
In the Supreme Court of Ohio

PENNSYLVANIA GENERAL INSURANCE COMPANY, etc.,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

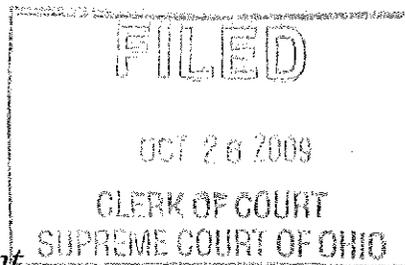
DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No CA-07-090619

**REPLY BRIEF OF APPELLANT
CONTINENTAL CASUALTY COMPANY**

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
E-mail: 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
E-mail: kathleensullivan@quinnemanuel.com
janebyrne@quinnemanuel.com

PAUL J. SCHUMACHER (#0014370)
TIMOTHY J. FITZGERALD* (#0042734)
* *Counsel of Record*
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: pschumacher@gallaghersharp.com
tfitzgerald@gallaghersharp.com



*Counsel for Defendant-Appellant
Continental Casualty Company*

(Counsel continued on inside cover)

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

E-mail: 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

E-mail: ewklinger@cpmy.com

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

JOHN T. MCLANDRICH* (#0021494)

** Counsel of Record*

THOMAS S. MAZANEC (#0009050)

FRANK H. SCIARDONE (#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

E-mail: jmclandrich@mrrklaw.com

tmazanec@mrrklaw.com

fscialdone@mrrklaw.com

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

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

E-mail: sgladstone@frantzward.com

bgallagher@frantzward.com

LAURA A. FOGGAN (PRO HAC VICE)

GREGORY J. LANGLOIS (PRO HAC VICE)

WILEY REIN LLP

1776 K Street, N.W.

Washington, D.C. 20006

Tel: (202) 719-7000

Fax: (202) 719-7207

E-mail: lfoggan@wileyrein.com

glanglois@wileyrein.com

*Counsel for Amicus Curiae Complex
Insurance Claims Litigation Association*

PAUL A. ROSE* (#0018185)

** Counsel of Record*

SALLIE 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

E-mail: prose@brouse.com

slux@brouse.com

aleffler@brouse.com

KEVEN DRUMMOND EIBER (#0043746)

CAROLINE L. MARKS (#0071150)

BROUSE MCDOWELL

1001 Lakeside Avenue, Suite 1600

Cleveland, OH 44114-1151

Tel: (216) 830-6830

Fax: (216) 830-6807

E-mail: keiber@brouse.com

cmarks@brouse.com

*Counsel for Amici Curiae The Ohio
Manufacturers' Association, et al.*

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. THIS COURT SHOULD OVERRULE *GOODYEAR* AND ORDER A PRO
RATA TIME-ON-THE-RISK ALLOCATION FOR LONG-TERM
INJURY 3

A. *Goodyear's* Continued Viability Is Properly Before This Court 3

B. This Court Should Overrule *Goodyear* 6

II. NO CLAIM FOR CONTRIBUTION CAN BE MADE HERE BECAUSE THE
INSURED'S BREACH OF CONTINENTAL'S POLICY RENDERED IT
"INAPPLICABLE" TO THIS CLAIM. 13

