

ORIGINAL

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

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

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.

Plaintiff-Appellee

v.

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

Defendants-Appellants

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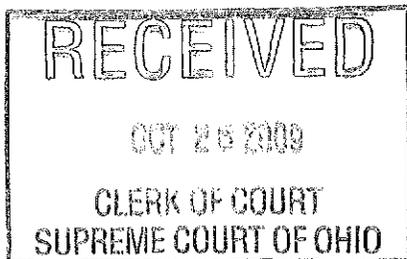
REPLY BRIEF OF DEFENDANT/APPELLANT NATIONWIDE INSURANCE COMPANY

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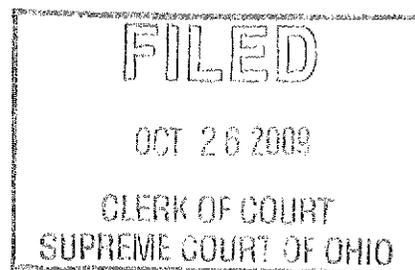
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## I. INTRODUCTION

Nationwide agrees that Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 2002-Ohio-2842 should be overruled and that this Court has the authority to address Goodyear in this appeal. This Court should reject Goodyear's "all sums" approach and adopt a pro rata by time on the risk allocation, as asserted by Defendant/Appellant Continental Casualty Co.

If this Court declines to overrule Goodyear, it should rule that when an insured fails to comply with a non-selected insurer's policy conditions regarding notice and the opportunity to participate in defending a claim and the selected insurer fails to act reasonably in providing notice to other insurers, the selected insurer is not entitled to contribution. Under Goodyear, the selected insurer's contribution rights only extend to policies that are "applicable" – meaning, among other things, that the insured has complied with the policy's terms and conditions. If certain policies are not applicable, and, as here, the selected insurer has also failed to act reasonably, equitable contribution should not be awarded.

Neither equity, nor the law, nor the facts support Penn-General's claim for contribution in this case. This Court should reverse the judgment of the court of appeals and reinstate the trial court's order in favor of Nationwide.

## II. LAW AND ARGUMENT

**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.**

Nationwide joins Continental's concerns about all-sums allocation and likewise urges this Court to adopt the pro-rata approach. Pro-rata allocation is sensible and fair. And, as demonstrated by the present case, Goodyear's all-sums approach is fundamentally flawed. The approach is destructive to the express language of the policies themselves, raises substantial constitutional questions about government infringement on contractual rights, and exposes insurers to allocation for an insured's periods of no insurance, self-insurance and/or insufficient insurance. This Court should take this opportunity to overrule Goodyear.

To avoid unnecessarily duplicating the arguments presented by Continental, Defendant/Appellant Nationwide incorporates by reference the arguments set forth in the merits brief of Continental filed on July 27, 2009. For the reasons set forth in Continental's brief, this Court should take this opportunity to overrule Goodyear. This Court should adopt a pro rata by time on the risk allocation.

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

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

**1. Equitable contribution only exists where a policy is "applicable."**

Assuming that this Court does not overrule Goodyear, this Court should clarify the scope of contribution. Goodyear merely held that selected insurers may "seek contribution from other responsible parties when possible" and "bear the burden of obtaining contribution from other applicable primary insurance policies as they deem necessary." Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512; 2002-Ohio-2842 at ¶ 11.

This Court's decision in Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., does not authorize a blanket disregard of Nationwide's policy language. Applying Goodyear, the eighth district stripped Nationwide of its bargained-for rights contained in those policies. That court held, "Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the [underlying] matter." (Appx. A-26, Op. at 15.) The court also held that "Park-Ohio had no duty to notify Nationwide and Continental of the [underlying] claim." (Appx. A-24, Op. at 13.) The prejudice and inequity of the eighth district's interpretation is Nationwide had: 1) No opportunity to defend; 2) No information about the circumstances of Mr. DiStefano's claimed injury; 3) No opportunity to control the litigation or settlement; 4) No information regarding demands; 5) No opportunity to control defense costs and expenses; 6) No opportunity to make the decision to go to trial. Under the eighth district's application of Goodyear, the only responsibility a non-selected insurer like Nationwide would have is to pay the bill that the selected insurer sends them. In this case, Nationwide did not even know about the underlying suit until almost two years after the case settled. In sum, the appellate court completely disregarded the conditions to coverage expressly contained in Nationwide's policies.

