitled to select from which Century policy it would seek indemnification. Boston Gas chose the XCP-3547 policy, which had a per occurrence limit of \$17 million and a per occurrence self-insured retention of \$100,000. Accordingly, the judge awarded Boston Gas \$6,127,327.90, which was the difference between the amount that the jury awarded to Boston Gas and the self-insured retention under the XCP-3547 policy. [FN13] The judge also issued a declaratory judgment obligating Century to pay all future costs associated with the investigation and environmental cleanup of the Everett site. Century appealed from this judgment.

On appeal to the United States Court of Appeals for the First Circuit (First Circuit), Century challenged the Federal District Court judge's application of the joint and several allocation method. *Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 12 (1st Cir.2008). After noting that the Massachusetts Supreme Judicial Court "has
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not yet resolved [the] allocation question," the First Circuit surveyed the merits of both "pro rata allocation" and "joint and several allocation." *Id.* at 13-15. The court also noted the split of authority among other States, concluding that a "growing plurality" of States apply pro rata allocation, while "a significant number" of other States apply joint and several allocation. *Id.* at 13-14 & nn. 6-7. See *infra* at notes 26, 29. The First Circuit then certified the three questions set forth above because it "found no controlling [Supreme Judicial Court] precedent on the allocation question and the issue is determinative of the scope of Boston Gas' [s] claim." *Boston Gas Co. v. Century Indem. Co.*, *supra* at 15. We turn now to the certified questions. [FN14]

Discussion. 1. Pro rata versus joint and several allocation. [FN15] The first certified question requires us to decide how to allocate liability for long-term environmental contamination where a policyholder sues one of its CGL insurers that provided coverage for the risk (was "on the risk") for only a portion of the time during which the contamination took place. This allocation issue commonly arises in the context of insurance disputes involving so-called "long-tail claims" [FN16] for injuries caused by environmental damage and toxic exposure. See 15 G. Couch, Insurance § 220:25, at 220-26 (3d ed.2005). These long-tail claims cause problems for courts because "[e]nvironmental damage and toxic exposure cases often involve injuries that occur over a number of years, known as 'progressive injuries.'" Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.Rev. 257, 257 (1997). In the ordinary case of a nonprogressive injury (e.g., motor vehicle accident or one identified tar spill), the policy in place at the time the covered damage or injury took place would cover all consequential damages, even those taking place after the policy period. 2 A.D. Windt, Insurance Claims and Disputes § 11:4, at 11-111 (5th ed.2007). [FN17] Progressive injuries like the environmental contamination in this case are different.

[FN18] Progressive injuries of this type are "indivisible injuries attributable to ongoing events without a single clear 'cause.'" *Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 13 (1st Cir.2008). "Progressive injuries frequently occur over time periods in which a liable party had insurance coverage under several different insurance policies, often provided by a number of insurance companies." Comment, *supra*. As the First Circuit recognized, "[t]he language of traditional [CGL] policies-drafted before such law suits became common [[FN19]]--does not neatly map onto these types of injuries." [FN20] *Boston Gas Co. v. Century Indem. Co.*, *supra*, citing

Hickman, Allocation of Environmental Cleanup Liability Between Successive Insurers, 17 N. Ky. L.Rev. 291, 292 (1990). Thus, courts struggle with the two analytically distinct concepts of (1) the trigger of coverage and (2) the scope of coverage under triggered CGL policies.

" 'Trigger of coverage' is a term of art whereby the court describes what must occur during the policy period for potential coverage to commence under the specific terms of an insurance policy." *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 518 (2005), quoting *Rubenstein v. Royal Ins. Co.*, 44 Mass.App.Ct. 842, 850 n. 6 (1998). "[C]ourts have adopted four trigger of coverage approaches: (1) manifestation; (2) injury-in-fact or actual damage; (3) exposure; and (4) continuous." [FN21] 23 E.M. Holmes, Appleman on Insurance § 145.3[B][1], at 13-14 (2d ed.2003). We rejected the manifestation trigger theory in an environmental contamination case involving CGL language very similar to the language in the Century policies here, see *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 853-855 (1993), and have not yet had occasion to adopt one of the other trigger theories in the context of environmental contamination. We do not address the trigger issue in this case, however, because it is outside the ambit of the certified questions.

Instead, we focus our analysis on the scope of coverage that the triggered CGL policies must provide in a case such as this. [FN22] Courts in other jurisdictions have struggled to define the scope of coverage where successive CGL policies are triggered by long-tail claims for injuries which take place over many years and are caused by environmental damage or toxic exposure. In most of these cases, "it is both scientifically and administratively impossible to allocate to each policy the liability for injuries occurring only within its policy period." Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.Rev. 257, 257-258 (1997). See 15 G. Couch, Insurance § 220:25, at 220-26 (3d ed.2005) (with respect to "environmental damage and toxic exposure cases ... it is virtually impossible to allocate to each policy the liability for injuries occurring only within its policy period"). "When it is impossible to determine the proportion of damage that occurred within each period, the law must allocate damages among the policies." Comment, *supra* at 258. Thus, "the courts are left with the nettlesome problem of how to allocate damages among the policies." 15 G. Couch, Insurance, *supra*.

Two principal approaches to the allocation issue have developed, leading to disagreement among State courts. [FN23] The first approach, generally preferred by policyholders, is often referred to as the "joint and several" [FN24] allocation method. Courts adopting this method typically hold:

"[A]ny policy on the risk for any portion of the period in which the insured sustained property damage or bodily injury is jointly and severally obligated to respond in full, up to its policy limits, for the loss. Courts applying joint and several liability usually focus on a policy's 'all sums' language, which commonly states: '[t]he Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay.' Once a policy is triggered, an insurer becomes liable for all sums that it is legally obligated to pay, which may include those sums attributable to bodily injury or property damage that did not occur during the insurer's policy period."

Jones, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25, 37-38 (1999).

Courts applying the joint and several allocation method have required insurers to pay " 'all sums' for which the insured is liable, including triggered years in which the insured had no insurance." 23 E.M. Holmes, *supra* at § 145.4[A][2] [a], at 21. "Most courts that have adopted the joint and several allocation method allow for the selection of only one policy regardless of whether or not any single policy alone will reimburse the policyholder to the full extent of its liability. Other courts will allow 'stacking' if one policy will not cover the policyholder's entire liability." [FN25] Colon, *Pay it Forward: Allocating Defense and Indemnity Costs in Environmental Liability Cases in California*, 24 Ins. Litig. Rep. 43, 53 (2002). "However ... those insurers picked may then seek reimbursement from other triggered policies in a contribution action against other insurers." 23 E.M. Holmes, *supra*. The seminal case adopting the joint and several allocation method is *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C.Cir.1981), cert. denied, 455 U.S. 1007 (1982). A number of States including Delaware, Indiana, Ohio, Pennsylvania, Washington, and Wisconsin, have adopted some form of the joint and several allocation. [FN26]