A. Continental's Policy Was Not Applicable To The *DiStefano* Loss 14

B. This Court Should Also Clarify The Rights And Obligations Of The
Targeted Insurer And The Insured Under *Goodyear* 19

CONCLUSION 20

PROOF OF SERVICE 22

TABLE OF AUTHORITIES

CASES

<i>Aetna Cas. & Sur. Co. v. Commonwealth</i> (Ky. 2005), 179 S.W.3d 830	11
<i>Al Minor & Assocs., Inc. v. Martin</i> , 117 Ohio St. 3d 58, 2008-Ohio-292	4
<i>Allstate Ins. Co. v. United Servs. Auto Ass'n</i> (Va. 1995), 452 S.E.2d 859	18
<i>Assets Realization Co. v. Am. Bonding Co.</i> (1913), 88 Ohio St. 216	14
<i>Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.</i> (Kan. 2003), 71 P.3d 1097	11
<i>Bellaire TV Cable Co. v. Valley Constr. Co.</i> , 2002-Ohio-3203, 2002 Ohio App. LEXIS 3231	17
<i>Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.</i> (1993), 67 Ohio St. 3d 274	3
<i>Blount v. Smith</i> (1967), 12 Ohio St. 2d 41	8
<i>Boston Gas Co. v. Century Indem. Co.</i> (Mass. 2009), 910 N.E.2d 290	10, 11
<i>Boston Gas Co. v. Century Indem. Co.</i> (1st Cir. 2008), 529 F.3d 8	10
<i>C.E. Morris Co. v. Foley Constr. Co.</i> (1978), 54 Ohio St. 2d 279	4
<i>Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.</i> (1992), 80 N.Y.2d 992	19
<i>Copper v. Willis</i> (April 17, 2000), 2000 Ohio App. LEXIS 1674	17
<i>Corporex Dev. & Constr. Mgmt., Inc. v. Shook, Inc.</i> , 106 Ohio St. 3d 412, 2005-Ohio- 5409	4
<i>Emhart Indus., Inc. v. Century Indem. Co.</i> (1st Cir. 2009), 559 F.3d 57	11
<i>EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's, London</i> (N.H. 2007), 934 A.2d 517	11
<i>Ferrando v. Auto-Owners Mut. Ins. Co.</i> , 98 Ohio St. 3d 186, 2002-Ohio-7217	15
<i>Fifth Third Bank v. Ducru Ltd. P'ship</i> , 157 Ohio App. 3d 463, 2004-Ohio-1801	6
<i>FirstEnergy Corp. v. Pub. Util. Comm'n</i> , 95 Ohio St. 3d 401, 2002-Ohio-2430	6

<i>GenCorp, Inc. v. AIU Ins. Co.</i> (N.D. Ohio 2000), 104 F. Supp. 2d 740.....	7
<i>Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.</i> , 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835	passim
<i>Helman v. Hartford Fire Ins. Co.</i> (1995), 105 Ohio App. 3d 617.....	15
<i>Hill v. Urbana</i> (1997), 79 Ohio St. 3d 130.....	6
<i>IFA Ins. Co. v. Atl. Mut. Ins. Co.</i> (N.J. Super. Ct. 2000), 751 A.2d 610.....	19
<i>Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.</i> (6th Cir. 2000), 210 F.3d 672.....	7
<i>Mannion v. Sandel</i> (2001), 91 Ohio St. 3d 318	5
<i>Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.</i> (Md. Ct. Spec. App. 2002), 802 A.2d 1070.....	10
<i>Millennium Chems., Inc. v. Lumbermens Mut. Cas. Co.</i> (N.D. Ohio Mar. 13, 2001), 2001 U.S. Dist. LEXIS 20974	7
<i>Nat'l Fire Ins. Co. v. Dennison</i> (1916), 93 Ohio St. 404.....	14
<i>New Mkt. Acquisitions, Ltd. v. Powerhouse Gym</i> (S.D. Ohio 2001), 154 F. Supp. 2d 1213.....	9
<i>Nottingdale Homeowners' Ass'n v. Darby</i> (1987), 33 Ohio St. 3d 32	8
<i>Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.</i> (C.P. 1995), 74 Ohio Misc. 2d 183.....	7
<i>Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.</i> (D.D.C. 1984), 597 F. Supp. 1515.....	7
<i>Republic Steel Corp. v. Board of Revision of Cuyahoga County</i> (1963), 175 Ohio St. 179.....	6
<i>Republic Steel v. Glaros</i> (1967), 12 Ohio App. 2d 29	14
<i>Ruby v. Midwestern Indem. Co.</i> (1988), 40 Ohio St. 3d 159.....	15
<i>Scott-Pontzer v. Liberty Mut. Fire Ins. Co.</i> (1999), 85 Ohio St. 3d 660.....	5
<i>Security Ins. Co. v. Lumbermens Mut. Cas. Co.</i> (Conn. 2003), 826 A.2d 107.....	11
<i>State v. 1981 Dodge Ram Van</i> (1988), 36 Ohio St. 3d 168	5
<i>State v. Carter</i> (1971), 27 Ohio St. 2d 135	4

