

IN THE SUPREME COURT OF OHIO

ORIGINAL

PENNSYLVANIA GENERAL INS. CO.,	:	Case No. 2009-0104
	:	
Plaintiff-Appellee	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
vs.	:	Eighth Appellate District
	:	
PARK-OHIO INDUSTRIES, INC., et al.	:	Court of Appeals Case No. 90619
	:	
Defendants-Appellants	:	

APPELLEE PENNSYLVANIA GENERAL INSURANCE COMPANY'S MERIT BRIEF

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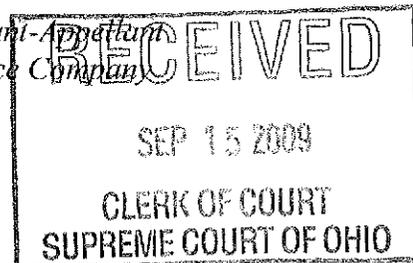
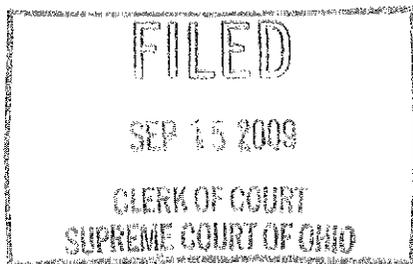
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## STATEMENT OF THE CASE AND FACTS

### A. Introduction

This appeal arises from a dispute between insurers concerning the allocation of general liability insurance coverage for the defense and settlement of a mesothelioma lawsuit styled as *George DiStefano, et al. v. Georgia-Pacific Corp., et al.*, Case No. 405329, formerly pending in the Superior Court of the State of California in and for the County of San Francisco (“*DiStefano* Litigation”). As a defendant in the *DiStefano* Litigation, Park-Ohio Industries, Inc. (“Park-Ohio”) had several general liability insurers from which it could have demanded defense and indemnity. However, pursuant to the “all sums” approach adopted in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, Park-Ohio demanded that Plaintiff-Appellee Pennsylvania General Insurance Company (fka General Accident Fire & Life Assurance Corporation, Ltd. [“Penn General”]) alone pay the full cost of defense and settlement, and then seek contribution from other triggered insurers. Penn General ultimately settled Park-Ohio’s *Goodyear* demand, paid the defense and settlement in full, and then sought contribution from other triggered insurers, including Defendants-Appellants Continental Casualty Company (“CNA”) and Nationwide Insurance Company (“Nationwide”).<sup>1</sup>

In upholding Penn General’s right to pursue contribution from CNA and Nationwide, the Eighth Appellate District correctly found that Penn General “investigated, handled and resolved the . . . claim in accordance with the terms and conditions of its policies, and, in compliance with

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<sup>1</sup>Policies issued to Park-Ohio by Travelers (from January 1, 1975 to January 1, 1979) were also triggered, and also at issue at the Trial Court level. However, Travelers settled with Penn General prior to this appeal. *Pa. Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, 179 Ohio App.3d 385, 2008-Ohio-5991, at ¶13 (an unreported copy appears in CNA’s Merit Brief, at Apx. pp. 5-27).

*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.”<sup>2</sup>

CNA and Nationwide, on the other hand, ask this Court to reverse the Eighth Appellate District and deny Penn General equitable contribution under the argument that:

- (1) Park-Ohio violated the notice-related and/or cooperation-related provisions of their respective policies;
- (2) Equity should preclude Penn General from seeking contribution; and/or
- (3) This Court should clarify or overrule *Goodyear* such that Penn General is precluded from seeking contribution.

While there is merit to clarifying or overruling *Goodyear*, as explained below in greater detail, none these objections warrants a reversal of the Eighth Appellate District’s decision to enter judgment for Penn General.

Because Park-Ohio never sought insurance coverage from CNA or Nationwide, it could not have violated the notice-related and/or cooperation provisions of their policies. Even if Park-Ohio could have violated conditions of policies from which it was *not* seeking coverage, CNA and Nationwide fail to explain how or why Penn General (which is not a party to such contracts) should be bound by Park-Ohio’s actions. And even if Penn General could somehow be bound by Park-Ohio’s actions, well-established Ohio law provides that CNA and Nationwide could only deny coverage for breach of their notice-related and/or cooperation provisions if they suffered prejudice as a result of such breach. See *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-

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<sup>2</sup>*Pa. Gen.*, at ¶40.

Ohio-7217, at paragraph one of the syllabus. In this case, however, the undisputed stipulated evidence clearly proves that CNA and Nationwide were *not* prejudiced by Park-Ohio's actions.

Likewise, any argument that Penn General's actions raise an equitable bar to its contribution claim fail. Whether cast as unreasonable delay (laches), failure to enforce contract rights (waiver), unclean hands or other equitable defense, the critical inquiry is whether CNA or Nationwide suffered prejudice as a result of Penn General's actions. Again, the undisputed, stipulated evidence clearly proves that CNA and Nationwide were *not* prejudiced by Penn General's actions.

Finally, while Penn General welcomes and agrees with CNA's call to clarify or overrule *Goodyear*, doing so would not change the outcome of this case in any practical sense. *Goodyear* simply adopted an insurance allocation scheme for progressive injury cases, it did not grant rights to, or take away rights from, Penn General. Therefore, even if *Goodyear* is overruled or clarified, this Court should affirm the Eighth Appellate District's decision to enter judgment for Penn General. Nevertheless, CNA is correct that in light of its integral connection with the issues in this case, *Goodyear*'s continued vitality is properly before this Court. When considering that future, the case at bar highlights some of the severe problems with *Goodyear*. Rather than decrease litigation, increase certainty and level inequities, *Goodyear* has done the opposite, and seven years of experience proves that *Goodyear* needs an overhaul.

One approach might be to simply overrule *Goodyear* in favor of "pro rata" allocation in the manner proposed by CNA. As explained by CNA and Amicus Curiae Complex Insurance Claims Litigation Association ("CICLA"), there are ample reasons to do this. Another approach, however, rests in the legal authorities relied upon in *Goodyear* itself--which expressly provide that the "all sums" approach needs to be clarified to address cases, such as this one, where the disputed insurance

policies include express provisions providing for “pro rata” allocation of insurance coverage. Where such express provisions exist and are otherwise valid and unambiguous, the authorities relied upon in *Goodyear* provide that “pro rata” allocation is mandated. There is no need (or authority for that matter) to resort to equity or salutary rules regarding allocation—simple enforcement of contractual provisions is all that is required. *Goodyear* did not address such express contractual provisions and should be clarified to make clear that it does not control insurance allocation in such cases. If this proves too problematic under the “all sums” approach, it only proves that CNA’s call to revise *Goodyear* is warranted.<sup>3</sup>

**B. Procedural History and Underlying Facts**

The facts and history of this appeal are not in dispute and are the subject of extensive joint stipulations and exhibits establishing the following.<sup>4</sup>

On March 7, 2002, George DiStefano (“DiStefano”) and his wife commenced the *DiStefano* Litigation against a number of defendants, including Park-Ohio, seeking damages arising from DiStefano’s battle with mesothelioma allegedly caused by years of exposure to asbestos in the

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<sup>3</sup>Assuming this Court heeds CNA’s call to clarify or overrule *Goodyear*, it would presumably adopt a rule calling for “pro rata” allocation in the first instance. The same result would be reached if this Court clarified *Goodyear* with respect to other insurance clauses under the alternative approach addressed by Penn General. Under the current approach to *Goodyear*, Penn General seeks “pro rata” allocation in the second instance (in a contribution action) and there is no evidence establishing that Penn General is precluded from pursuing this course. All of these outcomes lead to “pro rata” allocation (assuming that Penn General is not precluded from maintaining such an action). Accordingly, the outcome of this case does not depend upon whether any decision issued by this Court regarding the future of *Goodyear* is retrospective or prospective in application. *Wagner v. Midwestern Indemn. Co.*, 83 Ohio St.3d 287, 290, 1998-Ohio-111 (refusing to reverse and remand judgment based upon new insurance bad faith standard where application of new standard would not change the outcome of the case).