The second approach, generally favored by insurers, is usually referred to as the "pro rata" allocation method. Courts applying pro rata allocation typically "focus[] on the definitions of 'occurrence,' 'bodily injury' and 'property damage,' when read in conjunction with the 'Insuring Agreement,' to require the allocation of loss to a particular policy be proportionate to the damage suffered during that policy's term." 23 E.M. Holmes, *supra* at § 145.4 [A][2][b], at 25. Pro rata allocation "assigns a dual purpose to the phrase 'during the policy period' in the CGL policy's definition of 'occurrence.' The phrase serves both as a trigger of coverage and as a limitation on the promised 'all sums' coverage." Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L.Rev. 1215, 1234. Courts adopting this method allocate a portion of the total loss to each triggered policy using a variety of different formulas. See 23 E.M. Holmes, *supra* at § 145.4[A][2][b]-[d], at 24-32. See also J.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.3[b], at 4-17--4-21 (2d ed.2008) (describing nine pro rata allocation formulas). The pro rata "approach emphasizes that part of a long-tail injury will occur outside any particular policy period. Rather than requiring any one policy to cover the entire long-tail loss, [pro rata] allocation instead attempts to produce equity across time." Bratspies, *supra* at 1232. "One important feature of a pro rata allocation is that courts adopting this type of allocation generally require the policyholder to participate in the allocation ... for those periods of no insurance, self-insurance, or insufficient insurance." [FN27] J.M. Seaman & J.R. Schulze, *supra* at § 4.3 [c], at 4-21. See 23 E.M. Holmes, *supra* at § 145.4[A][2][b], at 27 ("In addition to satisfying self-insured retentions, the insured will typically bear responsibility for uninsured triggered years"). [FN28] The seminal case adopting the pro rata allocation method is *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir.1980). A number of States, including Colorado, Connecticut, Kansas, Kentucky, Minnesota, New Hampshire, New Jersey, New York, Vermont, and Utah, have adopted some form of pro rata allocation method. [FN29]

The Massachusetts Appeals Court has twice resolved the allocation question in favor of joint and several allocation. In *Rubenstein v. Royal Ins. Co.*, 44 Mass.App.Ct. 842, 843 (1998), a policyholder sued its insurers seeking indemnification and defense for liability stemming from an underground fuel oil leak and resulting soil contamination in Newton. The trial judge ruled that one of the insurers was obligated to indemnify the policyholder for the full amount the policyholder paid to settle a lawsuit brought against it for the soil contamination. *Id.* at 845. Although the insurer's indemnity obligation was reduced by the amount the policyholder had received from other insurers that had settled, the judge did not allocate damages on a pro

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rata basis. *Id.* With little express analysis, the Appeals Court upheld the judge's failure to allocate damages on a pro rata basis. *Id.* at 852. The court relied primarily on the "all sums" policy language and the continuous nature of the contamination in reaching its conclusion. *Id.* at 852-853.

In *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646, 648, 654-661 (2003), the Appeals Court again applied joint and several liability in the context of environmental contamination, but this time as a matter of Illinois law. The court relied primarily on the policy language, which provided no "basis for limiting indemnification to only those damages occurring during the policy period." *Id.* at 658. Notably, the policy contained a provision, entitled "Prior Insurance and Non Cumulation of Liability," that addressed property damage occurring before and after the policy period. [FN30] *Id.* at 656. The court reasoned that this provision would be "superfluous had the drafter intended that damages would be allocated among insurers based on their respective time on the risk." *Id.* After reviewing several decisions from Illinois appellate courts, the Appeals Court rejected the pro rata approach in favor of joint and several allocation.

[FN31] *Id.* at 656-661.

We have not yet considered the allocation question. In *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 503, 506 n. 3 (2005), a case involving asbestos-related liability claims, we reserved the issue for future decision because neither party challenged the joint and several allocation method used in that case. The First Circuit's certified questions now present us with an opportunity to consider the merits of pro rata versus joint and several allocation. Century and some amici urge us to apply the pro rata method of allocation. Boston Gas and some amici, on the other hand, advocate for joint and several allocation. In deciding which approach to adopt, we must look first to the policy language.

The interpretation of an insurance contract is a question of law. *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628 (2007), and cases cited. It "is no different from the interpretation of any other contract, and we must construe the words of the policy in their usual and ordinary sense." *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 280 (1997). "We read the policy as written and 'are not free to revise it or change the order of the words.'" *Id.* at 281, quoting *Continental Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 147 (1984). "Every word in an insurance contract 'must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable,'" *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, *supra*, quoting *Jacobs v. United States Fid. & Guar. Co.*, 417 Mass. 75, 77 (1994), "without according undue emphasis to any particular part over another." *Mission Ins. Co. v. United States Fire Ins. Co.*, 401 Mass. 492, 497 (1988), quoting *Woogmaster v. Liverpool & London & Globe Ins. Co.*, 312 Mass. 479, 481 (1942). "If in doubt, we 'consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'" *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 518 (2005), quoting *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 849 (1993). See *McGregor v. Allmerica Ins. Co.*, 449 Mass. 400, 402 (2007). Finally, "[a]ny ambiguities in the language of an insurance contract are interpreted against the insurer who used them and in favor of the insured." [FN32] *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, *supra*.

Century argues that the plain and unambiguous policy language of the XCP-3547 policy (the policy from which Boston Gas chose to recover in the Federal District Court), mandates application of the pro rata allocation method. Century reasons that the definition of "occurrence" establishes that the policy is triggered when Boston Gas demonstrates that "an accident" or "injurious exposure to conditions" resulted in property damage "during the policy period." Once the policy is triggered, Century argues (and subject to the policy's conditions and exclusions), the insuring agreement provides that Century will indemnify Boston Gas only for the "ultimate net loss" that Boston Gas is "legally obligated to pay [as damages] 'because of' ... 'property damage' ... 'to which this policy applies'" (emphasis in original). Century then looks to the "Policy Period, Territory" provision as supplying a definition of the phrase "to which this policy applies." That provision states that "[t]his policy applies to ... *property damage* ... which occurs anywhere *during the policy period*" (emphasis added). Century concludes that the policy provides coverage only for Boston Gas's liability resulting from property damage occurring during the policy period. Thus, a pro rata allocation method is required by the policy language where, as here, the amount of contamination occurring during any one policy period cannot be accurately determined.

Boston Gas argues that the plain and unambiguous language in the Century policies compels the adoption of

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the joint and several allocation method. It agrees with Century that the definition of "occurrence" establishes what must happen for one of the policies to be triggered, that is, property damage happening during the policy period. However, it contends that once the policy is triggered, the "ultimate net loss" provision in the insuring agreement defines the scope of Century's obligation to indemnify Boston Gas. The Century policies define "ultimate net loss" as "the sum actually paid" by Boston Gas to settle or satisfy "losses" for which Boston Gas is "liable." Consequently, once a Century policy is triggered by property damage occurring during the policy period, Century must pay "the sum actually paid" by Boston Gas for its liability and not some prorated amount.

Boston Gas points to other provisions in the policies that it claims show that losses covered by a policy may result from damage that takes place outside the policy period. In describing the per occurrence policy limits, the policies treat "all damages arising out of continuous or repeated exposure to substantially the same general conditions ... as arising out of one occurrence," to cap Century's liability for continuing damage at the per occurrence limit. In addition, the XCP-3547 policy contains a provision entitled "Other Insurance with [Century]" that provides that if another Century policy "is available" to Boston Gas "covering a loss also covered hereunder, [Century's] total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy."

Boston Gas argues further that Century's reliance on the "Policy Period, Territory" provision as a limitation on the scope of coverage is misplaced. It maintains that the language that Century quotes is not a "definition" of the term "to which this policy applies," but rather a portion of an unrelated provision that establishes the period and geographic scope in which the triggering event must take place. In other words, the "Policy Period, Territory" provision relates only to the trigger of coverage and not to the scope of coverage.

