ORIGINAL

№ 2009-0104

# In the Supreme Court of Ohio

***PENNSYLVANIA GENERAL INSURANCE COMPANY, et al.,***

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 № CA-07-090619

## BRIEF OF *AMICUS CURIAE* THE OHIO INSURANCE INSTITUTE IN SUPPORT OF APPELLANTS


Alan F. Berliner (0012240)
(Counsel of Record)
Philip B. Sineneng (0083406)
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215-6101
Tel: (614) 469-3268
Fax: (614) 469-3361
Alan.Berliner@ThompsonHine.com
Philip.Sineneng@ThompsonHine.com

*Counsel for Amicus Curiae*
*The Ohio Insurance Institute*

John T. McLandrich (0021494)
(Counsel of Record)
Thomas S. Mazanec (0009050)
Frank H. Scialdone (0075179)
MAZANEC, RASKIN, RYDER
& KELLER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
Tel: (440) 248-7906
Fax: (440) 248-8861
jmclandrich@mrrklaw.com
tmazanec@mrrklaw.com
fscialdone@mrrklaw.com

*Counsel for Defendant-Appellant,*
*Nationwide Insurance Co.*



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Richard M. Garner (0061734)
(Counsel of Record)
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, OH 44114-2654
Tel: (216) 348-1700
Fax: (216) 621-0602
rgarner@davisyoung.com

Elaine Whiteman Klinger (*pro hac vice*)
CHRISTIE, PABARUE, MORTENSEN
& YOUNG, P.C.
1880 JFK Boulevard – Tenth Floor
Philadelphia, PA 19103
Tel: (215) 587-1600
Fax: (215) 587-1699
ewklinger@cpmy.com

*Counsel for Plaintiff-Appellee, Pennsylvania General Insurance Company*

Paul A. Rose (0018185)
(Counsel of Record)
Salle Conley Lux (0022477)
Amanda M. Leffler (0075467)
BROUSE McDOWELL
388 S. Main Street, Suite 500
Akron, OH 44311
Tel: (330) 535-5711
Fax: (330) 253-8601
prose@brouse.com
slux@brouse.com
aleffler@brouse.com

*Counsel for Amici Curiae The Ohio Manufacturers' Association; Bridgestone Americas Tire Operations LLC; Dana Holding Corp.; Day-Glo Color Corp.; Goodrich Corp.; The Goodyear Tire & Rubber Co.; The Lincoln Electric Co.; The Lubrizol Corp.; Pilkinton North America, Inc.; The Proctor & Gamble Co.; RPM, Inc.; Resco Holdings LLC; Sherwin-Williams Co.; Tremco Inc.; and United Policyholders*

Timothy J. Fitzgerald (0042734)
(Counsel of Record)
Paul J. Schumacher (0014370)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
tfitzgerald@gallaghersharp.com
pschumacher@gallaghersharp.com

Rebecca L. Ross (*pro hac vice*)
TROUTMAN SANDERS LLP
55 West Monroe Street, Suite 3000
Chicago, IL 60603-5758
Tel: (312) 759-1921
Fax: (773) 877-3733
becky.ross@troutmansanders.com

Kathleen M. Sullivan (*pro hac vice*)
Jane M. Byrne (*pro hac vice*)
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Tel: (212) 849-7000
Fax: (212) 849-7100
kathleensullivan@quinnemanuel.com
janebyrne@quinnemanuel.com

*Counsel for Defendant-Appellant, Continental Casualty Company*

Stephen F. Gladstone (0012128)
(Counsel of Record)
Brendan M. Gallagher (0080663)
FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230
Tel: (216) 515-1660
Fax: (216) 515-1650
sgladstone@frantzward.com
bgallagher@frantzward.com

Laura A. Foggan *(pro hac vice)*
Gregory J. Langlois *(pro hac vice)*
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel: (202) 719-7000
Fax: (202) 719-7207
lfoggan@wileyrein.com
glanglois@wileyrein.com

*Counsel for Amicus Curiae Complex Insurance Claims Litigation Association*

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Insurance Institute ("OII") is a trade association representing 34 domestic property/casualty insurance companies, 11 foreign property/casualty insurers and reinsurers, 11 insurance trade associations and 2 insurance-related organizations. OII member companies represent about 84% of Ohio's private passenger auto insurance market, 83% of the homeowners market and 51% of the commercial market.

OII's primary objective is to help Ohioans achieve a better understanding of insurance issues. OII has an interest in this appeal because its members have been directly and adversely affected by this Court's decision in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842 ("*Goodyear*"). The adoption by the court in *Goodyear* of an "all sums" allocation, which allows an insured to obtain full payment from a single insurer for a claim triggering coverage under a number of years, has dramatically changed the ability of Ohio insurers to predict risks, analyze exposures and set reserves.