The eighth district disregarded that contribution exists only when there is "common liability" for the underlying loss or claim. Assets Realization Co. v. American Bonding Co. of Baltimore (1913), 88 Ohio St. 216, 253; Republic Steel v. Glaros (1967), 12 Ohio App.2d 29, 33. There is no common liability between policies where, as here, there is a failure to comply with conditions precedent to coverage in one of the policies. The eighth district's decision thus misinterprets Goodyear and ignores basic concepts of equitable contribution.

While the right to equitable contribution exists under proper circumstances, Penn-General is not entitled to equitable contribution in this case. As demonstrated in Nationwide's merits

brief, Park-Ohio breached conditions of Nationwide's policies and Penn-General failed to act reasonably or equitably toward Park Ohio's other insurers.

The facts and Ohio law unequivocally demonstrate that Park-Ohio's policy violations are prejudicial to Nationwide, which had no say in the defense or settlement of the underlying DiStefano claim.

Notice provisions in insurance contracts serve many purposes. Notice provisions allow the insurer to become aware of occurrences early enough that it can have a meaningful opportunity to investigate. In addition, it provides the insurer the ability to determine whether the allegations state a claim that is covered by the policy. It allows the insurer to step in and control the potential litigation, protect its own interests, maintain the proper reserves in its accounts, and pursue possible subrogation claims. Further, it allows insurers to make timely investigations of occurrences in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. [Citations omitted.]

Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau (2000), 88 Ohio St.3d 292, 302-03. These fundamental principles of Ohio law cannot be ignored. To do so, not only disregards the contractual intent of the parties, but also raises serious Constitutional concerns. The role of a court is to give effect to the intent of the parties to the agreement. Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos. (1999), 86 Ohio St.3d 270, 273, *citing* Employers' Liab. Assur. Corp. v. Roehm (1919), 99 Ohio St. 343, syllabus. The right to contract is fundamental and the United States and Ohio constitutions protect interference with that right. Clause 1, Section 10, Article I, United States Constitution ("No State shall ... pass any ... Law impairing the Obligation of Contracts ..."); *see also* Section 28, Article II, Ohio Constitution.

Penn-General argues that Nationwide suffered no prejudice by the actions of Park-Ohio. (*See, e.g.*, Penn-General's Br. at 2-3, 28.) This is impossible to maintain. Neither Park-Ohio nor Penn-General notified Nationwide of any potential claim until two years *after* the underlying asbestos litigation was settled. Under these circumstances, the imposition of contribution on

Nationwide would subject it to a significant financial burden even though it did not enjoy the right to participate and control the defense. Park-Ohio investigated and settled the asbestos case without Nationwide's involvement. It is difficult to conceive how Park-Ohio's complete disregard of Nationwide's policy rights could be viewed as anything but prejudicial in this case.

While this is not a contract action, Nationwide's policies are the basis for any claim Penn-General would have for contribution. "[A]fter all, [courts] are supposed to consider the particulars of the policy in deciding whether equitable contribution is appropriate." Truck Insurance Exchange Co. v. Unigard Insurance Co. (Cal. App. Ct. 2000), 79 Cal.App.4th 966, 978. From an equity standpoint, it is unjust to require Nationwide to contribute to the liability of the underlying claim when the policy provisions have been disregarded or ignored. (Id.) Equity cannot be used to overrule unambiguous policy language.

Likewise, Penn-General argues that it did nothing to bar its contribution claim. But, as found by the trial court, Penn-General failed to act reasonably in numerous respects. It ignored Park-Ohio's original tender of defense, failed to timely investigate the claim or assert potential policy defenses, and paid amounts for defense costs and the settlement without notifying other insurers. There are myriad provisions of the Penn-General policy that ostensibly would have voided coverage based on an insured's failure to notify, failure to cooperate with a defense, and failure to forward demands. Moreover, for more than two years after it received notice from Park-Ohio, and long after the underlying settlement, Penn-General made no attempt to notify Nationwide of the claim. Although Penn-General argued it had difficulty obtaining information about other insurers from Park-Ohio, Penn-General's own delay and lack of diligence persuaded the trial court that Penn-General did not merit an award of equitable contribution. A selected insurer has many options to obtain information about other insurance, such as pre-litigation

discovery and declaratory judgment actions. Given these factors, the trial court properly found it inequitable to allow Penn-General to impose its coverage, litigation, and settlement decisions on the non-selected insurers.