<i>State v. Continental Ins. Co.</i> (2009), 170 Cal. App. 4th 160, review granted, 91 Cal. Rptr. 3d 106.....	11
<i>State ex rel. Quarto Mining Co. v. Foreman</i> (1997), 79 Ohio St. 3d 78	5
<i>State Hous. Auth. Risk Pool Ass'n, Inc. v. Erie Ins. Group</i> , 2004-Ohio-7223, 2004 Ohio App. LEXIS 6741	17
<i>Towns v. Northern Security Ins. Co.</i> (Vt. 2008), 964 A.2d 1150	10
<i>Truck Ins. Exch. v. Unigard Ins. Co.</i> (2000), 79 Cal. App. 4th 966	18
<i>United Nat'l Ins. Co. v. Admiral Ins. Co.</i> (E.D. Pa. Aug. 19, 1992), 1992 U.S. Dist. LEXIS 12336	17, 18
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St. 3d 216, 2003-Ohio-5849.....	5, 8
<i>Westfield Ins. Co. v. Milwaukee Ins. Co.</i> , 2005-Ohio-4746, 2005 Ohio App. LEXIS 4255	14
<i>Wheeling Pittsburgh Corp. v. Am. Ins. Co.</i> (W. Va. Cir. Ct. Oct. 18, 2003), 2003 WL 23652106.....	11
<i>Whitaker v. M.T. Automotive, Inc.</i> , 111 Ohio St. 3d 177, 2006-Ohio-5481	4
<i>Williamson v. Rubich</i> (1960), 171 Ohio St. 253	4

STATUTES

13 Ohio Laws 1301.21	9
----------------------------	---

MISCELLANEOUS

Appleman, <i>INS. L & PRAC.</i> § 4921 (1981)	19
5 OHIO JUR. 3D <i>Appellate Review</i> § 348 (June 2009 Supp.)	5
Lee R. Russ, 15 <i>COUCH ON INS.</i> §217:4 (3d ed.)	14

INTRODUCTION

As Appellee Pennsylvania General Insurance Company (“Penn General”) agrees, this case presents starkly the problem facing courts that have tried to apply the “all sums” allocation ruling adopted in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (“*Goodyear*”), to a contribution action. *Goodyear*, which permits an insured to select a single insurer to pay for long term injury, and places the burden of seeking contribution from other “applicable” coverage on the targeted insurer, has proven to be inequitable and unworkable. Under *Goodyear*, the insured, who is fully paid by the targeted insurer, has no incentive to comply with any of its obligations under policies issued by its non-selected insurers.

As the decisions below demonstrate, courts addressing contribution claims between the targeted insurer and the non-selected insurers since *Goodyear* have adopted two solutions to this problem, each unsatisfactory. One alternative, chosen by the trial court in this case, is to apply the policies of the non-selected insurers as written and hold that, if the insured does not comply with its contractual obligations, the policies are not “applicable” and there is no basis for contribution because there is no common obligation to the insured. However, this approach permits the insured by its own inaction to eliminate the targeted insurer’s right to contribution. A second, even more inequitable, alternative is the one adopted by the Eighth District here: to permit contribution by finding that the non-selected insurers’ policies are “applicable” despite the insured’s non-compliance. This approach overrides the non-selected insurers’ policies by retaining their obligations while eliminating their protections. Such a wholesale revision of contracts is grossly unfair to the non-selected insurers and violates constitutional protections against contract impairment.

Continental submits that a third alternative is available and would avoid such unfairness: This Court should overrule *Goodyear* and instead adopt a pro rata allocation where each “applicable policy” would pay a share of the loss based on its time on the risk. Under that allocation scheme, the insured would be required to comply with all of the requirements of the policies it purchased—including those relating to notice, an opportunity to defend and consent to settle. If the insured chose not to do so, it would suffer the consequences: the policy would be rendered “inapplicable” and the insured would have to pay that share. There would be no need for satellite contribution actions because each insurer would only pay its share of the loss.