Under *Goodyear*, the *targeted insurer* loses its ability to enforce its provisions restricting coverage to injury that occurred during its policy period – the basis on which its premiums were set. Moreover, these insurers cannot accurately set reserves because it is impossible for them to predict whether they will obtain contribution from other carriers who may be insolvent or no longer in existence. The *non-selected insurers* are also adversely affected. The Eighth District's recent interpretation of the *Goodyear* decision in this case effectively eliminated all of the non-selected insurers' rights under their policies, while retaining their obligations. Thus, a non-selected insurer has no ability to limit its exposure because the appellate court has eliminated its right to timely notice, to defend the claim and to settle the action if and when it deems appropriate. OII files this brief because it believes that this Court should overrule *Goodyear* and instead adopt a pro rata method of allocation based on the time each insurer was on the risk.

## INTRODUCTION

In the seven years since this Court decided *Goodyear,* OII has seen the numerous problems, inequities, and inefficiencies that have arisen because of *Goodyear's* holding that when a continuous occurrence triggers claims under multiple primary policies, the insured is entitled to secure coverage from a single policy of its choice that covers "all sums" incurred as damages. The selected insurer must then bear the burden of obtaining contribution from other applicable primary policies as it deems fit. This case provides a striking example of why *Goodyear's* "all sums" holding is inequitable and unworkable, and should be overruled.

Here, the insured, Park-Ohio, selected Pennsylvania General Insurance Company ("Penn General") to provide coverage for a mesothelioma claim filed by George DiStefano that triggered more than twenty years of coverage. Park-Ohio gave notice of the claim to Penn General but chose not to provide notice to any of the other potentially applicable carriers. Several months later, Park-Ohio settled the claim for $1 million, once again notifying Penn General of its actions, but not any of the other insurers. Thus, Park-Ohio flagrantly violated the terms of the policies issued by the non-selected insurers, Continental Casualty Company ("Continental") and Nationwide Insurance Company ("Nationwide"), by abrogating those insurers' rights to prompt notice, to select counsel, to control the defense of the claim, to determine if settlement was appropriate and to negotiate the amount of such a settlement.

Penn General was also placed in a difficult situation. Penn General did not know, and had no reliable method of obtaining, the identities of Park-Ohio's other insurers at the time the *DiStefano* settlement was reached. Park-Ohio had refused to provide that information based on *Goodyear's* holding that Park-Ohio could target a single insurer. Thus, Penn General was left with two unsatisfactory options: deny Park-Ohio's claim and risk being sued for bad faith, or pay the entire claim and risk being unable to collect contribution from other insurers.

The entity that created these problems – and the one entity that possessed the information that could have avoided them – was Park-Ohio. Yet, under the "all sums" rule established in *Goodyear*, Park-Ohio claimed that it could breach its contracts with the non-selected insurers, settle the case without consent from any carrier, demand full payment from the targeted carrier, and then walk away from the litigation without bearing any of the consequences of the impossible situation it created.

To resolve the dilemma created by Park-Ohio's actions, the appellate court simply rewrote Continental's and Nationwide's policies, requiring the insurers to fulfill all obligations under the policies, but holding that *Goodyear* eliminated all of their rights under those contracts. For example, the court recognized that the notice provisions of Continental's and Nationwide's polices had been breached, but found that "under the all sums approach adopted by the Ohio Supreme Court in *Goodyear,* Park-Ohio had no duty to notify Nationwide and Continental of the DiStefano claim." (Op. p. 13). Despite the clear policy provisions giving Continental and Nationwide the right to defend and settle the case, the appellate court found that, based on *Goodyear,* "Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the DiStefano matter." (Op. p. 15). The appellate court acknowledged that Park-Ohio breached the provisions precluding settlement without Continental and Nationwide's consent, but did not enforce these provisions because "the all sums approach anticipates this very result." (Op. p. 16).

OII respectfully submits that it is now time for this Court to rectify the many problems engendered by *Goodyear*. This Court should overrule *Goodyear's* "all sums" approach and instead adopt a pro rata method of allocation based on the time each insurer was on the risk. This approach, which has been adopted by courts around the country, requires insureds to meet

their contractual obligations to all insurers and to suffer the consequences of their actions if they choose not to do so. In addition, the pro rata method is consistent with policy language that requires an insurer to pay only for injury during its own policy period, and allows insurers to properly forecast losses and set reserves. Finally, it permits an equitable and efficient allocation of liability, which eliminates the need for costly and inefficient contribution actions.

## 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.**

Although *amici curiae* Ohio Manufacturers' Association, et al. ("OMA") contend that "all sums has always been the clear and unequivocal law of this state," (Brief pp. 32-33), and "promotes efficiency" (Brief p. 4), neither claim is accurate. *Goodyear* established a significant change in the law[1] and the results have been anything but efficient. "All sums" has created an inequitable system that:

- distorts policy language;
- abrogates insurers' contractual rights;
- precludes insurers from properly predicting risks and setting reserves;

---

[1] Two years before *Goodyear* was decided, the U.S. Court of Appeals for the Sixth Circuit observed that Ohio law did not provide any definitive guidance on the proper method of allocation among consecutive insurance policies in progressive injury cases. *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 689 (6th Cir. 2000). The Sixth Circuit went on to predict that this Court would adopt a pro rata method of allocation. *Id.* Moreover, there was a split in the *Goodyear* Court concerning what the rule should be and the opinion ultimately relied on two out-of-state cases that had adopted the "all sums" rule to support its interpretation of the policy language. *Goodyear* at ¶ 10 (citing *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250 (Wash. 1998), and *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981)).