Finally, Boston Gas points out that while the policies do not contain pro rata provisions for indemnification, the XCP-3547 policy does include a pro rata provision for defense costs. [FN33] It contends that Century could have inserted a proration provision for indemnification, but it chose not to.

We agree with Century that a pro rata allocation of losses is consistent with, if not compelled by, the most reasonable construction of the policies at issue here. In the XCP-3547 policy, Century promised to indemnify Boston Gas for the "ultimate net loss" that it became "legally obligated to pay as damages because of ... *property damage ... to which this policy applies, caused by an occurrence*" (emphasis added). The "Policy Period, Territory" provision then explains that "[t]his policy applies to ... *property damage ... which occurs anywhere during the policy period*" (emphasis added). In the XPL-5607 policy, Century promised to indemnify Boston Gas for the "ultimate net loss" that it "may sustain by reason of the liability imposed upon [it] by law, or assumed by [it] under contract or agreement ... [f]or damages because of injury to or destruction of property, including the loss of use thereof, caused by an occurrence as defined herein." The "Policy Period, Territory" provision in that policy provides that "[t]his policy applies only to *occurrences* which happen *during the policy period*" (emphasis added). The policy defines an "occurrence," with respect to property damage, as "a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes *injury to or destruction of property during the policy period*" (emphasis added). In other words, that policy applies only to injury to or destruction of property taking place during the policy period. This conclusion is further supported by a clause in the XPL-5607 policy's provisions limiting Century's liability, which states that there is no limit to the number of occurrences for which Boston Gas can make claims, "provided such occurrences happen *during the policy period*" (emphasis added). The most reasonable reading of these provisions is that the Century policies provided coverage for that portion of Boston Gas's liability attributable to the quantum of property damage occurring during a given policy period. Our reading of this policy language is consistent with that of other courts that have construed CGL policies with similar provisions limiting the applicability of a policy to property damage that occurs during the policy period. [FN34]

Moreover, this limitation of coverage to liability resulting from property damage during the policy period derives from the definition of "occurrence" in the Century policies. In the XCP-3547 policy, an "occurrence," with respect to property damage, is "an accident, including injurious exposure to conditions, which results, *during the policy period*, in property damage neither expected nor intended from the standpoint of [Boston Gas]" (emphasis added). In the XPL-5607 policy, an "occurrence," with respect to property damage, is "an accident happening *during the policy period* or a continuous or repeated exposure to conditions which unexpectedly and unintentionally causes injury to or destruction of property *during the policy period*" (emphasis added). We read the phrase "during the policy period" in the definitions of "occurrence" as limiting the promised "ultimate net loss" coverage. See *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at*
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Lloyd's, 156 N.H. 333, 340 (2007), citing Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L.Rev. 1215, 1234 ("To courts adopting [pro rata allocation], the phrase 'during the policy period' in the policy's definition of 'occurrence' limits the promised 'all sums' coverage"). This limitation makes sense: property damage during the policy period triggers the Century policies, which then respond by providing coverage for liability attributable to the amount of property damage occurring during the policy period.

We reject Boston Gas's interpretation of the Century policies for several reasons. First, like other policyholders focusing on the phrase "all sums," Boston Gas ignores a fundamental principle of insurance contract interpretation by placing undue emphasis on the phrase "ultimate net loss." See *Mission Ins. Co. v. United States Fire Ins. Co.*, 401 Mass. 492, 497 (1988), quoting *Woogmaster v. Liverpool & London & Globe Ins. Co.*, 312 Mass. 479, 481 (1942) ("insurance policies should be construed as a whole 'without according undue emphasis to any particular part over another' "). See also *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222, 224 (2002) (policyholder's "singular focus on 'all sums' " would read out policy's limitation of coverage to liability caused by occurrences happening during policy period). Boston Gas's reading of the policies overlooks the limitation that the phrase "during the policy period" places on the scope of coverage. See *id.* at 224 ("joint and several allocation is not consistent with the language of the policies providing indemnification for ['ultimate net loss'] ... that resulted from an accident or occurrence 'during the policy period' ").

Second, the other provisions that Boston Gas points to do not support its position that losses covered by a Century policy may result from damage that takes place outside the policy period. For example, in the clause setting forth Century's limits of liability, the XCP-3547 policy provides that "all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." The XPL-5607 policy contains an almost identical provision in its definition of "occurrence." [FN35] Nothing in the provisions necessarily implies, however, that they refer to "continuous or repeated exposure to substantially the same general conditions" outside the policy period. It is equally plausible to read those provisions as applying to "continuous or repeated exposure to substantially the same general conditions" during the policy period. Moreover, these provisions govern only the number of occurrences for purposes of determining the limit of Century's liability; they do not expand coverage for damages occurring outside the policy period.

Similarly, the policies' "other insurance" clauses do not reflect an intention to cover losses from damage outside the policy period. Rather, the "other insurance" clauses simply reflect a recognition of the many situations in which concurrent, not successive, coverage would exist for the same loss. [FN36] For example, we resolved a conflict between "other insurance" clauses in *Mission Ins. Co. v. United States Fire Ins. Co.*, 401 Mass. 492, 492-493 (1988), where one insurer issued an umbrella liability policy to the lessor of a vehicle involved in a motor vehicle accident and another insurer issued a liability policy to the lessee. The "other insurance" clauses were implicated in that case because the policies were concurrent and thus, in the absence of other insurance, each policy would have provided coverage for the losses from the accident. *Id.* at 493. Similarly, "other insurance" clauses like the ones in the Century policies might come into play where two concurrent policies, one issued to a parent company and one to a subsidiary, both insure the subsidiary. This is not a successive coverage situation, but simply one in which two concurrent policies insure the same loss. Nothing about the "other insurance" clauses necessarily means that the policies were intended to cover losses occurring long before or after the policy period.

Significantly, the XCP-3547 and XPL-5607 policies do not contain so-called "noncumulation" clauses, which often provide for continuing coverage beyond the policy period. See, e.g., *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646, 656 (2003); *Liberty Mut. Ins. Co. v. Those Certain Underwriters at Lloyds*, 650 F.Supp. 1553, 1559 (W.D.Pa.1987); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 493-494 (Del.2001). For example, the policy in *Chicago Bridge* provided:

"[I]n the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy [the insurer] will continue to protect the [policyholder] for liability in respect of such personal injury or property damage without payment of additional premium."

Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, *supra*. Courts have recognized that such a provision is inconsistent with pro rata allocation because it expressly provides for coverage outside the policy period. See, e.g., *id.*; *Hercules, Inc. v. AIU Ins. Co.*, *supra*; *Liberty Mut. Ins. Co. v. Those Certain Underwriters*
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at *Lloyds, supra* at 1559-1560.

Further, we doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property damage occurring outside the policy period. Read as a whole, neither Century policy expressly makes or implies a promise to pay one hundred per cent of Boston Gas's liability for multi-year pollution damage occurring decades before or after the policy period. No reasonable policyholder could have expected that a single one-year policy would cover all losses caused by toxic industrial wastes released into the environment over the course of several decades. Any reasonable insured purchasing a series of occurrence-based policies would have understood that each policy covered it only for property damage occurring during the policy year.

"[T]here is no logic to support the notion that one single insurance policy among 20 or 30 years worth of policies could be expected to be held liable for the entire time period. Nor is it reasonable to expect that a single-year policy would be liable, for example, if the insured carried no insurance at all for the other years covered by the occurrence."

Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 940 (Colo.1999). See *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 710 (2003) ("Neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage periods"). Accordingly, the Century policies are not ambiguous because they admit of only one reasonable interpretation. See *Hazen Paper Co. v. United States Fid. & Guar. Co.*, 407 Mass. 689, 700 (1990) ("If there are two rational interpretations of policy language, the insured is entitled to the benefit of the one that is more favorable to it"). In the absence of ambiguity, we decline to construe the policies in favor of the insured. [FN37]

We are not persuaded by either *Rubenstein v. Royal Ins. Co.*, 44 Mass.App.Ct. 842 (1998), or *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646 (2003), to adopt the joint and several allocation method. As the First Circuit noted, *Rubenstein*'s treatment of the allocation issue was indeed cursory and focused solely on the policy's "all sums" language to the exclusion of any other policy language. See *Rubenstein v. Royal Ins. Co.*, *supra* at 852-853. As for *Chicago Bridge*, it was decided under Illinois law. *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, *supra* at 648. To the extent that the analysis of the policy language in *Chicago Bridge* was not unique to Illinois law, two key differences in the language cause us to reach a different result here. First, unlike the Century policies, the policy in *Chicago Bridge* contained a "noncumulation clause" that expressly provided for coverage, in certain circumstances, for property damage continuing after the policy period ended. *Id.* at 656. See *supra* at & note 30,-- . Second, unlike the Century policies here, the policy in *Chicago Bridge* apparently did not contain a "Policy Period, Territory" provision limiting the applicability of the policy to property damage happening during the policy period. Given these differences, we do not read *Chicago Bridge* as foreclosing the possibility that the definition of "occurrence" might have some bearing on the scope of coverage under a CGL policy. Therefore, we are not persuaded by *Rubenstein* or *Chicago Bridge* to apply joint and several allocation in the circumstance of this case.

Finally, adopting pro rata allocation is not only consistent with the policy language at issue here, but it also serves important public policy objectives. As the Supreme Court of New Hampshire recently stated:

"[T]he joint and several allocation method is improvident. It 'does not solve the Allocation problem; it merely postpones it.' ... This method 'divides the case into two separate suits: in the first suit, the insured selects and sues one of the triggered insurers; in the second suit, the selected insurer then sues other triggered insurers for contribution.' ... In this way, despite its advocates' claims to the contrary, the joint and several method does not decrease litigation costs, does not give courts guidance as to how to allocate liability, and requires insurers to 'factor the costs of uncertain liability into their premiums.' " (Citations omitted.)

EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 156 N.H. 333, 345 (2007), quoting Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.Rev. 257, 271 (1997). The United States Court of Appeals for the Second Circuit recognized similar benefits of pro rata allocation:

"[W]here the policies triggered are provided by multiple insurers, [pro rata] allocation avoids saddling one insurer with the full loss, the burden of bringing a subsequent contribution action, and the risk that recovery in

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such an action will prove to be impossible because, for instance, the insurer of other triggered policies is unable to pay.... Allocation results in the insured bearing the risk of any of its insurers' inability to pay, instead. 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 was a stranger to the selection process.

"Allocation also forces an insured to absorb the losses for periods when it self-insured and can prevent it from benefitting from coverage for injuries that took place when it was paying no premiums.... Allocation may also be more efficient because 'any contribution proceeding will involve many of the same issues that are raised in the initial liability proceeding, and ... it is more efficient to deal with these issues in a single proceeding.' "

Olin Corp. v. Insurance Co. of N. Am., 221 F.3d 307, 323 (2d Cir.2000), quoting *In re Prudential Lines Inc.*, 158 F.3d 65, 85 (2d Cir.1998).

In our view, pro rata allocation produces a more equitable result than joint and several allocation, which "creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage." *Public Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 939-940 (Colo.1999). This false equivalence would tend to "reduce[] the incentive of ... property owners to insure against future risks." *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 473 (1994). This in turn would "reduce the available assets to manage the risk." *Id.* In sum, the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result. [FN38]

Having concluded that a pro rata allocation of losses is appropriate in the circumstances of this case, we now consider how that allocation should proceed under Massachusetts law.

2. Pro rata allocation method. The second certified question requires us to determine the appropriate method or formula for allocating damages on a pro rata basis. Determining the proper method for prorating losses raises a myriad of issues, which have caused courts to adopt several different pro rata allocation methods in cases involving long-tail claims. See S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.3[b], at 4-17--4-21 (2d ed.2008). The ideal method is a "fact-based" allocation, under which courts would "determine precisely what injury or damage took place during each contract period or uninsured period and allocate the loss accordingly." *Id.* at § 4.3[b][1], at 18. "Although such an allocation is the most consistent with the contract language, the inability to make such determinations or the litigation costs associated with such an exact allocation has caused courts to use various proxies for deriving fair apportionment." *Id.* See, e.g., *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657, 662-665 (Minn.1994) (adopting flexible time-on-the-risk approach).

We discuss here the "two primary means of apportioning liability on a pro rata basis" where a fact-based allocation is not feasible. *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 340 (2007). Perhaps the most common method of apportionment is what has come to be known as pro rata allocation by "time on the risk." [FN39] See S.M. Seaman & J.R. Schulze, *supra* at § 4.3[b][3], at 4-19. Under this allocation method, "each triggered policy bears a share of the total damages [up to its policy limit] proportionate to the number of years it was on the risk [the numerator], relative to the total number of years of triggered coverage [the denominator]." 23 E.M. Holmes, *Appleman on Insurance* § 145.4[A][2][b], at 24 (2d ed.2003). "Apportioning costs among all triggered years is compatible with having determined that some injury or damage resulted in all of those years. Consistent with the contract language, an insurer pays its percentage of loss attributed to its policy period." *Id.* at 29. "[T]he time-on-the-risk method offers several policy advantages, including spreading the risk to the maximum number of carriers, easily identifying each insurer's liability through a relatively simple calculation, and reducing the necessity for subsequent indemnification actions between and among the insurers." *Towns v. Northern Sec. Ins. Co.*, 964 A.2d 1150, 1166 (Vt.2008). However, "[c]ritics of pro-ration by years note that it fails to consider the limits of each policy because a policy with very low limits of liability may be liable for the same amount as a policy with much greater limits, despite the likely disparity in the premium paid by the insured to the carrier(s)." 23 E.M. Holmes, *supra* at § 145.4[A][2][b], at 25 n. 109.

The other principal method of apportionment involves prorating losses by years and limits. The Supreme Court of New Jersey adopted this method in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 474-477 (1994), and it was subsequently adopted by the Supreme Court of New Hampshire, which explained:

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"Under pro-ration by years and limits, loss is allocated among policies 'based on both the number of years a policy is on the risk as well as that policy's limits of liability. The basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred.' ... Under this approach, 'an insurer's proportionate share is established by dividing its aggregate policy limits for all the years it was on the risk for the single, continuing occurrence by the aggregate policy limits of all the available policies and then multiplying that percentage by the amount of indemnity costs.' " (Citations omitted.)

EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 156 N.H. 333, 341 (2007), quoting 23 E.M. Holmes, *supra* at § 145.4[A][2][c], at 30, and Colon, Pay it Forward: Allocating Defense and Indemnity Costs in Environmental Liability Cases in California, 24 Ins. Litig. Rep. 43, 60 (2002). The rationale for allocating in this manner is "that insurers who provided more coverage, that is, higher limits or lower deductibles, assumed more of the risk of liability than insurers who provided less coverage." Comment, Allocating Progressive Injury Liability Among Successive Insurance Policies, 64 U. Chi. L.Rev. 257, 274-275 (1997). "A major criticism of pro-ration by years and limits is that insurers with higher limits may be liable for a disproportionate share of damages based solely on their limits." 23 E.M. Holmes, *supra* at § 145.4[A][2][c], at 30 n. 133. [FN40]

Century asks us to adopt the time-on-the-risk method in the absence of evidence more closely approximating the actual distribution of property damage. It argues, however, that we should leave room for lower courts to adopt different practical approaches to proration when the facts permit a more accurate estimation of how much property damage took place in each period. In its brief, Boston Gas did not take a position as to which method of pro rata allocation would be most appropriate, but it did suggest at oral argument that some limits should be placed on pro rata allocation, such as, that there should be no allocation for uninsured years or where insurance could not be purchased. Some of the policyholder amici also suggest that it would be inappropriate to allocate to the policyholder for periods when coverage was unavailable. Century, on the other hand, argues against allocating only across periods during which insurance was available.

We are persuaded that the time-on-the-risk method of allocating losses is appropriate where the evidence will not permit a more accurate allocation of losses during each policy period. "[I]ts inherent simplicity promotes predictability, reduces incentives to litigate, and ultimately reduces premium rates." Comment, *supra* at 281. The *Owens-Illinois* method of prorating by years and limits "disproportionately assign[s] liability to generous policies, disproportionately increasing their price, thus making them more difficult to purchase." Comment, *supra* at 276. Moreover, "[p]rogressive injuries by definition do not ... magically gravitate toward periods with more coverage." *Id.* at 283. Although either method would require us to indulge in a "probable fiction," *Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 14 (1st Cir.2008), we conclude that the more reasonable fiction to adopt is that the progressive injuries took place evenly across all policy periods. Proration by time on the risk reflects this "probable fiction." *Id.* See 1 A.D. Windt, *Insurance Claims and Disputes* § 6:47, 6-418--6-419 (5th ed.2007) ("the most equitable [method of proration] is allocating based upon the relative periods of time each insurer was on the risk, and the courts have, in general, so recognized").

As indicated above, most courts engaging in pro rata allocation require the policyholder to participate in the allocation to some extent. See S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.3[c], at 4-21--4-28 (2d ed.2008). "[W]here the policyholder is self-insured for any period of time on the risk, many courts have concluded that it is equally fair and reasonable to hold the policyholder responsible for that portion of the total defense and indemnity costs over which he or she chose to assume the risk." *Towns v. Northern Sec. Ins. Co.*, 964 A.2d 1150, 1167 (Vt.2008), and cases cited. That is, for triggered periods "in which there is either no coverage, insufficient coverage, or coverage that was issued with an applicable exclusion, these courts require the policyholder to bear the financial burden for those periods of no insurance, self-insurance, or insufficient insurance." S.M. Seaman & J.R. Schulze, *supra* at 4-21, and cases cited. Some courts have limited the policyholder's obligation to participate in the allocation to periods during which insurance was commercially "available." [FN41] These courts have generally held that losses should not be allocated to a policyholder for periods during which the "policyholder was unable to obtain coverage in the market place for a particular risk and with respect to losses resulting from activities or products placed into commerce before such time as coverage became 'unavailable' due to pollution and asbestos exclusions." S.M. Seaman & J.R. Schulze, *supra* at 4.3[c][1], at 4-27. We decline to adopt such an unavailability exception because to do so would contravene the limitation of coverage in the Century policies to liability attributable to property damage during the policy periods. As Century argues in its brief, the unavailability exception "effectively provides insurance where insurers made the calculated decision not to assume risk and not to accept premiums. In effect, because the policyholder could not buy insurance, it is treated as though it did by passing those uninsurable losses to insured periods." This would not be equitable to insurers if the insured

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purchased coverage for only a few years where there was protracted damage.

Finally, we conclude that Boston Gas must satisfy only a prorated amount of its per occurrence self-insured retention for each triggered policy period, to be prorated on the same basis as Century's liability. Thus, if the pollution in this case had occurred over the course of a decade, then one-tenth of the total cleanup cost would be apportioned to each policy year and Boston Gas would be responsible for one-tenth of its applicable self-insured retention for each year. We reach this conclusion because it produces an equitable result in the face of policy language that "is at best ambiguous as to what happens when the insurer is held liable for only part of a continuous occurrence." *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 401 (5th Cir.1995) (upholding District Court's apportionment of deductible on same basis as insurer's liability for defense costs). See *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628 (2007) ("Any ambiguities in the language of an insurance contract are interpreted against the insurer who used them and in favor of the insured"). Therefore, unless the policy language unambiguously provides otherwise, the policyholder's self-insured retention should be prorated on the same basis as the insurer's liability in the case of continuous environmental contamination.

In sum, where it is not feasible to make a fact-based allocation of losses attributable to each policy period, losses should be allocated using the time-on-the-risk method we have described. To prorate using that method:

"[T]he total amount of damages should be divided by the total number of years to yield the amount of damage that is fairly attributable to each year. For example, if an insured's liability for a decade of pollution is one million dollars, then one tenth of the total liability, or \$100,000, is fairly attributable to each policy-year.

Public Serv. Co. of Colo. v. Wallis & Cos., 986 P.2d 924, 941 (Colo.1999). The policyholder is responsible for any periods that it went without insurance. Finally, unless the policy language unambiguously provides otherwise, the policyholder is liable for only a prorated portion of its per occurrence self-insured retention for each triggered policy period, to be prorated on the same basis as the insurer's liability.

Ultimately, the pro rata allocation method that we espouse here addresses a problem of proof. We do not foreclose the possibility that in some cases the facts may permit a more accurate estimation of how much property damage took place in each period. If the evidence permits an accurate estimation of the quantum of property damage in each policy period then proration by time on the risk may be inappropriate. Given the factual complexities of cases of this sort, we defer to trial judges in the first instance to determine whether losses can be allocated based on the amount of property damage that in fact occurred during each policy period, or must instead be allocated on the basis of each insurer's time on the risk.

Our answers to the first two certified questions obviate the need to answer the third certified question.

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of this court, to the clerk of the United States Court of Appeals for the First Circuit, as the answers to the questions certified, and will also transmit a copy to each party.

FN1. Doing business as Keyspan Energy Delivery.

FN2. Certain London Market Insurance Companies; Travelers Casualty and Surety Company Associated Electric & Gas Insurance Services Limited; Aetna Casualty & Surety Company; The Hartford Insurance Company.

FN3. The acronym "CGL," which prior to 1986 stood for "comprehensive general liability," now stands for "commercial general liability." See 9A G. Couch, § 129:1, at 129-5 (3d ed.2005). The policies at issue in this case, which were written long before 1986, are "comprehensive" general liability policies. We shall use the acronym, "CGL," to refer to the policies at issue here. "[CGL] policies are designed to protect the insured against losses to third parties arising out of the operation of the insured's business." *Id.* at § 129:2, at 129-7.

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FN4. We acknowledge the amicus briefs of the American Insurance Association, Complex Insurance Claims Litigation Association, the National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America; A.W. Chesterton Company; Certain Underwriters at Lloyd's London and Certain London Market Insurance Companies; Continental Casualty Company; The Gillette Company; OneBeacon America Insurance Company; and United Policyholders.