Penn General “agrees with the arguments raised by CNA and [*Amicus Curiae*] CICLA to overrule *Goodyear*” (Br. at 21; *see also id.* at 22 n.56). Not surprisingly, *Amici Curiae* Ohio Manufacturers’ Association and several policyholder companies (collectively, “OMA”), do not. They have urged this Court not to reconsider *Goodyear*, arguing that no policyholder is a party to this action. That, however, is precisely the problem. *Goodyear* allows the policyholder to ignore its obligations under the non-selected policies, obtain full coverage for its claims, and walk away with impunity. Thus, under the framework *Goodyear* established, it is unlikely that the targeted insurer, policyholder, and non-selected insurer(s) would all be parties to a contribution action. The absence of the policyholder here reflects a defect in *Goodyear*, not a reason that this Court should avoid revisiting its holding. The continued viability of *Goodyear* is properly before this Court, and the inequities engendered by its “all sums” approach should be addressed.

In the alternative, this Court should at least clarify *Goodyear* to confirm that a targeted insurer can seek contribution from a non-selected insurer only if there has been compliance with all of the terms and conditions of a non-selected insurer’s policy. If the insured does not comply with its obligations under the non-selected insurer’s policies, it should bear the consequences and

be required to pay the pro rata share assigned to that non-selected insurer. In addition, the targeted insurer should insist that the insured comply with its obligations and invoke its rights to cooperation if the insured does not do so. Under no circumstances should this Court require the non-selected insurer to contribute when its policy has been violated.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *GOODYEAR* AND ORDER A PRO RATA TIME-ON-THE-RISK ALLOCATION FOR LONG-TERM INJURY.

A. *Goodyear's Continued Viability Is Properly Before This Court*

Penn General agrees that *Goodyear's* “continued vitality is properly before the court.” (Br. at 3). *Amicus Curiae* OMA nonetheless argues that this Court may not reach this issue. (OMA Br. 8-9). OMA is incorrect. *Goodyear's* continued viability is properly before this Court because it is an antecedent question embedded in Proposition of Law No. I as granted. For this Court to reach the issue of *Goodyear's* applicability to the instant contribution claim between a targeted insurer and a non-selected insurer, it must first determine whether the *Goodyear* framework remains the law of this State. *Cf. Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St. 3d 274, 279 (“When an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below to reach a legal issue that was raised, we will do so.”).

OMA suggests that this Court has established a strict rule against raising in a merits brief any “issues that an appellant fails to raise in its memorandum in support of jurisdiction.” (OMA Br. at 8). But in each of the cases OMA relies upon, (OMA Br. at 8-9), this Court merely refused to consider an argument that was far afield from the proposition of law presented in the

memorandum of jurisdiction—unlike the interpretation and application of *Goodyear*, which was front and center in Continental’s jurisdictional memorandum and opening brief.

For example, in *Corporex Development & Construction Management, Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409, ¶ 5 & n.1, this Court accepted jurisdiction to consider the scope of the economic-loss doctrine and therefore declined to address arguments on the unrelated issue of whether the appellate court had erred by reinstating an implied-product-warranty claim. Similarly, in *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St. 3d 177, 2006-Ohio-5481, ¶ 9 & n.2, this Court declined to consider whether the trial court had properly directed a verdict on a fraud claim where the jurisdictional memorandum solely addressed a separate claim under the Consumer Sales Practices Act. And in *Al Minor & Associates, Inc. v. Martin*, 117 Ohio St. 3d 58, 2008-Ohio-292, ¶ 9, this Court accepted jurisdiction to consider whether a memorized client list can be the basis of a trade secret violation and therefore declined to consider the separate issue of whether the client list was not a trade secret because it contained publicly available information. Nor does this case resemble *Williamson v. Rubich* (1960), 171 Ohio St. 253, (OMA Br. at 9), in which this Court dismissed an appeal where the appellant presented due process arguments in support of his motion to certify but then argued exclusively about a separate res judicata issue in his brief.