- creates disincentives for insureds to cooperate with their insurers;
- allows insureds to manipulate their coverage; and
- leads to costly and inefficient contribution litigation.

Moreover, since *Goodyear* was decided, courts around the country have recognized the inherent flaws with "all sums" and have increasingly adopted the pro rata method of allocation. This Court should take this opportunity to overrule *Goodyear* and bring Ohio into line with the majority approach.

## I. *GOODYEAR* HAS PROVEN TO BE UNWORKABLE AND SHOULD BE OVERRULED.

### A. *Goodyear* Is Inconsistent With Policy Language and Abrogates Insurers' Rights.

*Goodyear* should be overruled for a variety of reasons, but foremost among them is that *Goodyear* does not apply the policies as written, and its "all sums" ruling, at least according to the Eighth District, allows insureds to violate their obligations under their policies with impunity. Insurance policies are contracts. They contain both rights and obligations. Under Ohio law, it is well-settled that "insurance policies should be enforced in accordance with their terms as are other written contracts." *Goodyear* at ¶ 8 (*quoting Rhoades v. Equitable Life Assur. Soc.* (1978), 54 Ohio St. 2d 45, 47, 374 N.E.2d 643; *Nottingdale Homeowners' Ass'n v. Darby* (1987), 33 Ohio St. 3d 32, 36, 514 N.E.2d 702, 706, *superseded by statute*, Ohio Rev. Code § 1301.21, *as recognized in New Mkt. Acquisitions, Ltd. v. Powerhouse Gym*, 154 F. Supp. 2d 1213, 1225 (S.D. Ohio 2001). It is a long established principle that a court must respect the parties' right to contract freely. This Court has held that "[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint". *Blount v. Smith* (1967), 12 Ohio St. 2d 41, 47, 231 N.E.2d 301, 305. Indeed, this Court has recognized that "the United States Constitution specifically

protects against state encroachment upon contracts." *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶ 9. The facts of this case demonstrate that *Goodyear* violated these basic principles. *Goodyear* established a procedure that was inconsistent with the policy provisions of both the targeted and non-selected insurers' policies in three respects.

**First**, *Goodyear* is inconsistent with the policy terms limiting coverage to bodily injury or property damage that occurs *during the policy period.* In this case, for example, occurrence is defined in one of the Continental policies 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." (Supp. p. 224). *Goodyear* recognized these nearly universal policy provisions, but focused on two words – "all sums" – in the insuring agreement and held that insurers had agreed to pay for all damages that result from an occurrence if any injury occurs during the policy period. In reaching this conclusion, the Court failed to take into account the other policy terms. For example, the Continental insuring agreement states:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
> B. property damage
>
> *to which this insurance applies* caused by an occurrence . . .

(Supp. p. 222 (emphasis added)). The Policy Period – Territory provision of the policy specifically provides that: "This insurance *applies only to bodily injury or property damage which occurs during the policy period.*" (Supp. p. 223 (emphasis added)). When read together, there is no question that the "all sums" that the insurer agreed to pay was only for bodily injury or property damage which occurs during the policy period.

Under *Goodyear's* "all sums" approach, that policy language is essentially written out of the policies as demonstrated by this case. Here, the underlying plaintiff alleged that he was exposed to asbestos over a period of approximately 20 years. Under the "all sums" rule, Park-Ohio was permitted to demand that Penn General pay for all 20 years of damage, even though its policies were in effect for only a fraction of that time.

Eliminating this protection causes substantial problems for insurers. When insurers issue policies, they must be able to understand and predict the risks they are insuring in order to set appropriate premiums. It is inconceivable that Penn General could have anticipated in the early 1960s that its policy would cover bodily injury allegedly sustained by Mr. DiStefano in the 1970s or 1980s, much less that the policy premium incorporated any such risk. Moreover, the "all sums" rule impedes insurers' ability to forecast losses and set reserves, because an insurer has no way of knowing whether an insured will select its policy for a particular loss. If the insurer is selected, it also has no way to know if the insured actually purchased insurance covering the other years when bodily injury or property damage occurred or, as was the case here, whether the insured will fail to take adequate steps to preserve the selected insurer's contribution rights and potentially leave the insurer liable for many years of damage occurring outside its policy period. This uncertainty fundamentally impacts the ability of insurers to predict their losses. Thus, by ignoring the contractual language limiting coverage to bodily injury or property damage that occurs during the policy period, *Goodyear* requires an insurer to pay for a risk neither contemplated nor assumed and undermines an insurer's ability to set and maintain adequate reserves.