<sup>4</sup>(Pagination of the Record [“T.d.”] 148-150; Supplement, pp. 48-228)

1960s—nearly a half century before filing suit.<sup>5</sup> As trial approached, Park-Ohio would emerge as the only viable, collectible defendant.

Five months later, on August 22, 2002, just weeks before trial, Park-Ohio provided first notice of the *DiStefano* Litigation to Penn General and demanded that Penn General provide defense and indemnity to Park-Ohio under policies Penn General had issued to Park-Ohio's predecessor from December 30, 1960 to December 30, 1968.<sup>6</sup>

Penn General quickly retained experienced coverage counsel, Henry Rome ("Rome"), to assist in its investigation of the *DiStefano* Litigation.<sup>7</sup> It also demanded that Park-Ohio provide information regarding other insurance coverage.<sup>8</sup> Despite this request, Park-Ohio would resist efforts to produce other insurance information for another two years.<sup>9</sup> In the interim, on October 6, 2002, without notice to or consent from Penn General, Park-Ohio settled the *DiStefano* Litigation for \$1 million.<sup>10</sup>

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<sup>5</sup>(T.d. 148, ¶¶1-4; T.d. 150, Ex. No. 1; Supplement, pp. 48, 57-79). *Pa. Gen.*, at ¶2. Delays of years or decades are not uncommon in progressive injury claims, and create practical obstacles to efficient claims handling as both insurers and insureds struggle to, among other things, find ancient policies, place insurers on notice and determine whether policies remain applicable in light of intervening events (such as insolvency, exhaustion of aggregate limits, etc.). The "all sums" approach exacerbates the problems caused by these practical obstacles by theoretically allowing an insured to "find" a single insurer from decades ago and place the entire risk of loss upon that insurer rather than upon the web of risk management decisions the insured made over the course of many decades. *See also* (CNA Merit Brief, pp. 22-26).

<sup>6</sup>(T.d. 148, ¶¶6-7, 44-53; T.d. 150, Ex. Nos. 3, 47; Supplement, pp. 49, 52, 80-81, 202-220). Park-Ohio was the successor of Ohio Crankshaft—which had produced asbestos-laden products.

<sup>7</sup>(T.d. 148, ¶9; T.d. 150, Ex. Nos. 5-9; Supplement, pp. 49, 83-96).

<sup>8</sup>(T.d. 148, ¶¶11-12; T.d. 150, Ex. Nos. 8-10; Supplement, pp. 49, 95)

<sup>9</sup>(T.d. 148, ¶22; Supplement, p. 50). *Pa. Gen.*, at ¶¶3-4.

<sup>10</sup>(T.d. 148, ¶¶10-13; T.d. 150, Ex. No. 12; Supplement, pp. 49, 98).

This raised obvious issues about whether Park-Ohio had violated various conditions of the Penn General policies. However, Rome advised Penn General that: (1) Park-Ohio had enjoyed excellent legal representation; (2) Park-Ohio had no liability defenses available; (3) Park-Ohio faced a multi-million dollar verdict potential that likely had a conservative value of \$5-6 million; and (4) far from being prejudicial, the settlement was probably the best outcome in light of the circumstances.<sup>11</sup> Consequently, Rome further advised Penn General that despite Park-Ohio's failure to provide notice of, or obtain consent for, the settlement, there was no prejudice to Penn General as to allow it to avoid coverage on the basis of violation of the conditions in its policies.<sup>12</sup> In the years that would follow, no one would present any evidence to contradict Rome's conclusion.

Based upon this information, Penn General agreed to pay Park-Ohio its post-notice defense costs. With respect to indemnity, however, Penn General reserved all rights under its policies—including the right to allocation with any other triggered policies issued by other insurers.<sup>13</sup> This was unacceptable to Park-Ohio which Park-Ohio filed suit against Penn General in *Park-Ohio Industries, Inc. v. Gen. Acc. Ins. Co.*, Case No. 511015, in the Court of Common Pleas for Cuyahoga County, Ohio insisting that Penn General was obligated to provide coverage for the entire settlement and pre-notice defense costs.<sup>14</sup> It would not be until nearly a year later that Park-Ohio would finally be compelled by discovery to produce information regarding other insurance that pertained to DiStefano's claims, including policies issued by CNA (from December 30, 1968 to January 1, 1975)

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<sup>11</sup>(T.d. 148, ¶¶9-14 ; T.d. 150, Ex. Nos. 5, 13; Supplement, pp. 49, 83-90, 107-111).

<sup>12</sup>(T.d. 150, Ex. No. 13; Supplement, pp. 107-111). *Pa. Gen.*, at ¶¶5-8.

<sup>13</sup>(T.d. 148, ¶18; T.d. 150, Ex. No. 18; Supplement, pp. 49, 113-119).

<sup>14</sup>(T.d. 148, ¶23; T.d. 150, Ex. No. 22; Supplement, pp. 50, 123-129).

and Nationwide (from January 1, 1979 to February 1, 1988).<sup>15</sup> Penn General then quickly notified CNA and Nationwide that it would be seeking equitable contribution from them if it was required to pay more than its share of the settlement.<sup>16</sup>

With the obvious exception of policy limits and periods, the policies issued by CNA and Nationwide were generally legally indistinguishable from those issued by Penn General. In this regard:

- (1) all of the policies provided coverage for “all sums” Park-Ohio may become legally obligated to pay as damages because of bodily injury occurring during the policy period;
- (2) none of the policies included any substantive exclusions which excluded damages for the type of injuries claimed in the *DiStefano* Litigation;
- (3) all of the policies included notice, consent to settle, cooperation and right to defend provisions;
- (4) all of the policies included provisions that limited the insurer’s responsibility to provide indemnity to a pro rata share of the total loss if Park-Ohio had other insurance “applicable to the loss”.<sup>17</sup>

Accordingly, there were not any coverage arguments available to CNA or Nationwide that were not also available to Penn General. Nevertheless, CNA and Nationwide refused to provide coverage for the *DiStefano* Litigation.<sup>18</sup> This prompted Penn General to file the instant action seeking declaratory

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<sup>15</sup>(T.d. 148, ¶¶31, 54-57, 64-74; T.d. 150, Ex. Nos. 30-31, 48, 50; Supplement, pp. 51, 53-55, 150-177, 221-227).