But even assuming the issue of *Goodyear*’s continued viability is not embedded within Proposition of Law No. I, this Court still may—and should—consider it. *Cf. C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 280 (rejecting argument that this Court “will not consider any proposition of law which is not raised in the memoranda supporting or opposing claimed jurisdiction”); *State v. Carter* (1971), 27 Ohio St. 2d 135, 139 (“While appellant’s failure to raise [an] issue in the form required by Rule 5(D) of the Rule of Practice of the

Supreme Court would warrant our refusal to consider it, this court may nonetheless choose to grant it consideration.”); 5 OHIO JUR. 3D *Appellate Review* § 348 (June 2009 Supp.) (“Ohio courts may, in their discretion, consider assignments of error not properly set forth in the parties’ briefs. . . . Although an appellate court is not required to consider assignments of error not properly set forth in the briefs, the court may determine such assignments in the interest of justice.”) (citing cases).

OMA’s criticism that Continental did not challenge *Goodyear* in the courts below is equally misplaced. (OMA Br. at 14-15). Prohibitions on raising new arguments on appeal “are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause.” *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, 81, *cited in* OMA Br. at 14. But Penn General has not been deprived of any opportunity to respond because it agrees that *Goodyear* should be overruled and that the issue of its viability is properly before this Court. Nor did Continental forego its “duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.” *Id.* Because both the trial court and the Court of Appeals were bound by this Court’s decision in *Goodyear*, *see, e.g., Mannion v. Sandel* (2001), 91 Ohio St. 3d 318, 322, seeking *Goodyear*’s reversal at any earlier stage would have been a futile exercise of no benefit to the courts below. In such situations, this Court has previously overruled (or substantially limited) its own precedent. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849 (substantially limiting *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.* (1999), 85 Ohio St. 3d 660, based on arguments that had not been presented to courts below, which were bound by that decision); *see also State v. 1981 Dodge Ram Van* (1988), 36 Ohio St. 3d 168, 170 (“The general rule is that an appellate court will not consider any error which counsel for a party

complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time *when such error could have been avoided or corrected by the trial court.*") (internal quotations omitted & emphasis added); *Fifth Third Bank v. Ducru Ltd. P'ship*, 157 Ohio App. 3d 463, 2004-Ohio-1801, ¶ 20 ("Ordinarily, issues not raised in the trial court cannot be raised for the first time on appeal. *But because it is clear from the record that the trial court could not have made a decision concerning the promissory note, we must reverse and remand on this point.*"). Cf. *FirstEnergy Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 401, 2002-Ohio-2430, ¶ 11 ("This court has complete and independent power of review as to questions of law.")¹

Finally, even if there were a waiver here, "[t]his court has held on numerous occasions that the waiver doctrine is discretionary." *Hill v. Urbana* (1997), 79 Ohio St. 3d 130, 133-34. Since raising the possibility of overruling *Goodyear* below would have been a futile exercise, and developments since *Goodyear* strongly warrant its reconsideration, this Court should not allow the wording of Proposition of Law No. 1 to preclude consideration of *Goodyear*'s continued viability.

B. This Court Should Overrule *Goodyear*

Penn General "agrees with the analysis and criticism of *Goodyear*" in Continental's brief and notes with approval the sharp trend in other States toward pro rata allocation. (Br. at 22 n.56). But *Amicus Curiae* OMA argues that this Court should adhere to *Goodyear* despite its cumbersome and inequitable results. OMA's arguments are unpersuasive. First, it incorrectly asserts that *Goodyear* was based on a "long line of Ohio cases." (OMA Br. at 25). But

¹ This case is dissimilar to *Republic Steel Corp. v. Board of Revision of Cuyahoga County* (1963), 175 Ohio St. 179, 184, cited in OMA Br. at 15 n.4, where the appellant did not challenge the methodology and procedure for determining a property's value before the Board of Revision or the Board of Tax Appeals—which could have considered such a challenge—but instead waited until its appeal to this Court to do so.