**Second**, both Continental and Nationwide have provisions in their policies requiring Park-Ohio to provide notice of claims so that the insurer has an opportunity to defend and

participate in settlement. Notice provisions appear in the vast majority of liability policies, and Ohio courts have long recognized their importance. In *Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau,* (2000), 88 Ohio St. 3d 292, 302-03, 725 N.E.2d 646, 655, this Court recognized:

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

Other Ohio courts also have consistently upheld the importance of notice to an insurer. These courts have recognized that late notice prejudices insurers because it deprives them of important policy rights, including the right to participate in the investigation and defense of claims. *See Bellaire TV Cable Co. v. Valley Constr. Co.*, 7th Dist. No. 01-BA-44, 2002-Ohio-3203, at ¶ 46 (notice given three years after filing of underlying suit was unreasonably late as matter of law because "most if not all of the pretrial work had been completed" and insurer was "deprived of the opportunity to control or even influence the pretrial strategy"); *Copper v. Willis* (4th Dist. Apr. 17, 2000), 2000 Ohio App. LEXIS 1674 at *12 (notice three years after initial occurrence and more than a year after suit filed unreasonable because insurer was "put in a position where it cannot specifically ascertain what information or opportunities would have been available had notice been timely"); *Champion Spark Plug Co. v. Fid. & Cas. Co.*, (6th Dist. 1996) 116 Ohio App. 3d 258, 266 (unreasonable delay as a matter of law when the insured failed

to notify its insurers of pollution until two years after receiving letter from the EPA and after entering into consent orders).

Despite this strong recognition of the importance of notice provisions, the Eighth District held that "under the all sums approach adopted by the Ohio Supreme Court in *Goodyear,* Park-Ohio had no duty to notify Nationwide and Continental of the DiStefano claim." (Op. p. 13). In other words, according to the appellate court, *Goodyear* eliminated the non-selected insurers' rights to have *any* notice of the claim. Thus, although the non-selected insurers had none of the rights recognized by *Ormet* – the opportunity to investigate, control the litigation, protect their own interests, maintain the proper reserves, pursue possible subrogation claims, or defend against fraudulent, invalid or excessive claims – they were still ordered to pay the claim.

**Third,** the policies in this case, like most general liability policies, also contain provisions that give the insurer not only the duty, but also the right to defend and to make such "settlement of any claim or suit as it deems expedient." (Supp. p. 222). Moreover, the policies provide: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid at the time of accident." (Supp. p. 224). The appellate court held that *Goodyear* eliminated these contractual rights: "Under the all sums approach, only the insurer selected by the insured defends the insured and participates in the underlying tort claim litigation." (Op. p. 14). Indeed, the Court held, "In light of *Goodyear* and *Keene,* Nationwide and Continental, as non-targeted insurers, had no right to participate in the litigation and defense of the DiStefano matter, so they could not have been prejudiced by Pennsylvania General's failure to notify them of the suit and allow their participation in it."

Provisions such as the duty to defend, the right to control settlement, and the requirement that an insured not assume any obligation or make any payment without the insurer's consent are

important protections for insurers. These provisions assure that the insurer, as the entity that will ultimately pay the claim, can pick qualified counsel, determine whether it is a case that should be tried or settled, and decide what will be paid and when.

Moreover, like other contracting parties, each insurer is entitled to exercise its own judgment with respect to a claim. While insurers often work together in handling a claim involving bodily injury lasting over a period of years, each has its own responsibility to adjust the loss properly. If an insurer does not fulfill that obligation, that company (and that company alone) should suffer the consequences.

Here, the appellate court, without any authority other than *Goodyear*, allowed Penn General to bind the non-selected insurers. Because Penn General did not select counsel, no insurer was allowed to select counsel. Because Penn General did not participate in the settlement discussions, no insurer was allowed to participate. Because Penn General did not object to the settlement, no other insurer was allowed to object. Thus, effectively, the appellate court rewrote the non-selected insurers' policies to transfer all rights to the selected insurer. Such an abrogation of the non-selected insurers' constitutional rights should not be tolerated. *See Westfield Ins. Co.* at ¶ 9.

B. *Goodyear* Is Inequitable.

*Goodyear* should also be overruled because it is inequitable. Although *Goodyear* assumed that the targeted insurer could obtain contribution from other carriers to more fairly allocate a loss, the framework established by *Goodyear* requires a Hobson's choice: either the Court must require a non-selected insurer to pay when its policy terms have been violated (as the Eighth District ordered here) or the targeted insurer must forgo contribution if the insured failed to fulfill its obligations under the non-selected insurer's policy. Neither result is fair.

The *Goodyear* Court recognized that "in situations involving long-term injury or damage . . . it is difficult to determine which insurer must bear the loss." *Goodyear* at ¶ 5. The Court nevertheless allowed the insured to select a single policy to pay the entire claim because it thought that the targeted insurer could simply obtain contribution from other triggered polices, believing that "there [was] no dispute that there was continuous [injury] across multiple policy periods that gave rise to occurrences and claims to which these policies apply." *Id.* at ¶ 6. The *Goodyear* Court simply assumed that the insured had complied with the terms of all of the policies and that other policies would therefore be "applicable." However, the reality is far different. By allowing the insured to select a single primary policy against which it desires to make a claim, this Court so skewed the balance between insureds and insurers that the insured no longer has incentives to assure that all other policies will be "applicable."