<sup>16</sup>(T.d. 148, ¶32; T.d. 150, Ex. Nos. 32-34; Supplement, pp. 51, 178-187). *Pa. Gen.*, at ¶¶11-12.

<sup>17</sup>The other insurance clauses are addressed in greater detail below.

<sup>18</sup>(T.d. 148, ¶¶34-36, 38; T.d. 150, Ex. Nos. 37-38, 40; Supplement, p. 51).

relief and equitable contribution.<sup>19</sup> Penn General then sought to consolidate this suit with the earlier suit filed by Park-Ohio so that all insurance issues and parties could be joined before a single judge. However, Park-Ohio successfully opposed the effort, and won a stay of the instant action until its suit against Penn General was resolved.<sup>20</sup> All the while, CNA and Nationwide, fully aware of the allocation issues swirling around responsibility for the settlement, sat on their hands for over a year and did nothing. Finally, a year later, Penn General and Park-Ohio resolved the remaining issues between them, the stay was lifted, and Penn General was able to proceed with its claims against CNA and Nationwide.<sup>21</sup>

The contribution claim was submitted to the Trial Court on briefs and the foregoing stipulated record. Importantly, that record is devoid of *any* evidence that CNA or Nationwide were prejudiced by the actions of Park-Ohio or Penn General. To the contrary, the affirmative evidence is clear—there is nothing CNA or Nationwide could have done that would have resulted in any better outcome for the *DiStefano* Litigation. After the Trial Court incorrectly entered judgment for CNA and Nationwide, Penn General appealed to the Eighth Appellate District.<sup>22</sup> On appeal, the Eighth Appellate District correctly reversed and remanded the case to determine allocation shares between the insurers.<sup>23</sup> CNA and Nationwide now appeal to this Court.

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<sup>19</sup>(T.d. 148, ¶34; T.d. 150, Ex. No. 36).

<sup>20</sup>(T.d. 40, 48-49, 54; T.d. 148, ¶39; Supplement, p. 51).

<sup>21</sup>(T.d. 148, ¶¶24-25, 37; Supplement, pp. 50-51). *Pa. Gen.*, at ¶¶11-14.

<sup>22</sup>(T.d. 155; Supplement, pp. 34-47).

<sup>23</sup>*Pa. Gen.*, *supra*. (CNA's Merit Brief, Apx. pp. 5-27).

## ARGUMENT AGAINST APPELLANTS' PROPOSITIONS OF LAW

**PROPOSITION OF LAW:** No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 unless its policy is “applicable.” In order for the policy to be “applicable” to a claim, there must be full compliance with all terms and conditions of coverage in the non-targeted insurer’s policy.<sup>24</sup>

### A. Standard of Review

This case was presented to the Trial Court on a stipulated evidentiary record, is driven by interpretation of contractual provisions and involves declaratory relief. Accordingly, this Court’s review is de novo.<sup>25</sup> However, it bears noting that the Eighth Appellate District correctly found that judgment for Penn General was warranted whether review was de novo or under an abuse of discretion standard.<sup>26</sup>

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<sup>24</sup>Because CNA leads with an argument to overrule *Goodyear*, it has restyled and repositioned this Proposition of Law as: “ALTERNATIVE PROPOSITION OF LAW: IN THE ALTERNATIVE, THIS COULD 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.” (See CNA’s Merit Brief, p. ii). CNA’s revision appears to be substantively identical to the Proposition of Law accepted by this Court.

<sup>25</sup>See *Bennett v. Sinclair Refining Co.* (1944), 144 Ohio St. 139, 148-149, 57 N.E.2d 776; *Cincinnati Ins. Co. v. Slutz*, 5<sup>th</sup> Dist. CA-7109, 1987 Ohio App. LEXIS 9238, at \*2; *Mazza v. Cont’l. Ins. Co.*, 9<sup>th</sup> Dist. No. 21192, 2003-Ohio-360; *Truck Ins. Exchange v. Unigard Ins. Co.* (2d Dist. 2000), 79 Cal. App.4th 966, 973.

<sup>26</sup>*Pa. Gen.*, at ¶¶16-18 (“We find that the outcome is the same, no matter the standard of review . . . the trial court’s resolution of the controversy up the basis of Park-Ohio’s lack of notice . . . was an error of law . . . [and] We discern no prejudice to Nationwide or [CNA]. Under such circumstances, to relieve them of the obligation of contribution, and leave [Penn General] with the entire obligation, was an abuse of discretion.”)

**B. Goodyear: The Application and Allocation of General Liability Policies to Progressive Injury Claims.**

It is undisputed that this case has its genesis in *Goodyear*. In *Goodyear*, this Court for the first and only time addressed the application and allocation of general liability policies to progressive injury claims. The so-called “all sums” approach adopted in *Goodyear*, was accurately summarized by the Eighth Appellate District below as follows:

In *Goodyear* . . . , 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 in such situations, because the insured expected complete security from each policy 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.” . . .

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.” . . . (Citations omitted).<sup>27</sup>

In deciding *Goodyear*, this Court did not attempt to formulate a novel approach to insurance coverage for progressive injury claims, but instead weighed in on the running dispute between courts adopting an “all sums” approach to such cases and those adopting a “pro rata” approach. In electing to use the “all sums” approach, this Court relied heavily upon the rationale of the oft-cited (and oft-

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<sup>27</sup>*Pa. Gen.*, at ¶¶19-20.

criticized) decision in *Keene Corp. v. Ins. Co. of N. Am.* (D. C. Cir. 1981), 667 F.2d 1034.<sup>28</sup> *Keene* made clear that its holding arose from interpretation of the disputed insurance contracts as applied to progressive injury cases rather than from a judicially created doctrine. The court explained that it believed its conclusion resulted from a simple three-step analysis: (1) determining the “trigger” of coverage; (2) determining the extent of coverage once a policy is “triggered”; and (3) allocating responsibility between triggered policies.<sup>29</sup> It further explained its rationale for adopting the “all sums” approach as follows:

- (1) Asbestos-caused disease is a progressive bodily injury occurring over a long period of time. Because it is impossible to accurately quantify the amount of damages that may flow from such disease for any given specified sub-period of time, it is treated as *a single indivisible injury*.<sup>30</sup>
- (2) Because asbestos-caused disease is treated as a single indivisible injury, when the insured is a party to multiple, consecutive liability insurance policies providing coverage for “all sums” the insured may become legally obligated to pay as damages because of bodily injury occurring during the policy period, all such policies from the time of

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<sup>28</sup>*Goodyear*, at ¶¶10-11. In addition to *Keene*, this Court relied upon *Am. Nat’l. Fire Ins. Co. v. B&L Trucking & Constr. Co.* (1998), 134 Wash.2d 413, 423-429, 951 P.2d 250, and *J.H. France Refractories Co v. Allstate Ins. Co.* (1993), 534 Pa.29, 39-42, 626 A.2d 502 which applied *Keene*’s rationale to adopt an “all sums” approach. See also, *Monsanto Co. v. C.E. Heath Compensation & Liability Ins. Co.* (De. Sup. Ct. 1995), 652 A.2d 30, 33-34 (relied upon by *B&L Trucking*, 134 Wash.2d at 428).

