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In The Supreme Court of Ohio

PENNSYLVANIA GENERAL INSURANCE)
COMPANY,)
)
 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

REPLY BRIEF OF AMICUS CURIAE GREAT AMERICAN INSURANCE COMPANY
IN SUPPORT OF APPELLANT CONTINENTAL CASUALTY COMPANY

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MISCELLANEOUS

Allocating Progressive Injury Liability Among Successive Insurance Policies
64 U. Chi. L. Rev. 257 (1997)14

I. INTEREST OF THE AMICUS CURIAE

Great American Insurance Company (“Great American”) files this amicus curiae brief pursuant to Ohio Supreme Court Rule VI, § 6. Great American is incorporated in Ohio, it is a citizen of the State of Ohio, and its principal place of business is in Cincinnati, Ohio. Great American has issued numerous insurance policies in Ohio to corporations that are located in or have brought suit in Ohio, including policies containing language similar to the policy wording at issue here. Great American is interested in this case because it is familiar with the unjust results following from “all sums” allocation. By this brief, Great American seeks to provide the Court with helpful analysis on certain of the issues presented in the parties’ briefing.

This amicus curiae brief discusses two issues. First, the brief addresses the “all sums” approach to allocation, focusing on the insurance policy language in question and the Ohio rules of contract interpretation. The brief discusses case law regarding allocation of ongoing loss, and addresses whether “all sums” is a reasonable construction of the parties’ contracts.

Second, the brief addresses the question whether, under the “all sums” approach, an insured’s recovery from a “targeted” insurer is properly limited to that insurer’s pro rata share of covered liability when the insured fails to comply with coverage requirements set out in its other potentially-applicable policies.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Great American respectfully submits that the Court should reject the “all sums” allocation approach adopted in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St. 3d 512, 514-517, 2002-Ohio-2842, ¶¶ 5-12 (“*Goodyear*”), and should instead adopt the pro rata approach to allocation of injury from a continuous loss.

The “all sums” approach conflicts with the insurance policy language at issue, which limits coverage to injury within the policy period. In addition, the “all sums” approach violates the Ohio rules of contract interpretation, by stripping the meaning from policy wording that limits coverage to harm within the policy term. Separate policy clauses require that coverage is triggered by injury during the policy period and provide that coverage only applies to injury during the policy term. The “all sums” approach adopted in *Goodyear* improperly writes language out of the policies by making these separate policy clauses redundant.

Great American respectfully submits that *Goodyear* was incorrectly decided because the decision did not consider all of the policy wording at issue. The *Goodyear* opinion addressed the policies’ insuring provision and “property damage” definition, but did not discuss or even mention the policies’ separate definition of “occurrence.” When these policy terms are read together, as the rules of contract interpretation require, they permit coverage only for harm during the policy period. The policy wording in *Goodyear* – and in this case – precludes the “all sums” result.

Moreover, the “all sums” view is an unreasonable interpretation of the parties’ insurance contracts. It holds an insurer that issued a single triggered policy liable for all damage occurring over time – so that an insured who bought insurance for one year might obtain the same recovery as an insured who purchased insurance and paid premiums for decades. Further, the “all sums” approach makes an insurer’s liability for a covered loss depend on factors that the insurer cannot evaluate in underwriting a policy – such as whether coverage exists under other insurers’ policies in different years. That is not a reasonable construction of the policies.

For these reasons, the Court should hold that “all sums” allocation does not apply to an insurer’s duty to indemnify. Rather, as the policy wording provides, each policy should

only pay for liability imposed due to covered injury during its respective policy period. This pro rata approach is compelled by the policy language and the rules of contract interpretation.

If the Court rejects “all sums,” Continental Casualty Company’s alternative proposition of law does not need to be considered. Where each policy is interpreted only to cover injury during its own policy period, as the policy language provides, insureds must comply with the requirements stated in each of their applicable insurance contracts. But if “all sums” continues to apply, the Court should clarify *Goodyear* and rule that – where an insured seeks recovery from one insurer for a continuous loss, and the insured fails to meet requirements in its other insurers’ policies – the insured’s recovery from the targeted insurer is limited to that insurer’s pro rata share of liability. In this situation, the insured’s recovery should be limited because it deprived the other insurers of their right to participate in the response to the claim.