FN5. At nearly all the manufactured gas plant (MGP) sites, some tar escaped confinement and leaked into the environment. Once that leakage happens, tar tends to migrate and to contaminate soils and groundwater beyond the borders of the facility's site.

FN6. Boston Gas's investigation and cleanup were performed pursuant to the Massachusetts Oil and Hazardous Material Release Prevention Act, see G.L. c.

21E, and the orders and directives of the Massachusetts Department of Environmental Protection.

FN7. "Primary insurance" is "[i]nsurance that attaches immediately on the happening of a loss; insurance that is not contingent on the exhaustion of an underlying policy." Black's Law Dictionary 818 (8th ed.2004). "Excess insurance," on the other hand, is "[a]n agreement to indemnify against any loss that exceeds the amount of coverage under another policy." *Id.* at 816. "The primary insurer provides the first layer of insurance purchased by the insured, whether the coverage is from the first dollar of loss or subject to a high deductible." 1 R. Persons & K. Brownlee, *Excess Liability: Rights and Duties of Commercial Risk Insureds and Insurers* § 5:3, at 5-2 (4th ed.1999). "Large organizations such as corporations or large governmental agencies often have many layers of excess liability coverages in order to achieve the maximum protection they seek." *Id.* at § 5:4, at 5-6. "Excess ... insurance over a qualified purely self-insured retention of risk would not be considered 'primary;' the self-insurance itself is the 'primary' layer." *Id.* at § 5:3, at 2. The excess policies that Century issued to Boston Gas in this case provided the first layer of excess coverage over Boston Gas's primary layer of self-insurance.

FN8. A self-insured retention bears some resemblance to a deductible. A "self-insured retention" is "[t]he amount of an otherwise-covered loss that is not covered by an insurance policy and that usu[ally] must be paid before the insurer will pay benefits...." Black's Law Dictionary, *supra* at 1391. A deductible, on the other hand, is "the portion of the loss to be borne by the insured before the insurer becomes liable for payment." *Id.* at 444. "The difference between a self-insured retention and a deductible is usually that, under policies containing a self-insured retention, the insured assumes the obligation of providing itself a defense until the retention is exhausted." 2 A.D. Windt, *Insurance Claims and Disputes* § 11:31, 11-495 (5th ed.2007).

FN9. The other twenty-eight Boston Gas MGPs remain the subject of a larger dispute. Boston Gas intends to use the outcome of the Everett case as an exemplar to establish its rights against Century with respect to the other sites.

FN10. At least the XPL-5607 and XCP-3547 policies had exclusions for "property owned by" Boston Gas. The jury made no specific finding as to whether the XPL-3392 policy had a similar owned property exclusion.

FN11. The special verdict form asked the jury: "What is the amount Boston Gas Company has been legally obligated to pay for the investigation and cleanup as a result of the property damage at the Everett site *caused during the years for which it had coverage?*" (emphasis added). Boston Gas reads this question as asking the jury what Boston Gas's liability was as a result of

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property damage that happened from 1951 to 1969. Thus, Boston Gas understands the \$ 6,227,327.90 figure to represent the jury's finding that Boston Gas incurred over \$6.2 million in liability for property damage that happened solely from 1951 to 1969. Century does not read the question so narrowly. It understands the \$6.2 million figure to represent all of Boston Gas's liability for property damage that happened over a much longer period than merely 1951 to 1969.

At trial, Boston Gas did not attempt to prove that the \$6.2 million figure resulted only from property damage from 1951 to 1969. In fact, before trial, Boston Gas argued that it would be "impossible" to prove the extent of property damage during the policy periods or the fraction of Boston Gas's losses attributable to pollution during the policy periods. Boston Gas has argued before us that it need only prove that some damage occurred during a Century policy period in order to trigger Century's obligation to indemnify Boston Gas for all losses caused by property damage, even if some of the property damage took place outside the policy period. It thus appears that the jury verdict encompasses Boston Gas's liability for property damage at the Everett site over a much longer period than just 1951 to 1969. In any event, the ultimate

allocation decision will be made in the Federal court proceeding (that is, whether to allocate across 1951 to 1969, or another, longer period).

FN12. *Rubenstein v. Royal Ins. Co.*, 44 Mass.App.Ct. 842 (1998), S. C., 429 Mass. 355 (1999). See discussion, *infra* at--.

FN13. The contamination was treated as one "occurrence." The XCP-3547 policy provided that "all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence."

FN14. The United States Court of Appeals for the First Circuit also addressed several other issues in its opinion that are not relevant to our resolution of the certified questions. See *Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 15-23 (1st Cir.2008). The court found error in a special verdict question about the owned property exclusion in Century's policies, which requires the case to be remanded for a new trial on that issue to ensure that the jury award encompasses only remediation costs necessary to protect against off-site, as opposed to solely on-site, contamination. *Id.* at 15- 17. The court also ordered an adjustment to the declaratory judgment on remand, concluding that it could be read too broadly. *Id.* at 19-20.

Additionally, the court corrected an erroneous calculation of statutory prejudgment interest. *Id.* at 20-22. Finally, the court rejected Century's other arguments, which involved the exclusion of a supplementary report by one of Century's experts, jury instructions on the "expected or intended" defense, and the jury's findings as to the terms of the XPL-3392 policy. *Id.* at 17- 19, 22-23.

FN15. Boston Gas argues that the factual premise of the first certified question (i.e., that Century provided coverage for less than the full period of years in which contamination occurred) "is nonexistent" because it "is precisely what the jury did not find." In its opinion accompanying the certification order, however, the First Circuit noted that in addition to the jury's finding that the Everett site was contaminated during the Century policy periods (1951 to 1969), "contamination seemingly occurred over a much longer period, even though no findings were made as to duration." *Boston Gas Co. v. Century Indem. Co.*, *supra* at 12.

While the jury were not asked to make specific findings as to the duration of the contamination, the record supports the First Circuit's conclusion that contamination apparently took place outside the Century policy periods. The record includes reports prepared by the engineering firms Metcalf & Eddy and GEI Consultants, Inc., that conclude that the Everett site was contaminated by 1950 and continued to suffer contamination in 2005. Both of these reports were introduced in evidence at trial. Moreover, Boston Gas's own expert testified at trial that the Everett site suffered contamination

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from at least 1948 (and perhaps much earlier) until the present day. Consistent with this testimony, counsel for Boston Gas argued during his summation to the jury that contamination occurred at the Everett site from at least 1948 until the present day. Before trial, counsel for Boston Gas argued that there had been "continuous property damage" at the Everett site that began "well before [the] 1950 [Metcalf & Eddy] study." Finally, counsel for Boston Gas conceded at oral argument before this court that Boston Gas had argued in the Federal District Court that there was "ongoing property damage" at the Everett site. Accordingly, we assume, for the purposes of answering the First Circuit's certified questions, that contamination occurred outside the Century policy periods. Any further factual development is left to the Federal court.

FN16. "Long-tail claims" are those that can "occur many years after the triggering event and the expiration of the insurance policy." *Matter of the Liquidation of Am. Mut. Liab. Ins. Co.*, 434 Mass. 272, 291 (2001). "Most insurance policies issued before the mid-1980s provided 'occurrence' based coverage rather than 'claims-made' coverage. As a result, the insurance policies were said to have a 'long-tail' of coverage that applied to claims

brought long after the occurrence that gave rise to the claim of liability." Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L.Rev. 1215, 1217 n. 13.