<sup>29</sup>667 F.2d at 1042.

<sup>30</sup>Asbestos-caused disease constitutes a progressive injury where there may be a large lapse of time between exposure to asbestos and manifestation of asbestos-caused disease such that “different insurers are likely to be on risk at different points in the development of each plaintiff’s disease.” 667 F.2d at 1040. This creates evidence problems as the plaintiff can clearly prove that he or she was injured by the insured due to asbestos exposure, but the insured may be unable to prove the amount of actual damages within any given policy period. *Id.*, at 1052, FN 42. As a result, “we treat the diseases at issue in this case as single injuries that occur over extended periods of time.” *Id.*, at 1044, FN 20 (Emphasis added).

first exposure to asbestos to the end of the asbestos-caused disease or death will be triggered.<sup>31</sup>

- (3) Each policy is fully liable for all damages caused by the progressive injury up to its policy limits but *subject to the policy's other insurance clauses which "must govern the allocation of liability among the insurers in any particular case of asbestos-related disease."* Where appropriate, insurers may also use the doctrine of contribution to allocate insurance coverage in such circumstances.<sup>32</sup>

Thus, *Keene* reasoned that the interaction between: (a) the characterization of progressive injury claims (such as asbestos-caused disease) as *a single indivisible injury*; and (b) the insurance

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<sup>31</sup>Of the insurance coverage triggers available (exposure, actual injury, manifestation or continuous trigger), continuous trigger most readily accomplishes the purpose of the insurance policies by triggering all policies available to the insured from the moment of first exposure to injurious conditions to the end of the disease (usually death). This is appropriate because "[w]e interpret 'bodily injury' to mean any part of the single injurious process that asbestos-related diseases entail." 667 F.2d at 1046-1047 (Emphasis added).

<sup>32</sup>"[T]he insurance policies that the insurers "will pay on behalf of [the insured] '*all sums*' that [the insured] becomes legally obligated to pay as damages because of bodily injury during the policy period. We have defined 'bodily injury' to mean any part of the injurious process that begins with an initial exposure and ends with manifestation of the disease. As a result, when [the insured] is held liable for an asbestos-related disease, only part of the disease will have developed during any single policy period. The result of the development may have occurred during another policy period or during a policy period in which [the insured] had no insurance. The issue that arises is whether the insurer is liable in full, or in part, for [the insured's] liability once coverage is triggered. *We conclude that the insurer is liable in full, subject to the 'other insurance' provisions discussed . . . below.*" 667 F.2d at 1047. (Emphasis added). "[I]t is likely that the coverage of more than one insurer will be triggered. Because each insurer is fully liable, and because [the insured] cannot collect more than it owes in damages, the issue of dividing insurance obligations arises." 667 F.2d at 1050. The insured is permitted "to collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due, subject only to the provisions in the policies that govern allocation of liability when more than one policy covers an injury. That is the only way that [the insured] can be assured the security that is purchased with each policy. Our holding each insurer fully liable to [the insured] is also consistent with other courts' allocation of liability when more than one insurer covers *an indivisible loss.*" *Id.* (Emphasis added). "*When more than one policy applies to a loss, the 'other insurance' provisions of each policy provide a scheme by which the insurers' liability is to be apportioned . . . These provisions of the policies must govern the allocation of liability among the insurers in any particular case of asbestos-related disease.*" 667 F.2d at 1050. (Emphasis added). Additionally, insurers may use the doctrine of contribution to effect allocation. *Id.*, at FN 35.

policies' "all sums" language; mandated triggering all policies from exposure to death and making each triggered policy jointly and severally liable up to its policy limits. However, this joint and several liability was limited by the triggered policies' other insurance clauses. If those other insurance clauses mandated pro rata allocation, the court had no authority to alter them and they would be applied. *Goodyear* adopted this rationale without qualification, but did not reach the other insurance clause issue (presumably because the parties' merit briefs did not address this aspect of *Keene*).<sup>33</sup> Nor did *Goodyear* fully explain the interaction between the contribution process and the other insurance clauses. Future litigants were left with a decision that: (a) imposed joint and several liability upon triggered liability insurance policies; and (b) which identified contribution as one way that insurance allocation might be accomplished. Thus, *Goodyear* left open a host of questions.

These questions remained unresolved when Penn General paid the *DiStefano* Litigation defense and settlement costs in full and brought a contribution claim against CNA and Nationwide after Park-Ohio divulged their identities. Neither CNA nor Nationwide have challenged contribution as a mechanism to effectuate allocation between triggered policies. Instead, they have simply challenged Penn General's right to contribution *in this case*. In this regard, they argue that: (1) Park-Ohio allegedly violated various conditions of the CNA and Nationwide policies, and therefore their policies are not "applicable" (or, perhaps more accurately, are "untriggered"); and (2) Penn General should be equitably barred from obtaining contribution; that is, contribution would be appropriate but for Penn General's own actions. For the reasons that follow, neither of these

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<sup>33</sup>The parties' merit briefs in *Goodyear* are on file with this Court (Case Nos. 2000-1984 and 2001-0493), and can be found online on Lexis as 2000 OH S. Ct. Briefs 1984; 2001 OH S. Ct. Briefs LEXIS 31, 2001 OH S. Ct. Briefs LEXIS 35, and 2001 OH S. Ct. Briefs LEXIS 36.

contentions are valid or warrant reversal of the Eighth Appellate District's decision to enter judgment for Penn General.

**C. Park-Ohio Did Nothing to Bar Penn General's Contribution Claim.**

The Eighth Appellate District correctly described Penn General's contribution claim as follows:

Contribution is the right of a person who has been compelled to pay what another should have paid in part to require (usually proportionate) reimbursement . . . 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." . . . 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." . . . Since the doctrine of contribution has its basis in the broad principles of equity, it should be liberally applied. . . . Equity "cannot be determined by a fixed rule, but depends upon the peculiar facts and equitable considerations of each case . . . (Citations omitted).<sup>34</sup>

It went on to frame and answer the question in this case as follows:

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<sup>34</sup>*Pa. Gen.*, at ¶21. See also, *Nat'l. Fire Ins. Co v. Dennison* (1916), 93 Ohio St. 404, 410, 113 N.E. 260; *B&O RR Co. v. Walker* (1888), 45 Ohio St. 577, 588, 16 N.E. 475; *Arkwright Mut. Ins. Co. v. Lexington Ins. Co.*, 1<sup>st</sup> Dist. No. C-990347, 2000 Ohio App. LEXIS 4468, at \*2-3; 16 Couch on Ins. §222:98 (2008). In this regard, Penn General's contribution claim is very similar to a claim of unjust enrichment. See *Maryland Cas. Co. v. W.R. Grace & Co.* (2d. Cir. 2000), 218 F.3d 204, 211-212 (holding that with respect to insurance contribution claims "[t]he controlling inquiry under an equitable analysis is whether one party is unjustly enriched at the expense of another—the law abhors unjust enrichment"). This Court has explained the elements of unjust enrichment as: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, at ¶20. The purpose of such a claim is not to compensate the plaintiff for any loss or damage, but to compensate the plaintiff for the benefit conferred on the defendant. *Id.*, at ¶21.