III. ARGUMENT

A. The Court Should Overrule the “All Sums” Holding of *Goodyear*.

The “all sums” approach ignores express policy language limiting coverage to harm during the policy period.

The Ohio rules of contract interpretation require that insurance policy language must be construed in context of the entire policy. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St. 3d 306, 307-309, 2007-Ohio-4917, ¶¶ 7, 17 (courts must “examine the insurance contract as a whole”). Moreover, “[i]n the construction of a contract, courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.” *Farmers Nat’l Bank v. Delaware Ins. Co.* (1911) 83 Ohio St. 309, 310.

As with other contracts, insurance policies are interpreted so that each word and phrase is given independent effect and no terms are rendered meaningless or redundant. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992) 64 Ohio St. 3d 657, 658, 666-667 (rejecting an insured’s proffered construction of the pollution exclusion, the Court held: “Because such an interpretation would render the entire exclusion meaningless, it is neither acceptable nor desirable under the normal rules of contract construction”). As the Court of Appeals explained in *Sherwin-Williams Co. v. Travelers Cas. & Sur. Co.*, 2003-Ohio-6039, ¶ 30, “[i]nsurance contracts should be interpreted in a way that renders all the provisions meaningful and not mere surplusage.” The “all sums” approach cannot be applied to the insurance policy language at issue without violating these rules.

1. *Goodyear* Was Wrongly Decided, as the Opinion Omits Key Policy Terms and Conflicts with the Rules of Contract Interpretation.

Goodyear held that the policies in question were triggered by covered injury during the policy period, and that once a policy is triggered it then covers all damage and injury within and outside the policy period – up to the policy limits. *Goodyear, supra*, 95 Ohio St. 3d at 516, 2002-Ohio-2842, ¶¶ 9-11 (see the brief submitted by Amici Curiae Ohio Manufacturers’ Association *et al.* (the “Policyholder Amici”), at 23-25). But *Goodyear* was incorrectly decided because the opinion did not discuss or consider all of the relevant policy language.

As *Goodyear* recited, the policies’ insuring agreements promised 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*.

Goodyear, supra, 95 Ohio St. 3d at 515, 2002-Ohio-2842, ¶ 7 (emphasis added). And *Goodyear* observed that the policies defined “property damage” as:

injury to or destruction of tangible property *which occurs*
during the policy period....

Id. (emphasis in original).

But the *Goodyear* opinion never discussed the policies' separate definition of covered "occurrences." Aside from the insuring agreement and the "property damage" definition, the policies in *Goodyear* defined "occurrence" 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 the insured.¹

(Emphasis added.) In their brief in this case, the Policyholder Amici assert that the *Goodyear* opinion addressed the policies' "standard occurrence definition." (Policyholder Amici's Brief, at 28, citing *Goodyear, supra*, 2002-Ohio-2842, at ¶ 7.) That assertion is wrong. The *Goodyear* opinion only addressed the policies' insuring clause and "property damage" definition, but did not quote or discuss the separate "occurrence" definition. *See Goodyear, supra*, at ¶ 7.

When all the policy terms are considered, the policy language in *Goodyear* cannot be construed to cover injury outside the policy period as long as some harm resulted during the policy period. Rather, the policy language expresses two different timing requirements. Read together with the insuring agreement, the "occurrence" definition provides that the policy is triggered by an accident, including continuous or repeated exposure to conditions, which causes injury or damage "during the policy period." And the "property damage" definition, read into the insuring agreement, limits covered property damage to injury "during the policy period."

¹ This policy language was not set out or addressed in the *Goodyear* opinion, but it appears in the briefing in that case. *See* the merits brief of Appellees Aetna Casualty & Surety Co. *et al.* in *Goodyear*, available in LEXIS at 2000 OH S. Ct. Briefs 1984 (Ohio June 11, 2001), at page **45, fn 17. *See also* the Court of Appeals' superseded opinion in *Goodyear*, paraphrasing the policies' occurrence definition, at 2001 Ohio App. LEXIS 190, p. *11.