Contribution, however, is an equitable remedy that presumes that one party has satisfied an obligation for which multiple parties are liable. *Travelers Indem. Co. v. Trowbridge* (1975), 41 Ohio St. 2d 11, 13, 70 O.O.2d 6, 321 N.E.2d 787, overruled on other grounds, *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.* (1995), 73 Ohio St. 3d 391, 653 N.E.2d 235. In order for contribution to lie, there must be a "common obligation" or a "common liability." *Assets Realization Co. v. Am. Bonding Co. of Baltimore* (1913), 88 Ohio St. 216, 252-53, 102 N.E. 719; Lee R. Russ, 15 Couch on Ins. § 217:4 (3d ed.) ("[T]he right to contribution in insurance is predicated upon the principle that all insurers are equally liable for the discharge of a common obligation.").

The only basis for an insurance company's obligation to pay a judgment or settlement on behalf of a policyholder is the policy it issued. Unless there is coverage under the policy, there is *no* obligation for that insurer to pay anything on behalf of its insured. Thus, if the insured did

not comply with the conditions of coverage, the insurer has no obligation and contribution cannot be required.

In a closely analogous factual situation, the Eleventh District confirmed this principle. It held that an insurer that received notice of a claim two months after the underlying lawsuit was dismissed could not be required to contribute to defense expenses because the notice it received was unreasonable as a matter of law. *See State Hous. Auth. Risk Pool Ass'n v. Erie Ins. Grp.*, 11th Dist. No. 2003-P-0053, 2004-Ohio-7223. In that case, the Court dismissed the contribution claims brought by an insurer (SHARP) that had been notified of the claim and had defended the insured, finding that the other insurer (Erie) had not been given notice of the claim until after the suit was dismissed. The Court held that Erie was "entitled to a presumption of prejudice" which SHARP had not rebutted. Noting that "Erie had no opportunity to investigate the facts, investigate coverage, or pursue its own litigation strategies," the Court found that there could be no contribution claim because there was no coverage under the Erie policy. *Id.* at ¶¶ 24-25. While this result enforces the non-selected insurer's policy terms, it is unfair to the targeted insurer who paid the loss. This Court should instead adopt a pro rata allocation, so that if the insured breaches a non-selected policy, it must pay that insurer's pro rata share. The "all sums" system, which unfairly puts the burden of the insured's breach on one of the insurers, should be overruled.

In addition, "all sums" is inequitable because it often creates windfalls for insureds at the insurers' expense. Under the "all sums" rule, a policyholder that purchased insurance at any time during the alleged injury is entitled to the same coverage as a policyholder that purchased insurance in every consecutive policy period. This is unfair, both to policyholders and to their insurers. If an insured purchased coverage for only one year during a 20-year period of alleged

exposure to asbestos (or purchased insurance from a financially-questionable company), that insured should not be entitled to the same protection as an insured that purchased 20 consecutive policies from solvent insurers. But under "all sums", those two policyholders would be treated the same. Such a result both forces the insurer to underwrite the risk that its insured will not purchase coverage in other years and also rewards the insured that chooses not to buy consecutive coverage but is still able to obtain full coverage for progressive claims.

Finally, the "all sums" rule has also created significant problems for insurers who have reinsurance – a protection that is extremely important to the financial stability of insurers. A recent opinion by the House of Lords held that reinsurance policies could not be forced to cover losses that occurred outside of their policy periods, even if the policies they reinsure were forced to pay those losses because of "all sums" rulings. *See Wasa Int'l Ins. Co. v. Lexington Ins. Co.*, [2009] UKHL 40, 3 W.L.R. 575, 2009 WL 2207451 (U.K. House of Lords July 30, 2009). Thus, if an Ohio insurer pays for loss that took place outside of its policy period (as *Goodyear* requires), it may not be able to recover under reinsurance contracts it purchased to cover losses for that policy. Such an uncertainty undermines the financial stability of insurers, which creates negative consequences for both insurers and their policyholders.

C. "All Sums" is Inefficient.

The "all sums" approach is also inefficient. Although OMA asserts that this matter has proceeded expeditiously and in a manner that has promoted judicial economy, (*See* OMA Br. at 4-6), that is hardly the case. The underlying *DiStefano* case was indeed resolved in approximately seven months. But the underlying case was filed in California, and the speed with which it was resolved reflects only how California courts handle certain types of asbestos litigation. In contrast, the contribution action here has gone on for seven years – a result which

would not have been necessary had a pro rata allocation been used in 2002.[2] This chain of events is anything but efficient.

OMA also argues that the facts presented in this case represent an efficient outcome because Park-Ohio was able to collect its entire defense and settlement costs from Penn General and walk away. (OMA Br. at 5). But that is the problem. Park-Ohio received its entire defense and settlement costs even though it chose to violate the terms of its policies requiring notice of occurrence and payment without consent. The contractual rights of the insurers cannot be destroyed simply to promote the convenience of the policyholder, but that is the result of the all sums approach here.[3]

A pro rata approach would be much simpler because it would accomplish in one step what requires two steps under "all sums". If that approach had applied here, Park-Ohio would have had an incentive to notify each of its insurers of the claim or risk forfeiting its right to coverage from any insurer it did not notify. Each insurer's right to notice and to participate in the defense and settlement of claims would have been protected. Park-Ohio would still have received full coverage, but it would have collected a portion of its defense and indemnity costs from each carrier. The share of each insurer could be easily determined by dividing the number

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[2] OMA also asserts that "all sums" cannot be unworkable because this is the first case to reach this Court since *Goodyear*. That position ignores just how complex and protracted contribution disputes can become. This case is based on a settlement reached less than four months after *Goodyear* was decided and has taken seven years to reach this Court.