[M]ay 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 that 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.<sup>35</sup>

From this, the Eighth Appellate District correctly concluded:

- (1) The policies issued by Penn General, CNA and Nationwide were all triggered by the *DiStefano* Litigation and there were no applicable exclusions barring coverage. Under *Goodyear*, Park-Ohio could have chosen any one of them to bear full responsibility for the *DiStefano* Litigation.<sup>36</sup>
- (2) Because Park-Ohio was not seeking insurance coverage from CNA or Nationwide, it had no obligation to provide notice or to otherwise comply with their policy conditions.<sup>37</sup> Likewise, neither CNA nor Nationwide had the right to participate in or control the *DiStefano* Litigation or its settlement.<sup>38</sup>
- (3) Penn General’s right to contribution did not arise from contract, but from equity—and only after Penn General had paid the *DiStefano* Litigation costs and settlement in full.<sup>39</sup>

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<sup>35</sup>*Pa. Gen.*, at ¶25.

<sup>36</sup>*Pa. Gen.*, at ¶38. CICLA agrees with this conclusion, observing: “*All* of the insurers’ policies were triggered by [DiStefano’s] claim.” (CICLA Amicus Brief, p. 2, FN 2).

<sup>37</sup>*Pa. Gen.*, at ¶27.

<sup>38</sup>*Pa. Gen.*, at ¶32.

<sup>39</sup>*Pa. Gen.*, at ¶¶26-33.

These conclusions are common sense, and it is not surprising that they are consistent with other courts addressing equitable contribution between insurers.<sup>40</sup> Such reasoning alone should be sufficient to reject arguments that Park-Ohio's actions rendered the policies of CNA and Nationwide inapplicable, but there is more in the stipulated record that further demonstrates the fallacy of CNA's and Nationwide's arguments. In this regard, even assuming *arguendo*, that: (a) Park-Ohio was required to comply with the conditions of policies under which it was not seeking insurance coverage, and (b) Park-Ohio violated those provisions; the undisputed, stipulated evidence affirmatively demonstrates that neither CNA nor Nationwide suffered any prejudice as a result. Rather, it proves that they could not have done any better in resolving the *DiStefano* Litigation than Park-Ohio did. Consequently, their arguments fail based upon Court's decision in *Ferrando*.

In *Ferrando*, this Court held that an insurer may not deny otherwise applicable insurance on the basis that the insured breached the conditions of an insurance policy unless the breach of those conditions prejudiced the insurer.<sup>41</sup> This Court provided the following reasons for its holding:

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<sup>40</sup>See e.g. *Foremost Ins. Co. v. Motorists Mut. Ins. Co.*, 167 Ohio App.3d 198, 2006-Ohio-3022, at ¶¶7-39, *appeal denied* by 111 Ohio St.3d 1434, 2006-Ohio-5351 (holding that first-in-time settling insurer was entitled to equitable contribution from second-in-time settling insurer despite release signed by the insured releasing second-in-time settling insurer from liability beyond the settlement); *Employers Ins. Co. of Wausau v. The Travelers Indemn. Co.* (1<sup>st</sup> Dist. 2006), 141 Cal. App. 4<sup>th</sup> 398, 402-406, 46 Cal.Rptr.3d 1 (insured's settlement with other insurers did not preclude equitable contribution claim by non-settling insurer against settling insurers); *Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1<sup>st</sup> Dist. 1998), 65 Cal.App.4<sup>th</sup> 1279, 1294-1295, 77 Cal.Rptr.2d 296 ("This right of contribution belongs to each insurer individually. It is not based on any right of subrogation to the rights of the insured, and is not equivalent to 'standing in the shoes' of the insured . . . This right is not a matter of contract, but flows from 'equitable principles'").

<sup>41</sup>Although *Ferrando* involved uninsured/underinsured motorists ("UM/UIM") coverage, it relied upon contract principles rather than Ohio's UM/UIM statute—R. C. 3937.18. Lower courts routinely apply *Ferrando*'s analysis outside the UM/UIM context. See e.g. *First Am. Title Ins. Co. v. Chicago Ins. Co.*, 8<sup>th</sup> Dist. No. 88274, 2007-Ohio-1593, at ¶¶13-18 (errors and omissions insurance context); *Indiana Lumbermens Mut. Ins. Co. v. Conner Industries, Inc.*, 12<sup>th</sup> Dist. No. CA2005-02-023, 2005-Ohio-6036, at ¶¶13-16 (errors and omissions insurance context). *Ferrando*

- (1) the requirement was consistent with the national majority position;<sup>42</sup>
- (2) the requirement was consistent with general contract law which requires there to be a “material” breach of a contract by one party before the other party will be discharged from its duty to perform;<sup>43</sup>
- (3) the requirement recognized the unequal bargaining power between the insurer and the insured in most insurance contracts;<sup>44</sup> and
- (4) the requirement supports the public policy objective of compensating tort victims.<sup>45</sup>

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addressed a range of policy conditions—including notice, subrogation and consent-to-settle clauses.

This Court has imposed a similar prejudice-type analysis in legal malpractice cases where a client claims but for its attorney’s negligence, the client would have had a better outcome by continuing to litigate a case rather than settle it. In such cases, the client will not be able to prevail where the undisputed evidence demonstrates that the settlement was the best possible outcome of the litigation. See *Environmental Network Corp v. Goodman Weiss Miller LLP*, 119 Ohio St.3d 209; 2008-Ohio-3833, at syllabus. Likewise, a client claiming that the attorney’s negligence deprived the client of the ability to obtain a judgment against a tortfeasor must not only prove the damages that would have been recoverable from the tortfeasor, but must also prove that such damages were collectible. See *Paterek v. Petersen & Ibold*, 118 Ohio St.3d 503, 2008-Ohio-2790, at ¶¶29-39.

<sup>42</sup>2002-Ohio-7217, at ¶¶25-34.

<sup>43</sup>2002-Ohio-7217, at ¶¶28, 37-38. Ohio law (and the national majority view) holds that a breach of contract by one party that has substantially performed does not discharge the obligations of the other party to the contract unless that breach is “material.” See *Lewis & Michael Moving & Storage, Inc. v. Stofcheck Ambulance Serv., Inc.*, 10<sup>th</sup> Dist. No. 05AP-662, 2006-Ohio-3810, at ¶¶20-22; *O’Brien v. The Ohio State University*, 10<sup>th</sup> Dist. No. 06AP-946, 2007-Ohio-4833, at ¶¶56-60, appeal not allowed by 117 Ohio St.3d 1406, 2008-Ohio-565; *Tucker v. Young*, 4<sup>th</sup> Dist. No. 04CA10, 2006-Ohio-1126, at ¶25; *Software Clearing House, Inc. v. Intrak, Inc.* (1<sup>st</sup> Dist. 1990), 66 Ohio App.3d 163, 583 N.E.2d 1056; Restatement (Second) of Contracts, §241. A “material breach of contract” is a party’s failure to perform an element of the contract that is so fundamental to the contract that the single failure to perform defeats the essential purpose of the contract or makes it impossible for the other party to perform. *O’Brien*, at ¶56.