In adopting “all sums,” *Goodyear* incorrectly omitted the policies’ “occurrence” definition, ignored the different purposes of the “occurrence” and “property damage” definitions, and thereby nullified the meaning of these terms. The dissent in *Goodyear* rightly concluded that the majority opinion “virtually ignores the requirement that the injury must occur during the policy period.” *Goodyear, supra*, 95 Ohio St. 3d at 521, 2002-Ohio-2842, ¶ 28 (dissent).

Thus, the policies in *Goodyear* specified that they only cover sums the insured is obligated to pay for damages because of property damage “which occurs during the policy period.” This requirement of injury during the policy period is a limitation on the “sums” covered by the policy. And this interpretation is confirmed by examining the policies’ “property damage” and “occurrence” definitions in the context of the policy’s insuring agreement. Reading these definitions together with the insuring agreement illustrates that (subject to their other terms) the policies in *Goodyear* provided coverage for:

all sums which the insured shall become legally obligated to pay as damages because of ... [injury to or destruction of tangible property *which occurs during the policy period*] to which this policy applies caused by [an accident, including injurious exposure to conditions, which results, *during the policy period*, in ... property damage neither expected nor intended from the standpoint of the insured].

The insuring agreement and controlling definitions set out two separate references to harm “during the policy period” – one a trigger provision, and the other a limitation on the coverage provided. The “all sums” view ignores these dual requirements and violates the rules of contract interpretation by making the separate references to injury “during the policy period” redundant.

In short, *Goodyear*’s “all sums” holding is contrary to the policy wording and the rules of contract interpretation. *Goodyear* was wrongly decided in light of the complete policy

language that was before the Court. The Court should therefore overrule *Goodyear* and reject the “all sums” holding in that case.

2. The Policy Language in this Case is Not Susceptible to the “All Sums” Approach.

Likewise, the policy language at issue in this case is not susceptible to “all sums” allocation. The policies issued by Continental Casualty Company provide insurance for covered bodily injury and property damage resulting from an “occurrence.” The Continental policies define “occurrence” as “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.” (*See* Continental’s opening merits brief at 17.) In addition, each Continental policy contains a separate Policy Period/Territory clause, which expressly states that: “This insurance applies only to bodily injury or property damage which occurs during the policy period within the policy territory.” (*Id.* at 16.)

These policies, like the policies in *Goodyear*, contain two different timing requirements. Continental’s indemnity obligation is triggered by a covered occurrence – that is, covered bodily injury or property damage during the policy period. And the Policy Period/Territory clause separately provides that coverage is limited to bodily injury or property damage that takes place during the policy period. These policies are not susceptible to an “all sums” construction under Ohio’s rules of contract interpretation, because an “all sums” holding would ignore the different requirements stated in the “occurrence” definition and the Policy Period/Territory clause, improperly making these separate clauses redundant.

According to the “all sums” view, the Continental policies would cover all injury “during *and before and after* the policy period” – as long as some covered harm took place during the policy period – despite the express wording of the “occurrence” definition and the

“Policy Period/Territory” provision. (*See, e.g.*, the Policyholder Amici’s Brief, at 23-26.) Under the Policyholder Amici’s argument, the Continental policies would mean the same thing with or without the Policy Period/Territory clause – effectively writing that clause out of the policies. By contrast, the “pro rata” allocation approach gives meaning to all the policy terms.

Because the “pro rata” approach gives effect to the “occurrence” definition and the Policy Period/Territory clause in Continental’s policies – while “all sums” would make these policy terms redundant – the rules of contract interpretation require the “pro rata” interpretation. *See Farmers Nat’l Bank, supra*, 83 Ohio St. at 310 (“if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain”).

The Massachusetts Supreme Court recently addressed similar policy language, and held that this wording means that coverage only applies to property damage that takes place during the policy period:

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.