FN17. "[C]onsider the simple case of an automobile accident in 1994 with a definite prognosis that an injured occupant's spine will deteriorate in 1996 resulting eventually in paralysis. The policy in effect during 1994 must indemnify for all damages attributable to the 1994 accident even though the full extent of the damages or the injury will not take place until a future date." *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 465, 478-480 (1994).

FN18. The progressive injury in this case was environmental contamination caused by various spills and leaks that took place before, during, and after the Century policy periods.

FN19. For example, the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980. See 42 U.S.C. §§ 9601 et seq. The Massachusetts Oil and Hazardous Material Release Prevention Act, which is the State analogue to CERCLA, was enacted in 1983. See G.L. c. 21E, inserted by St.1983, c. 7, § 5.

FN20. "Most liability policies are designed to respond to losses, such as automobile accidents, which occur instantaneously. Losses of this nature are relatively easy to identify because damages are both immediate and finite, and can be measured quite simply against the limits of the policy or policies in effect on the date of the accident.

"On the other hand, losses where damage develops unrecognized over an extended period of time, such as bodily injury claims for toxic exposures and property damage claims for environmental contamination, are more difficult to pinpoint both in time and in degree. In these cases, correlating degrees of damage to particular points along the loss timeline may be virtually impossible. This has led to substantial uncertainty as to how responsibility for such losses should be allocated where multiple insurers have issued successive policies to the insured over the period of time the damage was developing." Hickman, *Allocation of Environmental Cleanup Liability Between Successive Insurers*, 17 N. Ky. L.Rev. 291, 292 (1990).

FN21. Manifestation trigger assigns the date of loss "to the policy period when property damage or actual damage is discovered, becomes known to the insured or a third party, or should have reasonably been discovered." 23 E.M. Holmes, *Appleman on Insurance* § 145.3[B][2], at 14 (2d ed.2003). Injury-in-

fact trigger "implicates all of the policy periods during which the insured proves some injury or damage." *Id.* at 15. Exposure trigger results in "all insurance contracts in effect when property was exposed to hazardous waste" being triggered. *Id.* at 16. Finally, continuous trigger posits that "any policy on the risk at any time during the continuing loss is triggered ... from the date of initial exposure through manifestation." *Id.* at 17.

FN22. By "scope of coverage," we mean the amount that Century must pay to satisfy its obligation to indemnify Boston Gas under the triggered CGL policies.

FN23. Not surprisingly, there is also disagreement among commentators about which approach is preferable. E.g., compare Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L.Rev. 257 (1997) (advocating proration by time on the risk), with Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies*, 1999 BYU L.Rev. 1215 (advocating "single-vertical allocation" between policyholder and insurers [essentially a form of joint and several allocation], followed by "time-on-the-risk" allocation among insurers).

FN24. This allocation method is variously referred to as "joint and several," "all sums," "vertical exhaustion," and "vertical spike." S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* § 4.1, at 1 (2d ed.2008). We shall use the term "joint and several," but we note that it is conceptually distinct from the tort concept of joint and several liability. "Since each insurer is responsible only for the policy limits it bargained for, it is not joint and several liability in the tort law sense where a tortfeasor deemed only 10 percent responsible is liable for 100 percent of the judgment if the other tortfeasors are insolvent or otherwise unavailable." Colon, *Pay it Forward: Allocating Defense and Indemnity Costs in Environmental Liability Cases in California*, 24 Ins. Litig. Rep. 43, 51 n. 66 (2002). See also Stempel, *Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders*, 25 Wm. Mitchell L.Rev. 769, 791 n. 98, 816-817 & n. 195 (1999) ("term joint and several liability is misleading in the insurance coverage context").

FN25. "Stacking policy limits means that when more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim up to the full limits of the policy." Colon, *supra* at 53.

FN26. See, e.g., *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 494 (Del.2001); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058 (Ind.2001); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 516-517 (2002); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 39-42 (1993); *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wash.2d 413, 428-429 (1998); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 616 (Wis.2009).

FN27. Some courts have recognized an exception to this rule where insurance was "unavailable." See *infra* at-- & note 41.

FN28. While most courts have held policyholders with occurrence-based policies responsible for a full per occurrence deductible or self-insured retention under each triggered policy, a minority of courts have prorated policyholders' deductibles. See S.M. Seaman & J.R. Schulze, *supra* at § 4.3[c] [2][A] at 4-29--4-32.

FN29. See, e.g., *Public Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 935 (Colo.1999); *Security Ins.*

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Co. v. Lumbermens Mut. Cas. Co., 264 Conn. 688, 710 (2003); *Atchison, Topeka & Santa Fe Ry. v. Stonewall Ins. Co.*, 275 Kan. 698, 753-754 (2003); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky.2005); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732 (Minn.1997); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 344 (2007); *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 478-480 (1994); *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224-225 (2002); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 140-142 (Utah 1997); *Towns v. Northern Sec. Ins. Co.*, 964 A.2d 1150, 1167 (Vt.2008).

FN30. That provision stated: "It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability hereon as stated in item 2 of the Declarations shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.

"Subject to the foregoing paragraph and to all the other terms and conditions of this policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this policy Underwriters will continue to protect the Assured for liability in respect of such personal injury or property damage without payment of additional premium." *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London*, 59 Mass.App.Ct. 646, 656 (2003).

FN31. The Appeals Court cautioned that because "the policy here was first issued by [the defendant insurers] in 1961 ... [o]ur analysis is confined to the policy language before us, and so does not necessarily bear on environmental coverage disputes involving more recent policies with different wording." *Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, supra* at 660 n. 15.

FN32. An ambiguity arises when there is more than one rational interpretation of the relevant policy language. *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 849 (1993). "However, an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other." *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 466 (1995).

FN33. The "Defense, Settlement and Supplementary Payments" provision states that, in certain circumstances, Century "shall contribute to the legal costs in the ratio that its proportion of the liability for the judgment rendered, or settlement made, bears to the whole amount of said judgment or settlement."

The XPL-5607 policy has a virtually identical provision, titled "Legal Costs," which states that, in certain circumstances, Century "shall contribute to the costs in the ratio that its proportion of the liability for the judgment rendered, or settlement made, bears to the whole amount of said judgment or settlement."

FN34. See, e.g., *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 324 (2d Cir.2000) (court deemed policy language limiting coverage to "accident" or "property damage" "during the policy period" "at least consistent with" pro rata allocation); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1227-1228 (6th Cir.1980) (pro rata allocation where "Policy Period, Territory" provisions limit coverage to injury or damage during policy period); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 731 (Minn.1997) (pro rata allocation where "[t]his policy applies ... to occurrences during the policy period anywhere in the world ..."); *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657, 659 (Minn.1994) (pro rata allocation where "[t]his policy applies only to occurrences which occur during the policy period ..."); *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 222 (2002)

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(pro rata allocation where "[t]his policy applies only to 'occurrences' as defined herein, happening during the policy period"). See also *Towns v. Northern Sec. Ins. Co.*, 964 A.2d 1150, 1166 (Vt.2008) (pro rata by time on the risk "is most consistent with ... the standard occurrence-based policy provision limiting coverage to damages occurring *during* the policy term on which it is based" [emphasis in original]). See generally S.M. Seaman & J.R. Schulze, Allocation of Losses in

Complex Insurance Coverage Claims § 4.2[b], at 4-8 (2d ed. 2008) ("Although pre-1986 [CGL] contracts often contain language to the effect that the contract covers 'all sums which the insured shall become legally obligated to pay ... as damages,' the contracts expressly modify this phrase to make clear that 'all sums' is limited to damages 'to which this policy applies.' Further, the contracts provide coverage only for the damages that take place 'during the policy period' " [emphasis added]). Contrast *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 625 (Wis.2009) (adopting "all sums" allocation where policy expressly covered property damage occurring "partly before and partly within the policy period" and contained no "Policy Period, Territory" provision limiting coverage to property damage occurring during policy period).