[3] OMA also argues that this Court should not revisit *Goodyear* because the policyholder is not a party. (OMA Br. at 13). Park-Ohio's lack of involvement is the primary factor that creates the inefficiencies under the all sums method. *See Goodyear* at ¶ 30 (Young, J., dissenting) (noting that "the insured, not the targeted insurance carrier, is the one that chose the other insurance carriers" and should "logically and in all fairness bear that burden of obtaining the proper share of coverage from each of the other carriers"). Under "all sums", the insured ordinarily will not be a party to contribution litigation, even though the insured is the party that possessed the information that could have avoided problems such as the ones existing here.

of years of its coverage by the total number of years of alleged injury and there would have been no need for a second round of litigation between insurers.

## II. COURTS IN OTHER JURISDICTIONS HAVE INCREASINGLY REJECTED "ALL SUMS."

By following the "all sums" rule, Ohio goes against the national majority rule. A clear and growing majority of states allocate losses from progressive injuries on a pro rata basis across consecutive insurance policies. Moreover, since *Goodyear* was decided, the great majority of courts addressing the issue for the first time have adopted a pro rata method of allocation. (*See* Continental Br. at 19-20).

### A. OMA Incorrectly Characterizes the Split of Authority Between Pro Rata and All Sums and Fails to Acknowledge All Sums As the Minority Rule.

OMA's amicus brief suggests there is no trend towards pro rata allocation, and that jurisdictions remain roughly evenly divided on the question of "all sums" versus pro rata. That is not accurate. Many of the jurisdictions OMA claims have adopted "all sums" have not done so and, in fact, there is support in some of them for the pro rata approach.

For example, OMA incorrectly claims that Florida and Virginia follow the "all sums" rule. Neither state's courts have addressed the proper method of allocation for long-tail claims. The sole basis for including those states is an unpublished federal district court opinion issued thirteen years ago, which cites no law from either jurisdiction, and in a single paragraph assumes Florida, Virginia, and three other states would follow the "all sums" approach because all sums "seems to be harmonious with the general principles of insurance law followed in each of the states in question." *CSX Transp., Inc. v. Admiral Ins. Co.*, 1996 U.S. Dist. LEXIS 17125 (M.D. Fla. Nov. 6, 1996), at *29-30. This unsupported assumption cannot be characterized as the law of either state. Indeed, a federal district court in Virginia endorsed, albeit in dicta, the pro rata

method of allocating both indemnity and defense costs in the asbestos context. *Morrow Corp. v. Harleysville Mut. Ins. Co.*, 101 F. Supp. 2d 422, 427 & n.5, 429-30 & nn.8-10 (E.D. Va. 2000).

South Carolina is also not an "all sums" jurisdiction. The case cited by OMA, *Century Indem. Co. v. Golden Hills Builders, Inc.*, 561 S.E.2d 355, 357 (S.C. 2002), involved only a single insurance policy and addressed whether the policy provided coverage for continuing damage that began before the policy period. This is not an allocation issue because there were no consecutive policies. Indeed, the Fourth Circuit has interpreted South Carolina law as permitting pro rata allocation in environmental pollution cases. *See Spartan Petroleum Co. v. Federated Mut. Ins. Co.*, 162 F.3d 805, 812 (4th Cir. 1998).

Hawaii likewise has not adopted the "all sums" approach and could arguably be characterized as a pro rata jurisdiction. The Hawaii Supreme Court declined to answer the question of whether consecutive insurers would be jointly and severally liable to the insured for damages caused by a progressive injury. *See Sentinel Ins. Co. v. First Ins. Co. of Hawaii*, 875 P.2d 894, 907 (Haw. 1994). The court did, however, allocate damages between the insurers using a time-on-the-risk formula. *See id.* at 918-19.

Michigan also has not adopted the "all sums" rule. Michigan appellate courts have issued conflicting opinions regarding the proper method of allocation. *Compare Arco Indus. Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61, 69 (Mich. Ct. App. 1998) (pro rata), *with Dow Corning Corp. v. Continental Cas. Co.*, 1999 Mich. App. LEXIS 2920 at * 24 (Mich. Ct. App. Oct. 12, 1999) (all sums). The Michigan Supreme Court has not resolved this conflict, but two federal district courts have predicted that it would adopt a pro rata time-on-the-risk method of allocation if presented with the issue. *Stryker Corp. v. Nat'l Union Fire Ins. Co.*, 2005 U.S. Dist. LEXIS 13113 at *18 (W.D. Mich. July 1, 2005) (predicting Michigan Supreme Court would follow

*Arco* and reject *Dow Corning*); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 544-45 (W.D. Mich. 2003) (same).