Boston Gas Co. v. Century Indem. Co., et al. (Mass. 2009) 454 Mass. 337, 358; 910 N.E.2d 290, 306-307 (emphasis in original). This Court should also reject “all sums” and hold instead that each policy only provides insurance for covered bodily injury and property damage taking place during its own policy period – as the policy language expressly states.

3. “All Sums” Is an Unreasonable Construction of the Policy Wording.

The “all sums” approach not only conflicts with express policy wording, it is an unreasonable interpretation of the parties’ contracts. As one commentator noted, applying the “all sums” view to standard occurrence policy language would amount to the same result as if a court – in interpreting a contract in which the promisor agreed to purchase “all widgets manufactured by the promisee during June 1995” – decided that the phrase “all widgets” obliges the promisor to buy all the promisee’s widgets in perpetuity from the beginning of time to eternity. B. Telles, Long Term Division, Calif. Law Bus. at 34 (October 21, 1996). The “all sums” result arbitrarily replaces the contract terms limiting coverage for injury “during the policy period” with the words “during and outside the policy period,” without justification.

Moreover, the “all sums” approach is contrary to reason. It unfairly holds an insurer that issued a single triggered policy liable for all damage occurring at any time, although the insurer only received premiums for the risk of harm during the policy period. That result makes it impossible for an insurer to make rational underwriting decisions based on an assessment of the risk that property damage might occur during the policy period, because the premium charged would have to take into account the entire risk of loss for all time, rather than the risk of damage during the policy period under consideration. As one court noted:

This [pay in full] approach could easily be extremely unfair to an insurer who was on the risk for a day but who then is burdened with the entire loss incurred over several years. Certainly such a formulation cannot help correlate risks insured with premiums charged.

Uniroyal Inc. v. Home Ins. Co. (E.D.N.Y. 1988) 707 F. Supp. 1368, 1392.

The Massachusetts Supreme Court recently agreed that liability policy wording is not reasonably susceptible to the “all sums” approach. *Boston Gas, supra*, 454 Mass. at 362-363.

The *Boston Gas* court held: “[W]e doubt that an objectively reasonable insured reading the relevant policy language would expect coverage for liability from property damage occurring outside 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.” *Boston Gas, supra*, 454 Mass. at 362-363.

Also rejecting the “all sums” approach, the Colorado Supreme Court aptly stated the reasoning behind such decisions:

As many courts have commented, the [“all sums”] method followed by the trial court 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 Service Company of Colorado v. Wallis & Companies (Colo. 1999) 986 P.2d 924, 939.

As these courts explained, it is not reasonable to conclude that an insured that bought insurance in one year would be entitled to the same coverage for a 30-year continuous loss as an insured that paid premiums to purchase insurance in each of those years.

In short, the “all sums” argument defies the reality of insurance underwriting, because it permits an insured to obtain coverage for harm resulting after the insurer’s policy period expired, although the insurer had no opportunity to assess the risks presented by the insured in years after the policy period expired – and the insurer had no ability to charge premium based on such post-expiration risks. *Olin Corp. v. Insurance Co. of North America* (2d Cir. 2000) 221 F.3d 307, 323 (pro rata allocation properly requires “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”).

The “all sums” approach defies reasonableness in another respect. Under “all sums,” while each triggered policy is liable for the entirety of a continuing loss, the various insurers have equitable contribution rights against one another. Yet the contribution rights of any one insurer for a particular loss would depend on whether other insurers’ policies cover the loss. That question would in turn depend on a number of factors that cannot be addressed in underwriting a policy. These factors include, for example, whether the insured purchased insurance after the policy period at issue, whether subsequent policies added exclusions barring insurance for risks covered under earlier policies, whether the insured could find all its policies years later when claims arise, and whether the other insurers remained solvent. The risk that an insurer might become insolvent – or that the insured would lose its policies over time – would be shifted from the policyholder to its other insurers, because under “all sums” the policyholder could recover in full from a solvent insurer, which could not obtain contribution from those other insurers. It is objectively unreasonable to construe the policies to provide that the insurers’ exposure depends on variables that cannot be assessed during the underwriting process, but which instead depend on contracts the insured makes with other insurers.