<sup>44</sup>2002-Ohio-7217, at ¶35.

<sup>45</sup>2002-Ohio-7217, at ¶36.

*Ferrando* is controlling on the issue of whether Park-Ohio's actions invalidate coverage under the CNA and Nationwide policies, and its holding is clearly adverse to CNA and Nationwide. Recognizing this, CNA and Nationwide distance themselves from *Ferrando's* holding and its rationale.<sup>46</sup>

Instead, CNA and Nationwide rely heavily on California insurance law announced in *Truck Ins. Exchange v. Unigard Ins. Co.* (2d Dist. 2000), 79 Cal. App.4th 966, 94 Cal. Rptr.2d 516.<sup>47</sup> While *Truck Ins.* is factually similar to this case, the similarities end there. California (like Ohio) has adopted a prejudice analysis with respect to notice provisions, but unlike Ohio it has adopted a pure condition precedent analysis with respect to consent-to-settle and voluntary payment provisions.<sup>48</sup> No prejudice analysis is necessary if such a provision is violated and equity cannot create coverage where there was none in the first place. *Truck Ins.* found that the targeted insurer's contribution was barred because the insured's settlement violated this condition precedent to coverage under the disputed policies involved in the contribution action.<sup>49</sup> Therefore, the disputed policies were, as CNA and Nationwide argue, "not applicable". In this case, however, it is undisputed that Ohio law governs insurance coverage under the disputed policies.<sup>50</sup> Under Ohio law,

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<sup>46</sup>Nationwide fails to even mention the case and CNA relegates it to an obscure point of law. (CNA Merit Brief, p. 34).

<sup>47</sup>(CNA Merit Brief, p. 31; Nationwide Merit Brief, p. 20).

<sup>48</sup>*Truck Ins.*, 79 Cal. App.4th at 977; Lehavi, *Feature: Making Sense of Notice, Cooperation, and Consent Provisions in Liability Insurance Policies*, 50 Orange County Lawyer 50 (Oct. 2008); See also *The West Bend Co. v. Chiapua Industries, Inc.* (E.D. Wis. 2000), 112 F.Supp.2d 816, 824-825 (identifying *Truck Ins.* among national conflicting authorities on this issue).

<sup>49</sup>*Truck Ins.*, 79 Cal.App.4th at 977-981.

<sup>50</sup>The policies were issued in Ohio to an Ohio insured, and all of the parties have argued Ohio law throughout the proceedings.

*Ferrando* requires a prejudice analysis, and therefore the outcome in *Truck Ins.* is not possible (unless this Court also wishes to clarify and/or overrule *Ferrando*).

**D. Penn General Did Nothing to Bar Its Contribution Claim.**

Alternatively, CNA and Nationwide argue that it is inequitable to require them to provide contribution to Penn General because: (1) late notice deprived them of their notice-rights, including the right to control the litigation and settlement; (2) Penn General failed to force Park-Ohio to timely turn over information regarding other applicable insurance; and (3) Penn General failed to enforce its own policy provisions (variously referred to as “being a volunteer” or “sitting on one’s rights”). However, for the reasons that follow, none of the contentions has merit.<sup>51</sup>

First, as previously explained, there was no time-related or notice-related deficiency to Penn General’s contribution claim. The notice-related provisions of the CNA and Nationwide policies are not germane to Penn General’s contribution claims. Even if they were, they were not violated in a manner as to preclude coverage under those policies. Furthermore, any argument that Penn General’s own actions caused a time-related or notice-related bar to its claim for contribution is really an assertion of the equitable defense of laches. To succeed on a laches defense, CNA and Nationwide need to prove: (1) a delay or lapse of time in asserting a right; (2) an absence of an excuse for such a delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4)

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<sup>51</sup>While CNA and Nationwide attempt to paint a dark picture of Penn General’s actions in this matter, the Eighth Appellate District found otherwise, opining: “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.” Pa. Gen., at ¶37. CICLA agrees. Although CICLA mistakenly contends that neither CNA nor Nationwide should have to provide coverage for the *DiStefano* Litigation, it unequivocally agrees that Penn General did nothing wrong in the handling of this matter. (See CICLA Amicus Brief, pp. 2-5, 16-19).

prejudice.<sup>52</sup> However, as explained by the Eighth Appellate District, Ohio law is clear that Penn General's right to contribution did not accrue until it fully paid the *DiStefano* Litigation defense costs and settlement in late-2005—*more than three years after the settlement*.<sup>53</sup> This is consistent with Ohio's view that unjust enrichment claims do not accrue until the last point in time that the plaintiff conferred and the defendant unjustly received a benefit.<sup>54</sup> Thus, CNA and Nationwide are apparently advocating the imposition of a duty hitherto unknown in Ohio—that a plaintiff must place a defendant on notice of a possible cause of action months, or even years, before the cause of action accrues. Of course, this is not the law of Ohio, and Penn General did not untimely assert its contribution claim. It is undisputed that CNA and Nationwide were placed on notice of Penn General's contribution claims in September of 2004—more than a year before Penn General's contribution claim even accrued. Even assuming (without conceding) that Penn General unduly delayed asserting its contribution claim, the evidentiary record nonetheless clearly establishes that: (1) Penn General had a valid excuse for the delay due to Park-Ohio's refusal to turn over other insurance information for years; and (2) neither CNA nor Nationwide suffered any prejudice as a result of the delay.

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<sup>52</sup>*State ex. rel. North Olmsted Fire Fighters Ass'n. v. City of North Olmsted*, 64 Ohio St.3d at 536-537. Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the defense of laches, the defendant must prove material prejudice. *Thirty-Four Corp. v. Sixty-Seven Corp.* (1984), 15 Ohio St.3d 350, 474 N.E.2d 295, at paragraph two of the syllabus.

<sup>53</sup>*Pa. Gen.*, at ¶33.

<sup>54</sup>*Desai v. Franklin* (9<sup>th</sup> Dist. 2008), 177 Ohio App.3d 679, 2008-Ohio-3957, at ¶¶20-23. It is generally recognized that there is a 6-year statute of limitations with respect to unjust enrichment claims. *Desai*, 177 Ohio App.3d at ¶15. If Penn General's contribution claim is to be treated like an unjust enrichment claim, Penn General would have had until 2011 to bring its contribution claim against CNA and Nationwide. While laches can cut a statute of limitations short, it should only do so upon a "clear showing of special circumstances." *Thirty-Four Corp.*, at paragraph one of the syllabus. Such circumstances are absent from this case.

Consequently, there can be no time-related or notice-related defenses to Penn General's contribution claim.