Nationwide does not suggest the elimination of the doctrine of contribution among insurers. Rather, Nationwide asserts that Penn-General is not entitled to contribution in this case. Simply put, a prerequisite to equity is the opportunity to have some say in how litigation and settlement decisions are made. Here, Nationwide did not have that opportunity. Further, under the eighth district's decision, a non-selected insurer would never have that opportunity. This is not and should not be the law.

**2. An insured should bear the consequences of its failure to comply with a non-selected insurer's policies under Goodyear.**

The insured must comply with all provisions of the non-selected insurers' policies to make them "applicable." Without such compliance, an insured violates its obligations to the insurer and voids coverage. Since Park-Ohio breached conditions of Nationwide's policy in this case, no contribution from Nationwide is warranted under Goodyear.

While the insured has the right to disregard a non-selected insurer's rights for whatever reason, that insured's rights would then be limited to the pro-rata share of the loss from the selected insurer. The insured would bear the responsibility for the remainder of the loss because it did not comply with the non-selected insurer's policy language.

While Goodyear protects the rights of policy holders, it does *not* eviscerate the rights of insurers or non-selected insurers. To be clear, a policy holder may select a certain insurer, but that does not mean that such selection eliminates all further responsibilities under the non-selected insurers' policies or the selected insurer's policy. Here, Park-Ohio failed to comply with

numerous critical policy provisions contained in Nationwide's policies (e.g., notice, cooperation, consent to settle, etc.). Where the insured decides to select one insurer without complying with the provisions of the respective policies of non-selected insurers, the insured should then pay the non-selected insurer's share.

To be clear, Nationwide is not embracing Mut. Of Enumclaw Ins. Co. v. USF Ins. Co. (Wash 2008), 191 P.3d 866 as suggested by Amicus Ohio Manufacturers Association (Br. of OMA at p. 4, fn.1.) In USF Inc., the court found that where an insured did not tender a claim under the non-selected insurer's policy, the non-selected insurer could not be held liable for a claim of contribution by a selected insurer. Thus, the insured's conduct affected the contribution rights of other insurers. Nationwide's position is simply that an insured may act in a way (as Park-Ohio did here) that makes its policies not "applicable" under Goodyear.

This Court should refuse to impose equitable contribution and reject the eighth district's holding that a non-selected insurer's policies had no effect on a selected insurer's contribution claim. See Truck Insurance Exchange Co. v. Unigard Insurance Co. (Cal. App. Ct. 2000), 79 Cal.App.4<sup>th</sup> 966. As demonstrated and despite Penn-General's arguments, Nationwide has been prejudiced when it was completely stripped of any opportunity to be involved in the underlying DiStefano litigation. The Truck decision provides a materially analogous case, as demonstrated in Nationwide's Merits brief at 20-21. As the Truck court explained:

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

Applied, Inc., Unigard's insured, tendered the defense of the Cimarron cases to Truck, not Unigard. Absent tender, it is difficult to understand what, if anything, Unigard was supposed to do. Although the defense was tendered to, and accepted

by, Truck, Unigard did not receive notice of its potential liability for contribution until after the Cimarron cases were resolved.

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

(Id. at 979.) In light of the disregard of its express policy language, Nationwide should not be held liable for contribution.

### III. CONCLUSION

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

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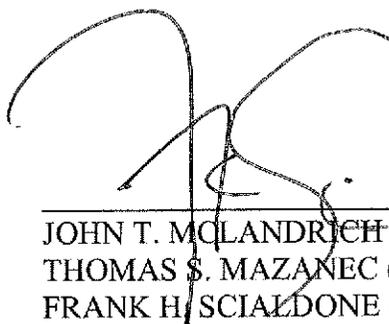
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