This point is illustrated by two hypothetical claims, involving a continuous loss taking place over 10 years. In both hypotheticals, the insured bought a series of one-year policies from different insurers, with each policy having annual policy limits of \$10 million. In both hypotheticals, the insured incurred \$10 million in liability for the ten years of injury.

In the first hypothetical, the insured purchases ten one-year policies, each policy covers the loss, and each insurer is solvent. The insured seeks recovery only from the insurer who issued the policy in year three. Under the “all sums” approach, if the insured obtained

\$10 million in insurance recovery from the year 3 insurer, that insurer could recover contribution totaling \$9 million from the other nine insurers.

By contrast, in the second hypothetical, the year 3 insurer is the only solvent insurer whose policy covers the loss. The year 1 and 2 policies were lost over time, and cannot be established. The insured decided to “self-insure” in years 4 and 5, and did not buy insurance during those years. The insurers that issued policies in years 6 and 7 later became insolvent, and cannot pay contribution. And the insured bought policies during years 9 and 10 that include exclusions barring coverage for the loss. In this example, the “all sums” approach would require the year 3 insurer to pay the entire \$10 million loss, with no recovery from other insurers.

That is, under the “all sums” approach, the year 3 insurer’s obligation increases ten-fold from the first to the second hypothetical, only because the insured lost other policies, the insured did not buy insurance in certain years, the insured bought insurance from companies that later became insolvent, and the insured subsequently bought policies that contain different terms. But the year 3 insurer could not assess any of those factors at time it issued its policy and set the premiums to be paid, and had no part in the insured’s purchase of policies from other insurers.

In short, the “all sums” approach is objectively unreasonable because it makes an insurer’s liability for a covered loss depend on the terms of the insured’s other policies, on whether the insured purchased coverage in other policy periods, and on other insurers’ financial stability. It is not reasonable to conclude that insurers construed the policy terms to mean that their obligations could increase tenfold as in this hypothetical – or possibly more – due to circumstances that the underwriter could not evaluate during the negotiations for the policy.

Rather, the only objectively reasonable interpretation of this policy language is that each triggered policy only covers injury “during the policy period.” Under the pro rata

approach, the insured is properly responsible for liability due to harm during years in which the insured did not maintain applicable insurance. *See Boston Gas, supra*, 454 Mass. at 364, quoting *Olin, supra*, 221 F.3d at 323 (holding that the insured rightly bears the risk that its other insurers are unable to pay contribution, stating “[t]here 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). The “all sums” view is contrary to the policy wording and is unreasonable in application.

4. The “All Sums” Approach Creates Needless Secondary Disputes.

The “all sums” approach is also unreasonable because it creates needless disputes and litigation regarding allocation of insurers’ liability. Under the “all sums” view, each insurer whose policies are triggered by a continuous loss is potentially responsible to the insured for the entire loss (up to the policy limits). That is, multiple policies may be liable to an insured for the same loss. The question then becomes how the loss is allocated among the respective insurers.

There are a number of different possible allocation methods, which may produce very different outcomes. One allocation method is based on the number of years each insurer covered a continuous loss. Another method adds the qualification that where any primary policy is exhausted, the remaining primary policies pay their respective “time on the risk” shares of the remaining liability. Another allocation approach combines the insurers’ respective time on the risk with a consideration of their respective policy limits. Yet other approaches are based on the premiums paid for the respective policies, or on combinations of these various factors.

The number of competing methods for allocating “all sums” liability among insurers has spawned repeated claims and litigation. The diversity of competing allocation methods – combined with the vastly different outcomes that can result from the various theories – practically guarantees that disputes concerning allocation of “all sums” liability will be raised

in claims involving continuing harm over multiple policy periods. And, contrary to the Policyholder Amici's assertion, the "relative dearth" of Ohio case law on the subject means that disputes over allocation of "all sums" liability among insurers in Ohio proceed without definitive guidance from the appellate courts. (*Cf.* Policyholder Amici Brief at 32.)