The law in Illinois is unsettled. In a case primarily addressing trigger rather than allocation, the Illinois Supreme Court held that a lower court did not err by rejecting a pro rata approach in a particular case. *See Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 165 (Ill. 1987) . But *Zurich* did not mandate an "all sums" approach, and numerous post-*Zurich* opinions have applied a pro rata allocation among excess insurers. *See AAA Disposal Sys., Inc. v. Aetna Cas & Sur. Co.*, 821 N.E.2d 1278, 1290 (Ill. App. Ct. 2005); *Missouri Pacific R.R. v. Int'l Ins. Co.*, 679 N.E.2d 801, 805-809 (Ill. App. Ct. 1997) ("We read nothing in *Zurich* as precluding the application of the pro rata, time-on-the-risk allocation method announced in *Outboard Marine* to the case at bar"); *Outboard Marine Corp v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740, 746-751 (Ill. App. Ct. 1996); *John Crane, Inc. v. Admiral Ins. Co.*, 2006 WL 1010495, at *32 (Ill. Cir. Ct. Apr. 12, 2006).

Texas law is also unsettled. OMA contends that the Supreme Court of Texas adopted the "all sums" approach in *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994). But *American Physicians* addressed whether concurrent insurance policy limits could be "stacked", and not the proper allocation of costs between those concurrent insurers. *See id.* at 855. *American Physicians* does not involve either a progressive injury or consecutive policy periods, and is thus inapplicable to the issue of whether "all sums" or pro rata allocation is appropriate. Other courts applying Texas law have issued conflicting decisions on the proper method of allocation. *Compare Royal Ins. Co. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 644 (5th Cir. 2004) (applying pro rata allocation under Texas law based on "other insurance"

clauses), *with Tex. Prop. & Cas. Ins. Guar. Ass'n v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 605 (Tex. Ct. App. 1998) (construing *American Physicians* as adopting "all sums" rule).

B. Since *Goodyear* Was Decided, Other States Have Repeatedly Rejected "All Sums" Allocation.

At the time *Goodyear* was decided, there was an approximately even split between jurisdictions applying all sums and those applying pro rata allocation. Prior to *Goodyear*, the highest courts of eleven states had addressed the issue, with five adopting the "all sums" approach,[4] and six adopting the pro rata approach.[5] But as the practical effects of the "all sums" approach have become more apparent with experience, courts have increasingly recognized the problems, inequities, and inefficiencies created by all sums. As a result, in the seven years since *Goodyear* was decided, there has been a pronounced nationwide shift away from the all sums approach. Six additional state supreme courts[6] have adopted a pro rata method of allocation

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[4] *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 491 (Del. 2001); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 , 507 (Pa. 1993); *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403, 414 (R.I. 2001); *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 253-54 (Wash. 1998). Additionally, *Aerojet-Gen. Corp. v. Transport Indem. Co.*, 17 Cal. 4th 38, 56-57 (1997), adopted the "all sums" rule as to defense costs only; the issue of whether "all sums" should also apply to indemnity is currently before the California Supreme Court. *State v. Continental Ins. Co.*, 170 Cal. App. 4th 160, 176 (2009), review granted, 91 Cal. Rptr. 3d 106.

[5] *Pub. Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 939-41 (Colo. 1999); *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1079 (La. 1992); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 731-33 (Minn. 1997); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994); *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-24 (2002); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 140-41 (Utah 1997).

[6] *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 306 (Mass. 2009); *Towns v. Northern Security Ins. Co.*, 964 A.2d 1150, 1167 (Vt. 2008); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, London*, 934 A.2d 517, 526 (N.H. 2007); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005); *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 116 (Conn. 2003); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1134 (Kan. 2003).

since *Goodyear*, while only one[7] has adopted the all sums approach. As a result, by continuing to follow "all sums", Ohio is now in a distinct minority of states.

OMA's argument that focusing only on cases decided in 2009 reveals a trend towards "all sums" is similarly misplaced. Earlier this year, Massachusetts adopted the pro rata approach (*see Boston Gas Co.*, 910 N.E.2d at 306), and Wisconsin became the first and only state to adopt all sums since *Goodyear* was decided (*see Plastics Eng'g Co.*, 759 N.W.2d at 627). The other two cases cited by OMA do not involve new analysis of whether "all sums" or pro rata is a better approach but rather follow previous precedent. *See Emhart Indus., Inc. v. Admiral Ins. Co.*, 559 F.3d 57, 70-72 (1st Cir. 2009) (applying "all sums" under Rhode Island law based on *Kayser-Roth Corp.*, 770 A.2d at 414); *Continental Ins. Co.*, 170 Cal. App. 4th at 176 (applying "all sums" under California law based on its interpretation of *Aerojet-Gen Corp.*, 17 Cal. 4th at 56-57). Indeed, the same First Circuit that applied "all sums" under established Rhode Island law in *Emhart Industries* found the issue was unsettled under Massachusetts law and certified the question to the Massachusetts Supreme Judicial Court, which led that court to adopt the pro rata method earlier this year. *See Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8, 13 (1st Cir. 2008) (noting the "growing plurality" of states adopting pro rata allocations).