FN35. The XPL-5607 policy provides: "All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence."

FN36. " 'Other insurance' refers only to two or more concurrent policies, which insure the same risk and the same interest, for the benefit of the same person, during the same period. However, 'other insurance' clauses are not intended to allocate liability among successive insurers because they do not insure the same risk and would unjustly make consecutive insurers liable for damages occurring outside their policy periods." 23 E.M. Holmes, Appleman on Insurance § 145.4[C], at 34 (2d ed.2003).

"Historically, 'other insurance' clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a given loss.... An example of a typical multiple-coverage case is the situation in which a loss is incurred by an insured driver while driving an automobile of an insured owner with the owner's permission.... In such a case both policies clearly cover the entire loss." (Citations omitted.) *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 470 (1994).

FN37. A number of other courts adopting the pro rata allocation method have deemed similar policy language unambiguous, and thus declined to construe the policies in favor of the insured to provide for joint and several allocation. See, e.g., *Public Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 939- 940 (Colo.1999) (policies not ambiguous because "pick and choose" allocation method not reasonable interpretation); *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 710-711 (2003) ("Although we are bound to construe ambiguities in favor of the insured ... we cannot torture the insurance policy language in order to provide [the policyholder] with uninterrupted insurance coverage where there was none" [citation omitted]); *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 224 (2002) (joint and several allocation inconsistent with "unambiguous language" of policies).

FN38. Boston Gas has directed our attention to *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 70-74 (1st Cir.2009), where the court recently applied the joint and several or "all sums" method of allocation to defense costs as a matter of Rhode Island law. Significantly, the First Circuit concluded that adopting pro rata allocation would be inconsistent with Rhode Island's "manifestation" theory for the trigger of coverage. *Id.* at 72 n. 2, 77, quoting *Emhart Indus, Inc. v. Home Ins. Co.*, 515 F.Supp.2d 228, 256 (D.R.I.2007) ("[T]o adopt th[e] 'time-on-the-risk' allocation borders on adopting a 'continuous trigger' theory of coverage, in which the existence of [pollutants] 'triggers' coverage every year.... '[T]he Rhode Island Supreme Court has adopted a separate, more circumscribed trigger theory.' "). See *id.* at 78, quoting *CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 668 A.2d 647, 649 (R.I.1995) (" 'occurrence' under a general liability policy takes place when property damage, which includes property loss, manifests itself or is discovered or in the exercise of reasonable diligence, is discoverable"). See also 23 E.M. Holmes, Appleman on Insurance § 145.3[B] [2][a], at 14 (2d. ed.2003) (manifestation

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trigger assigns date of loss "to the policy period when property damage or actual damage is discovered, becomes

known to the insured or a third party, or should have reasonably been discovered"). We have not adopted a trigger theory that is so circumscribed. See *Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 853-855 (1993) (rejecting manifestation trigger theory in environmental contamination context but declining expressly to adopt another trigger theory). See also 23 E.M. Holmes, *supra* at 15 ("Although a manifestation trigger of coverage provides greater certainty as to the date of loss and avoids allocation among several years of coverage, the trend is to spread risk over the years that injury or damage was taking place rather than in the year of discovery"). Pro rata allocation is thus not inconsistent with any "circumscribed" trigger theory in Massachusetts as it may be in Rhode Island. Finally, the *Emhart* case is distinguishable because it involved allocation of defense costs, while this case involves allocation of indemnity costs. See *Emhart Indus., Inc. v. Century Indem. Co.*, *supra* at 70, 72 ("there is *no connection* between limiting coverage by the policy period and the amount of defense costs").

FN39. The "time on the risk" approach is also sometimes referred to as "proration by years" or "equal shares." See 23 E.M. Holmes, *supra* at § 145.4 [A][2][b], at 24-25.

FN40. The following example, taken from the New Hampshire Supreme Court's opinion in the *EnergyNorth* case, illustrates the difference between pro rata by time on the risk and pro rata by time and limits:

"Assume that a company, which was found liable for a \$15 million verdict for pollution over twenty years, had insurance with four different primary insurers.... Company A provided \$.5 million insurance for five years; Company B provided \$1 million insurance for six years; Company C provided \$2 million insurance for four years; and Company D provided \$4 million insurance for five years....

"Under *pro-ration by years*, Company A would be liable for 25% of the verdict, or \$3.75 million, because it was on the risk for five out of the twenty years over which the pollution occurred.... Company D would also be liable for 25% of the verdict for the same reason.... Company B would be liable for 30% of the verdict, or \$4.5 million, because it was on the risk for six out of the twenty years, and Company C would be liable for 20% of the verdict, or \$3 million, because it was on the risk for four out of the twenty years....

"Under *pro-ration by years and limits*, Company A would be responsible for 6.85% of the risk.... This percentage is derived by dividing its total limit for the five years it was on the risk (\$2.5 million) by the total limits of all of the policies during the entire twenty years of pollution (\$36.50 million).... This percentage is then multiplied by the \$15 million verdict to yield \$1.0275 million as the total amount of Company A's liability.... Company B would be responsible for 16.44% of the risk (\$6 million limit divided by \$36.50 million) or \$2.466 million (16.44% of \$15 million). Company C would be responsible for 21.92% of the risk (\$8 million limit divided by \$36.50 million) or \$3.288 million (21.92% of \$15 million).... Company D would be responsible for 54.80% of the risk (\$20 million divided by \$36.50 million) or \$8.220 million (54.80% of \$15 million)." (Emphases added. Citations omitted.)

EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, 156 N.H. 333, 341-342 (2007), citing Bass, *The Montrose Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers*, 5 Hastings W.-Nw. J. Envtl. L. & Pol'y 209, 221, 222 (1999).

FN41. See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgt. Corp.*, 73 F.3d 1178, 1203-1204 (2d Cir.1995), modified, 85 F.3d 49, 51 (2d Cir.1996) (adopting "proration-to-the-insured" for "years in which [the policyholder] elected not to purchase insurance or purchased insufficient insurance," but not for periods after 1985, when asbestos liability insurance became unavailable); *Owens-Illinois, Inc. v.*

United Ins. Co., 138 N.J. 437, 479 (1994) ("When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable"). But see, e.g., *Sybron Transition Corp. v. Security Ins.*, 258 F.3d 595, 599-600 (7th Cir.2001) (rejecting *Stonewall*'s distinction between periods when insurance was "available" or "unavailable" because "[t]he whole idea of a time-on-the-risk calculation is that any given insurer's share reflects the ratio of its coverage [and thus the premiums it collected] to the total risk"); *AAA Disposal Sys., Inc. v. Aetna Cas. & Sur. Co.*, 355 Ill.App.3d 275, 287 (2005) ("Because the policy periods contained in the ... insurance policies do not include the years plaintiffs went uninsured, we fail to understand why [the insurer] should have to bear the costs from that period.... We understand that insurance coverage was not available for the period at issue, but intervenors cannot shift responsibility for the uninsured years to [the insurer]").

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