By contrast, where "all sums" is rejected, such disputes and litigation regarding allocation among insurers are not required, because each policy pays only for the pro rata portion of covered loss during its policy period. (*See, e.g.*, the allocation method described in *Public Service Co. of Colorado, supra*, 986 P.2d at 941, 941 fn. 17.) Under the pro rata interpretation, there typically is no overlapping coverage to apportion among the insurers in a second litigation. Rather, each triggered policy simply pays for the pro rata share of the overall harm that happened in its own policy period, subject to the policy terms, conditions, exclusions and limits.

Courts have considered the needless litigation on allocation issues resulting from "all sums" as a basis for rejecting the "all sums" approach. For example, the New Hampshire Supreme Court held that the joint and several "all sums" approach is "improvident" because:

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 ... 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 Lloyds (N.H. 2007) 156 N.H. 333, 345; 934 A.2d 517, 527, quoting Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L. Rev. 257, 271 (1997).

Citing that discussion, the Massachusetts Supreme Court recently held that “adopting pro rata allocation is not only consistent with the policy language at issue here, but it also serves important public policy objectives.” *Boston Gas, supra*, 454 Mass. at 364. The Massachusetts court concluded that – in addition to being compelled by the policy language – “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.” *Id.* at 366.

5. Courts in Other Jurisdictions Have Increasingly Rejected “All Sums.”

The majority of state Supreme Courts to consider this issue have rejected the “all sums” approach in the indemnity context, and this trend is growing. The list of state high courts rejecting the “all sums” argument includes Massachusetts, New York, New Jersey, Connecticut, Vermont, New Hampshire, Kentucky, Minnesota, Louisiana, Kansas, Colorado, and Utah:

- *Boston Gas, supra*, (Mass. 2009) 454 Mass. at 358 (the “policy applies only to injury to or destruction of property taking place during the policy period”).
- *Towns v. Northern Sec. Ins. Co.* (Vt. 2008) 964 A.2d 1150, 1167 (allocating coverage based on years on the risk, and assigning the insured responsibility for damage in years where it had no applicable insurance).
- *Southern Silica of Louisiana, Inc. v. Louisiana Ins. Guaranty Assoc.* (La. 2008) 979 So.2d 460, 465-466, 468 (finding the available insurance “is the pro rata share of each insurer for each year that insurer was on the risk”).
- *EnergyNorth Natural Gas, supra*, (N.H. 2007) 934 A.2d at 526 (“we doubt that [the insured] could have had a reasonable expectation that each single policy would indemnify [it] for liability related to property damage occurring due to events taking place years before and years after the term of each policy.’ ... Nor could [the insured] have had a reasonable expectation that it would be exempt from liability for injuries that occurred during any period in which [the insured] was uninsured or underinsured.”) (Citations omitted.)
- *Security Ins. Co. of Hartford v. Lumbermens Mutual Casualty Co.* (Conn. 2003) 826 A.2d 107, 121 (“we cannot torture the insurance policy language in order to

provide [the insured] with uninterrupted insurance coverage where there was none”).

- *Atchison, Topeka & Santa Fe Railway Co. v. Stonewall Insurance Co.* (Kan. 2003) 71 P.3d 1097, 1134 (“the concept of joint and several liability is not consistent with the term ‘all sums’ in the policies. It also clearly contradicts the fundamental insurance agreement to indemnify the insured for injuries during a specified policy period.”)
- *Aetna Cas. & Sur. Co. v. Commonwealth of Kentucky* (Ky. 2003) 179 S.W.3d 830, 842 (affirming the lower courts’ rulings pro rating damage over the policy periods at issue).
- *Consolidated Edison Co. v. Allstate Ins. Co.* (N.Y. 2002) 98 N.Y.2d 208, 224 (rejecting joint-and-several allocation, and holding that covered liability (if any) was correctly pro-rated over all policy periods and uninsured years in question).
- *Public Service Company of Colorado, supra*, (Colo. 1999) 986 P.2d at 939 (“We do not believe that these policy provisions can reasonably be read to mean that one single-year policy out of dozens of triggered policies must indemnify the insured’s liability for the total amount of pollution caused by events over a period of decades, including events that happened both before and after the policy period....”).
- *Carter-Wallace v. Admiral Ins. Co.* (N.J. 1998) 712 A.2d 1116, 1123-1125 (rejecting an “all sums” joint and several approach).
- *Domtar, Inc. v. Niagara Fire Insurance Company* (Minn. 1997) 563 N.W.2d 724, 732 (finding liability under each policy according to the time each policy was on the risk), citing *Northern States Power v. Fidelity & Casualty Co. of N.Y.* (Minn. 1994) 523 N.W.2d 657.
- *Sharon Steel Corporation v. Aetna Casualty & Surety Co.* (Utah 1997) 931 P.2d 127, 140-142 (rejecting “all sums” even in the defense context).