Second, it is also clear that Penn General, which shared legally indistinguishable policy language with CNA and Nationwide, was not a volunteer, did not sit on its rights, and did not fail to enforce its own policy provisions. Under *Goodyear* (without clarification), Penn General was liable for the full settlement. CNA's and Nationwide's criticism of Penn General is really that it should have been more litigious. It should have disregarded Rome's legal advice and refused to provide any coverage because Park-Ohio settled the *DiStefano* Litigation without notice to or consent from Penn General (regardless of whether that action caused actual prejudice to Penn General). Such criticism is absurd, contrary to Ohio law and certainly is not a legitimate defense to Penn General's contribution claims in this case.

**CNA'S ALTERNATE PROPOSITION OF LAW: This Court should overrule the holding of *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.**

Despite the disagreement with CNA and Nationwide over Penn General's contribution rights in this case, Penn General generally agrees with the arguments raised by CNA and CICLA to overrule *Goodyear*. In addition to those arguments, it should be added that one of the most compelling justifications for the "pro rata" approach is that it requires the policyholder to participate in the allocation for periods of no insurance, self-insurance and/or insufficient insurance.<sup>55</sup> This prevents the insured from stretching the insurers' promise to pay to damages that occur *during the*

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<sup>55</sup>See *Boston Gas Co. v. Century Indemn. Co.* (2009), 454 Mass. 337, 353, 910 N.E.2d 290.

*policy period* into a promise to pay damages *regardless of when they occur*. While this issue is not present in this case, it is not uncommon in progressive injury cases, and therefore it is not unreasonable to consider it in the context of any discussion pertaining to *Goodyear*.

If this Court is not inclined to overrule *Goodyear*, however, many of the problems identified by CNA and CICLA could be diminished by simply following *Keene*'s conclusion that other insurance clauses control insurance allocation in progressive injury cases. To be clear, Penn General is not embracing *Keene*.<sup>56</sup> However, *Keene* inescapably forms the basis of *Goodyear*, and therefore *Keene*'s reliance upon other insurance clauses must be reexamined if *Goodyear* is not overruled.

As discussed above, *Keene*'s conclusion that each liability insurance policy in effect from the time of first exposure to asbestos until the end of the asbestos-caused disease is triggered, and, is jointly and severally responsible to cover all damages caused by the progressive injury, was predicated upon the characterization of the progressive injury as being a *single indivisible injury*. Joint and several liability for a single indivisible injury is not a foreign concept to Ohio law. Not only did this Court adopt this concept in *Goodyear*, but the concept is consistent with this Court's approach to the legal responsibility of consecutive tortfeasors that cause an indivisible injury. *See Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313, at syllabus ¶¶5-7. In such tort cases, this Court has held that joint and several liability between consecutive tortfeasors is appropriate. If such a tortfeasor seeks to limit his or her joint and several liability on the ground that the harm is capable

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<sup>56</sup>Penn General agrees with the analysis and criticism of *Goodyear* addressed at pp. 11-28 of CNA's Merit Brief and pp. 20-23 of CICLA's Amicus Brief. *See also Boston Gas*, 454 Mass. at 357-361. Since the time *Goodyear* was decided in 2002, the highest courts in Massachusetts, Vermont, New Hampshire, Kentucky, Connecticut, Kansas, Maryland and New York have all issued decisions adopting "pro rata" allocation in progressive injury cases. (CNA Merit Brief, p. 19). Lower courts or federal courts in Michigan, Illinois, Texas and Oregon have done the same. (*Id.*, pp. 19-20).

of apportionment among the tortfeasors, the burden of proof as to the apportionment is upon that tortfeasor. *Id.* The rationale for such a rule is that if the plaintiff is able to prove that each consecutive tortfeasor caused the plaintiff an indivisible injury, it would be unfair to allow some tortfeasors to escape liability simply because the damages from the indivisible injury cannot be discretely apportioned between the tortfeasors.<sup>57</sup> In such circumstances, there is no “logical or reasonable basis . . . to make an arbitrary apportionment for its own sake.”<sup>58</sup>

With respect to insurance allocation, however, there is a logical and reasonable basis for apportionment based upon the express contractual provisions of the triggered insurance policies. When a progressive injury occurs over several years and triggers several liability insurance policies, *Keene* looked to the triggered policies’: (1) limits; (2) policy periods; (3) promises to pay “all sums” the insured became legally obligated to pay because of progressive injury occurring during the policy period; and (4) other insurance clauses. Such provisions cannot simply be ignored, but must be enforced as written if contract law is to mean anything.<sup>59</sup> Such concerns are not just a matter of

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<sup>57</sup>53 Ohio St.3d at 195-198.

<sup>58</sup>53 Ohio St.3d at 196 (quoting 2 Restatement of the Law 2d Torts (1965), Section 433A, Comment *I*).

<sup>59</sup>As this Court has explained:

An insurance policy is a contract . . . When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers’ Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E.223, syllabus. See, also, Section 28, Article II, Ohio Constitution. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy.

common law, they are a matter of *constitutional* import because the parties' freedom to contract is protected by both the state and federal constitutions.<sup>60</sup> An other insurance clause can no more be ignored than the policy's limit of liability or other provisions.

If the damages from the progressive injury can, in fact, be discretely apportioned between policy periods, then there is no basis to apply an "all sums" approach in the first instance because the policies limit themselves to covering damages caused by injury occurring during the policy period. In such cases, other insurance clauses may not be relevant. Each set of damages is distinct. However, if the damages from progressive injury cannot be discretely apportioned between policy periods, joint and several liability would be appropriate--unless the triggered policies include pro rata other insurance clauses in which case the other insurance clauses would limit liability to the insurer's

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*Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, paragraph two of the syllabus. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. *Id.* As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423.

\* \* \*

A court . . . is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties . . . *Blosser v. Enderlin* (1925), 113 Ohio St.121, 148 N.E. 393, paragraph one of the syllabus ("there can be no intendment or implication inconsistent with the express terms [of a written contract]").

*Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, at ¶¶9-14. See also (CNA Merit Brief, p. 29; Nationwide Merit Brief, pp.17-18).

<sup>60</sup>*Galatis*, at ¶¶9-10, 39.

pro rata share. This is the result mandated by *Keene* and the other authorities relied upon in *Goodyear*.<sup>61</sup>

The policies issued by Penn General, CNA and Nationwide in this case all include pro rata other insurance provisions that provide, in pertinent part, as follows:

- (1) **Penn General: “Other Insurance.** If the Insured has other insurance against a loss covered by this policy the company shall not be liable under the policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss . . .”<sup>62</sup>
- (2) **CNA: “. . . Contribution by Limits:** If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.”<sup>63</sup>
- (3) **Nationwide: “. . . Contribution by Limits:** If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to

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<sup>61</sup>*B&L Trucking*, 134 Wash.2d at 423 (“*Keene* . . . held the insurer must be able to collect from any insurer whose policy is triggered the full amount of indemnity due, subject only to the ‘other insurance’ provisions”); *J.H. France Refractories*, 534 Pa. at 41-42 (“When more than one policy applies to a loss, the ‘other insurance’ provisions of each policy provide a scheme by the insurer’s liability is to be apportioned . . . There is no bar against an insurer obtaining a share of indemnification or defense costs from other insurers under ‘other insurance’ clauses or under the equitable doctrine of contribution”); *see also Monsanto*, 652 A.2d at 33-35 (explaining that “pro rata” other insurance clause like those in this case should be treated as a policy exclusion that “limit[s] the obligation of the indemnity; but in the absence of such a provision, the “all sums” fully applies).