Those courts that have adopted the pro rata allocation method in the years since Goodyear have done so in recognition of the pro rata method's simplicity and its superiority over the unwieldy and unworkable all sums method. For example, in *EnergyNorth*, the New Hampshire Supreme Court stated that "pro-ration is a superior allocation method to joint and several liability" in part because "despite its advocates' claims to the contrary, the joint and several method does not decrease litigation costs, does not give courts guidance as to how to

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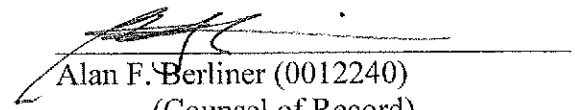
[7] *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 (Wis. 2009).

allocate liability, and requires insurers to factor the costs of uncertain liability into their premiums." *EnergyNorth,* 934 A.2d at 527 (internal citations omitted). The court also found that "[j]oint and several allocation rests on an assumption not in accordance with the development of the law: that at every point in the progression the provable damages due to injury in any one of the years from exposure to manifestation will be substantially the same." Id. at 526 (quoting *Carter-Wallace v. Admiral Ins.* Co., 712 A.2d 1116, 1121 (N.J. 1998)). *See also Boston Gas Co.,* 910 N.E.2d at 311 ("In sum, the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result"); *Atchison, Topeka & Santa Fe Ry. Co.,* 71 P.3d at 1134 (finding that the all sums approach "clearly contradicts the fundamental insurance agreement to indemnify the insured for injuries during a specified policy period."); *Towns*, 964 A.2d at 1166 (agreeing "that the time-on-the-risk method offers several policy advantages, including spreading the risk to the maximum number of carriers, easily identifying each insurer's liability through a relatively simple calculation, and reducing the necessity for subsequent indemnification actions between and among the insurers."); *Security Ins. Co.*, 826 A.2d at 121 (refusing to "torture the insurance policy language" to apply the all sums approach, and noting that "[n]either the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage periods.").

## CONCLUSION

For the reasons stated above, the Ohio Insurance Institute submits that this Court's opinion in *Goodyear* has proven to be inequitable and unworkable, and the great weight of post-*Goodyear* authority in other jurisdictions has rejected its "all sums" approach. *Goodyear* should be overruled, and this Court should adopt a pro rata method of allocation.

Respectfully submitted,



Alan F. Berliner (0012240)
(Counsel of Record)
Philip B. Sineneng (0083406)
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, OH 43215-6101
Tel: (614) 469-3268
Fax: (614) 469-3361
Alan.Berliner@ThompsonHine.com
Philip.Sineneng@ThompsonHine.com

*Counsel for Amicus Curiae*
*The Ohio Insurance Institute*

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the Brief of Amicus Curiae The Ohio Insurance Institute in Support of Appellant was served upon the following by regular U.S. Mail, postage pre-paid, on October 26, 2009:

John T. McLandrich
Thomas S. Mazanec
Frank H. Scialdone
MAZANEC, RASKIN, RYDER
& KELLER CO., L.P.A.
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139

*Counsel for Defendant-Appellant,*
*Nationwide Insurance Co.*

Timothy J. Fitzgerald
Paul J. Schumacher
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108

Kathleen M. Sullivan
Jane M. Byrne
QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

Rebecca L. Ross
TROUTMAN SANDERS LLP
55 West Monroe Street, Suite 3000
Chicago, IL 60603-5758

*Counsel for Defendant-Appellant,*
*Continental Casualty Company*

Richard M. Garner
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, OH 44114-2654

Elaine Whiteman Klinger
CHRISTIE, PABARUE, MORTENSEN & YOUNG, P.C.
1880 JFK Boulevard – Tenth Floor
Philadelphia, PA 19103

*Counsel for Plaintiff-Appellee,*
*Pennsylvania General Insurance Company*

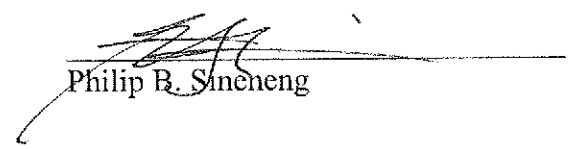
Paul A. Rose
Salle Conley Lux
Amanda M. Leffler
BROUSE McDOWELL
388 S. Main Street, Suite 500
Akron, OH 44311

*Counsel for Amici Curiae The Ohio Manufacturers' Association; Bridgestone Americas Tire Operations LLC; Dana Holding Corp.; Day-Glo Color Corp.; Goodrich Corp.; The Goodyear Tire & Rubber Co.; The Lincoln Electric Co.; The Lubrizol Corp.; Pilkinton North America, Inc.; The Proctor & Gamble Co.; RPM, Inc.; Resco Holdings LLC; Sherwin-Williams Co.; Tremco Inc.; and United Policyholders*

Stephen F. Gladstone
Brendan M. Gallagher
FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230

Laura A. Foggan
Gregory J. Langlois
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

*Counsel for Amicus Curiae Complex Insurance Claims Litigation Association*



Philip B. Sineneng