The Policyholder Amici claim that half of the state Supreme Courts to consider the issue have adopted “all sums.” (See Policyholder Amicus Brief at 16-17.) That is incorrect. In fact, of the 18 state high courts to consider the issue, the 12 courts cited above reject application of “all sums” to an insurer’s duty to indemnify. By contrast, only six state high courts apply “all sums” in the indemnity context, including this Court and the Supreme Courts of

Pennsylvania, Delaware, Indiana, Wisconsin, and Washington.² The majority of state Supreme Courts to address the issue have rejected “all sums.”

Several of the state Supreme Court cases cited by the Policyholder Amici do not support their “all sums” argument here. The cited Wisconsin decision involved unique policy language regarding coverage for damage “partly before and partly within the policy period.” *Plastics Engineering, supra*, (Wisc. 2009) 759 N.W.2d at 618, 626. Illinois, which the Policyholder Amici count in their favor, supports the pro rata position under more recent cases. *See Outboard Marine Corp. v. Liberty Mutual Ins. Co.* (Ill.App.Ct. 2d Dist. 1996) 283 Ill.App.3d 630, 642-643 (“While the insurers agreed to indemnify OMC for ‘all sums,’ it had to be for sums incurred during the policy period”). And the Hawaii Supreme Court did not resolve the “all sums” question in *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai’i* (Haw. 1994) 76 Hawaii 277, 290, 301; 875 P.2d 894, 907, 918 (all the damage at issue took place during the insurers’ respective policy periods, there was no occasion to consider allocating injury in uninsured periods to the insured, and the court stated that questions whether insurers are jointly and severally liable for indemnity “were not then and are not presently conclusively answered”).

The Texas Supreme Court in *American Physicians Exchange v. Garcia* (Tex. 1994) 876 S.W.2d 842, 855, did not permit an insured to recover “all sums.” (*Cf.* Policyholder Amici’s Brief at 16 fn. 5 and 18 fn. 10). Rather, the Court held that the insured could at most recover one year’s policy limit for a loss spanning several years, stating that if coverage were

² See *Goodyear, supra*, 95 Ohio St. 3d at 514-517, 2002-Ohio-2842, ¶¶ 5-12; *J.H. France Refractories Co. v. Allstate Ins. Co.* (Pa. 1993) 626 A.2d 502, 507-509; *American Nat. Fire Ins. Co. v. B & L Trucking and Const. Co., Inc.* (Wash. 1998) 951 P.2d 250, 253-257; *Plastics Engineering Co. v. Liberty Mutual Ins. Co.* (Wis. 2009) 759 N.W.2d 613, 620; *Hercules Inc. v. AIU Ins. Co.* (Del. 2001) 784 A.2d 481, 491; *Allstate Ins. Co. v. Dana Corp.* (Ind. 2001) 759 N.E.2d 1049, 1057-1058.

found to apply the insured would only be allowed to chose the single highest policy limit in effect while the loss continued. *American Physicians, supra*, 876 S.W.2d at 853-855.

The South Carolina Supreme Court did not adopt “all sums” in *Century Indemnity Co. v. Golden Hills Builders, Inc.* (S.C. 2002) 561 S.E.2d 355, 357-358. (Cf. Policyholder Amici’s Brief at 16 fn. 5.) The Court held the policy at issue “provides coverage for continuing damage that began during the policy period” – but did not decide whether all policies in effect during an ongoing loss cover “all sums” due to damage outside the policy term. *Id.* at 358.