<sup>62</sup>(Supplement, p. 204).

<sup>63</sup>(Supplement, p. 225).

the total applicable limit of liability of all valid and collectible insurance against such loss.<sup>64</sup>

Importantly, each of these other insurance provisions declares that “*the company shall not be liable for*” more than its “pro rata” share of a mutually covered loss. They do not say that the insurer will pay the full loss and then seek contribution from other triggered policies. They do not even suggest such a result. They clearly and unequivocally limit each insurers’ exposure to “pro rata” responsibility in the first instance.<sup>65</sup> But for *Goodyear* (which omitted any reference to other insurance clauses), the insurance allocation issues in this case should have been resolved without the need to resort to a contribution action.

It bears noting that some courts hold that other insurance clauses are *not* applicable to consecutive insurers in progressive injury cases like this one because the consecutive policies do not insure the same loss.<sup>66</sup> They theorize that other insurance clauses are limited to concurrent insurers. Such criticism, however, neglects to recognize that the central assumption of the “all sums” approach is that the progressive injury is characterized as *a single indivisible injury* incapable of being divided into discrete sub-parts. Ergo, each triggered policy is jointly and severally responsible for the *same* loss. While it may be understandable why courts that adopt “pro rata” allocation can avoid this conclusion, courts that adopt the “all sums” approach cannot escape it. This inexorable conclusion is missing from *Goodyear*, and the glaring omission subjects insurers to increased litigation (and even claims of bad faith) because it suggests that the “all sums” approach applies irrespective of the

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<sup>64</sup>(Supplement, p. 226).

<sup>65</sup>Some of the policies also include “equal shares” other insurance provisions, but these are only triggered if all other policies provide that they will contribute to the loss by “equal shares”. As not all of the policies include such provisions, the “pro rata” provisions control.

<sup>66</sup>*See eg. Boston Gas*, 454 Mass. at 361-362.

policies' other insurance clauses. Of course, this cannot be true unless such provisions are judicially-written out of the policies in violation of the state and federal constitutions. Accordingly, at the very least, *Goodyear* should be clarified to explain that joint and several liability of triggered insurance policies does not, and cannot, apply if the policies include pro rata other insurance clauses.

If *Goodyear* were so clarified, a typical case would proceed as follows:

- When a progressive injury claim is made against the insured, the insured would tender the claim to one of the triggered insurers for defense and indemnity. Because the duty to defend is broader than the duty to indemnify, this insurer would initially be obligated to defend the insured against the entire claim provided at least some of the damages were covered by the insurer's triggered policy. Accordingly, an insurer could not initially avoid its duty to defend on the basis that there might be other triggered insurance available.
- The defending insurer would then have the right to investigate whether there is other insurance applicable to the loss.<sup>67</sup> If other triggered insurance was identified, it would be necessary to allocate insurance coverage for the progressive injury claim.
- If the triggered policies included other insurance clauses, then allocation of responsibility for the single indivisible injury would be made pursuant those clauses. For instance, if there was an effort to settle the tort claim, the defending insurer would only be liable for its allocated share. Likewise, if the tort claim proceeded to trial and resulted in a judgment, the defending insurer would only be liable for its allocated share. It would be the responsibility of the insured or the plaintiff(s) to seek satisfaction of the judgment from other triggered insurers. If the triggered policies did not include other insurance clauses, the "all sums" approach would be utilized.

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<sup>67</sup>If there is other insurance, and damages can be reasonably apportioned between consecutive policies based upon the tort evidence, then each insurer would only be liable to provide coverage for damages from injury that occurred during its policy period. Joint and several liability for indemnity would not be possible. If, however, damages cannot be reasonably apportioned between consecutive policies based upon the tort evidence--that is, if the progressive injury constitutes a single indivisible injury--then each insurer who promised to pay "*all sums*" that the insured becomes legally obligated to pay as damages for such injury would become jointly and severally liable for damages caused by the progressive injury.

- Contribution claims between insurers would likely be reduced because insurance allocation issues would be addressed while the tort claim is pending. If contribution claims arose, they would be subject to standard equitable defenses such as laches, etc.

This is no more involved than the current *Goodyear* framework, and, more importantly, is the result that is required by the insurance contracts themselves. In progressive injury cases, the litigants are going to have to tackle insurance allocation issues—whether this occurs before, during or after the tort litigation. However, if the constitutional protection against the impairment of contracts is to have any meaning at all, the other insurance clauses must be enforced as written. Resorting to judicially imposed salutary allocation rules without regard to the language of the parties’ contracts is simply not an option. Such an approach would not serve Ohio’s system of justice, it would undermine it. If this creates too many problems under the “all sums” approach, the obvious solution is to embrace CNA’s call to adopt the “pro rata” approach which has the practical effect of rendering the other insurance clauses superfluous. Either way, pro rata allocation should be applied in cases such as this.

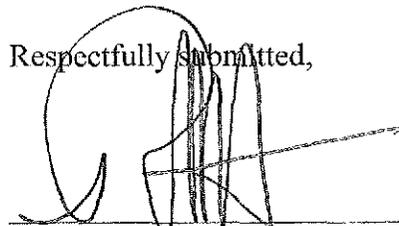
### **CONCLUSION**

While this Court should overrule *Goodyear* in the manner requested by CNA, or, at least clarify *Goodyear* in the manner discussed above, the outcome of this case should remain the same even if *Goodyear* passes into history—judgment should be affirmed for Penn General. In this regard, Park-Ohio settled the *DiStefano* Litigation without notice to, or consent from, any of its insurers—including Penn General. However, the undisputed evidence establishes that none of the insurers suffered any prejudice from the settlement as to allow them to avoid their contractual obligations to Park-Ohio. Furthermore, despite Park-Ohio’s delay in providing insurance

information to Penn General, CNA and Nationwide were on notice of Penn General's demand for contribution before Penn General's contribution cause of action even accrued (which is why Penn General's complaint included demands for declaratory relief). Accordingly, no reasonable argument can be raised that either Park-Ohio's or Penn General's actions somehow bar Penn General's contribution claim.

For future cases, if *Goodyear* is overruled or clarified, it is likely that the frequency of cases such as this will be reduced. Certainly, Ohio's courts will be provided with tools to better manage the contingencies and inequities that can develop during the course of such cases as they develop. Most importantly, the freedom to contract will be sheltered rather than discarded as an impediment to efficiency.

Respectfully submitted,



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A copy of the foregoing has been served via ordinary U.S. Mail, this 14th day of September

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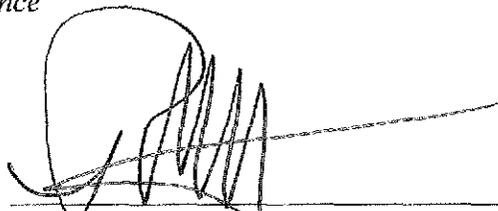
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