And the California Supreme Court’s cited decision in *Aerojet-General Corp. v. Transport Indemnity Company* (1997) 17 Cal.4th 38, did not decide allocation of insurers’ duty to indemnify. Rather, *Aerojet* involved the duty to defend, specifically “whether *defense costs* may be allocated to the insured,” and the court’s analysis focused on considerations unique to the duty to defend. *Id.* at 56-57 (emphasis added); *see also* 68-76. The California Supreme Court has not decided whether “all sums” applies to the duty to indemnify. In fact, that question is presently before the California Supreme Court in a pending case, on grant of review in *State of California v. Continental Casualty Co.*, Supreme Court Case No. 170560.

Finally, it appears the Policyholder Amici did not cite a case supporting their claim that the Rhode Island Supreme Court has adopted “all sums.” (See Policyholder Amici’s Brief at 18 and 16 fn. 5, citing a First Circuit case applying Rhode Island law.)

B. At a Minimum, the Court Should Hold that an Insured Cannot Recover “All Sums” from a Targeted Insurer if the Insured Breached Coverage Conditions in Other Insurers’ Policies.

For the reasons set out above, *Goodyear* was incorrectly decided and the Court should overrule that decision and reject “all sums.” But if “all sums” continues to apply in Ohio, the Court should clarify *Goodyear* and rule that – where an insured targets one insurer for payment of a covered ongoing loss, and the insured fails to meet conditions precedent to

coverage in its other insurers' policies – the insured's recovery is limited to the pro rata share of injury resulting during the targeted insurer's policy periods.

Where an insured focuses its coverage claim on one insurer, and fails to advise other insurers of a loss until after the suit is resolved, the insured deprives those other insurers of their contractual right to associate in the defense of the litigation. As a consequence for breaching its other policies, the insured's recovery from a targeted insurer should be limited to the pro rata share of covered liability caused during the targeted insurer's policy term(s).

As noted in Appellee's merits brief (at 18-19), Ohio law requires prejudice to establish a coverage defense based on an insured's breach of the policies' notice, cooperation and consent-to-settlement clauses. *See Ferrando v. Auto Owners Mutual Ins. Co.*, 98 Ohio St. 3d 186, 205-207, 2002-Ohio-7217, ¶¶ 79-86. The Court holds that a presumption of prejudice arises when an insured provides an insurer with late notice of claim or commits a similar breach of other policy conditions. *Id.* at 205-207, 207-208, ¶¶ 81 and 88. But where an insured provides no notice to non-targeted insurers until after the underlying suit is resolved, the presumption of prejudice to those insurers should be un rebuttable. The non-targeted insurers are necessarily prejudiced where – as here – they first learn of a claim after the litigation is resolved, because such insurers are deprived of their contractual right to participate in the defense and monitor and control the insured's defense costs.

Where an insured fails to notify non-targeted insurers of a claim, and those insurers' policies therefore do not provide coverage, it would be unjust to hold the targeted insurer liable for "all sums" while depriving that insurer of contribution rights against other insurers. Rather, the equitable result is to require the insured to bear the consequences of its breach. Accordingly, if the Court decides not to overrule *Goodyear*, the Court should rule that

where an insured asserts a timely claim against one insurer, but fails to meet coverage requirements stated in its other insurers' policies, the insured's recovery is limited to the pro rata share of covered injury that resulted during the targeted insurer's policy period(s).

IV. CONCLUSION

The real problem here is "all sums." The "all sums" approach contradicts the policy language, and leaves needlessly complex allocation issues in its wake. Accordingly, Great American respectfully asks the Court to (1) reject "all sums," (2) rule that an insured's liability for continuous harm should be allocated on a pro rata basis over all years during which injury took place, (3) hold that each insurer can only be liable for covered injury during its own policy period, and (4) hold that insureds are responsible for the portion of injury during periods in which they did not obtain applicable insurance.

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Respectfully submitted,



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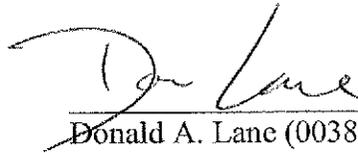
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