Goodyear in fact did not cite any Ohio cases in support of its “all sums” holding and relied exclusively on authority from other jurisdictions. *Goodyear*, 95 Ohio St. 3d 512 at ¶¶ 9-12. Prior to *Goodyear*, this Court had not determined the proper method of allocation for cases involving long term injury extending across multiple policy periods, and other courts applying Ohio law had issued conflicting opinions. Compare *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.* (6th Cir. 2000), 210 F.3d 672, 690 (applying pro rata allocation), and *GenCorp, Inc. v. AIU Ins. Co.* (N.D. Ohio 2000), 104 F. Supp. 2d 740, 752 (applying pro rata allocation), with *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.* (C.P. 1995), 74 Ohio Misc. 2d 183, 216 (applying “all sums” allocation). As stated in one case OMA itself cites: “A searching review of Ohio law reveals that the Ohio courts have yet to decide the specific issues before this Court [regarding allocation method].” *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.* (D.D.C. 1984), 597 F. Supp. 1515, 1520; see also *Millennium Chems., Inc. v. Lumbermens Mut. Cas. Co.* (N.D. Ohio Mar. 13, 2001), 2001 U.S. Dist. LEXIS 20974 at **12-15 (rejecting argument that excess insurers were fraudulently joined because Ohio law on allocation was unsettled and did not unequivocally require horizontal exhaustion).

OMA next claims that the “all sums” determination is required by the policy language, arguing that “courts look to the ‘all sums’ language contained in a policy’s basic grant of coverage, which requires the insurers to pay ‘all sums’ the policyholder becomes legally obligated to pay in regard to the underlying liability.” (OMA Br. at 23-24). OMA’s paraphrasing, however, is not accurate. The policy provisions do not require the insurer to pay all amounts “the policyholder becomes legally obligated to pay in regard to the underlying liability”; the policy provides that the insurer will pay “all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . to which this insurance

applies caused by an occurrence” (Supp. pp. 218 (Penn General); 222 (Continental) (emphasis added)). Furthermore, the “Policy Period; Territory” provision in the policies specifically provides that “this insurance applies only to bodily injury or property damage which occurs during the policy period and within the policy territory.” (Supp. pp. 218, 223). These provisions, read together, make plain that the policies *do not apply* to bodily injury that occurs outside the policy period.

Neither *Goodyear* nor OMA address the limitation contained in the “Policy Period; Territory” provision. Instead, this Court appeared to assume in *Goodyear* that “[t]here is no language in the triggered policies that would serve to reduce an insurer’s liability if an injury occurs only in part during a given policy period.” 95 Ohio St. 3d 512 at ¶ 9. The policies, however, plainly specify that they do not apply to bodily injury or property damage that occurs in years before or after the policy period.

Requiring an insurer to pay for injury that happens outside of the policy period is directly contrary to the policy language and violates *Goodyear’s* own pronouncement that “insurance policies should be enforced in accordance with their terms as are other written contracts.” *Id.* Courts are not free to override the language of an insurance policy—or any other contract—to create coverage that was neither intended nor provided by the policy. See *Galatis*, 100 Ohio St. 3d 216 at ¶ 9 (the “freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against state encroachment upon contracts”); *Blount v. Smith* (1967), 12 Ohio St. 2d 41, 47 (the 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.”); *Nottingdale Homeowners’ Ass’n v. Darby* (1987), 33 Ohio St. 3d 32,

37, *superseded by statute*, 13 Ohio Laws 1301.21, *as recognized in New Mkt. Acquisitions, Ltd. v. Powerhouse Gym* (S.D. Ohio 2001), 154 F. Supp. 2d 1213, 1225 (“[T]his court will not interfere with the right of the people of this state to contract freely and without needless limitation.”). Thus, *Goodyear’s* requirement that a targeted insurer pay for injury that did not occur during its policy period raises serious constitutional concerns.

The “all sums” approach also raises equitable issues which this Court attempted to address by holding that the targeted insurer can seek contribution from other applicable policies. Indeed, *Goodyear* is based on an assumption that all of the insurers owe a common obligation. Here, however, the insured’s actions prevented any contribution claim by Penn General from arising. The Eighth District’s solution to that problem was to rewrite Continental’s policies so as to retain all of Continental’s contractual obligations while abrogating all of Continental’s contractual protections, including the right to be given prompt notice of a claim, the right to select counsel and defend the action and the right to determine when and whether to settle.²

There can be no doubt that the Eighth District regarded this express override of the contractual provisions as compelled by *Goodyear*:

- “[U]nder 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.” (Apx. p. 20).
- “Nationwide and Continental argue, and the trial court agreed, that Pennsylvania General’s failure to notify them of the DiStefano matter in the six weeks between Pennsylvania General’s learning of the case and Park-Ohio’s early settlement prejudiced them, because they were unable to

² Continental’s policies provide: “In the event of an occurrence, written notice . . . shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.” (Supp. p. 225). The policies also provide that Continental has “the right and duty to defend any suit against the insured . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . .” (Supp. p. 222). Finally, the policies also state: “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 to others at the time of accident.” (Supp. p. 225).

participate in the defense and settlement of the lawsuit. *But the all sums approach adopted by the Ohio Supreme Court in Goodyear anticipates exactly this approach.*" (Apx. p. 21) (emphasis added).

- "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." (Apx. p. 22)
- "In short, Nationwide and Continental argue that it is not equitable to allow Pennsylvania General to impose its coverage, litigation and settlement decisions on them as non-selected insurers. But, as already discussed, the all sums approach anticipates this very result." (Apx. p. 23).

The Eighth District's unilateral reformation of Continental's policies, decades after they were issued, cannot be squared with this State's constitutional prohibitions against interfering with the freedom of contract, nor with basic principles of contract and equity. *Goodyear* could not have anticipated such a complete abrogation of the non-selected insurers' contractual rights. Now that such a consequence is apparent, *Goodyear* should be overruled.

The decisions of other States since *Goodyear* likewise support this approach. As Penn General itself notes (Br. at 22 n.56), other States have increasingly rejected the "all sums" approach in favor of the more equitable and efficient pro rata method of allocation. By continuing to follow the "all sums" approach, Ohio is now in a distinct minority of States. *See Boston Gas Co. v. Century Indem. Co.* (1st Cir. 2008), 529 F.3d 8, 13 ("growing plurality" apply pro rata allocation). Since *Goodyear* was decided in 2002, the highest courts of six states have squarely rejected "all sums" allocation for progressive injury cases.³ *Boston Gas Co. v. Century Indem. Co.* (Mass. 2009), 910 N.E.2d 290, 306 (pro rata allocation is "consistent with, if not compelled by, the most reasonable construction" of policy language); *Towns v. Northern*

³ *See* Cont. Merit Br. at 19-20. Continental's opening brief included *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.* (Md. Ct. Spec. App. 2002), 802 A.2d 1070, 1104, on this list, but that decision is from an intermediate appellate court.

Security Ins. Co. (Vt. 2008), 964 A.2d 1150, 1166 (advantages of pro rata include “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”); *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s, London* (N.H. 2007), 934 A.2d 517, 526-27 (describing all sums as “improvident” and “inconsistent with the cumulative nature” of progressive injuries); *Aetna Cas. & Sur. Co. v. Commonwealth* (Ky. 2005), 179 S.W.3d 830, 842; *Security Ins. Co. v. Lumbermens Mut. Cas. Co.* (Conn. 2003), 826 A.2d 107, 121 (“Neither the insurers nor the insured could reasonably have expected that the insurers would be liable for losses occurring in periods outside of their respective policy coverage periods.”); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.* (Kan. 2003), 71 P.3d 1097, 1134.

OMA’s assertion that the balance of authority between “all sums” and pro rata remains “roughly in equipoise,” (OMA Br. at 16), ignores the clear national trend of the last several years. In addition to the six state supreme courts adopting pro rata allocation,⁴ numerous other state and federal courts have rejected “all sums” in post-*Goodyear* decisions. (See Continental’s Merit Brief at 19-20 and cases cited therein). In contrast, OMA cites only four post-*Goodyear* cases applying “all sums,” including one unpublished trial court decision, *Wheeling Pittsburgh Corp. v. Am. Ins. Co.* (W. Va. Cir. Ct. Oct. 18, 2003), 2003 WL 23652106, one case where the state supreme court previously adopted the all sums approach, *Emhart Indus., Inc. v. Century Indem. Co.* (1st Cir. 2009), 559 F.3d 57, 70-72 (applying existing Rhode Island law), and one case currently on appeal that also purports to follow existing state law, *State v. Continental Ins.*

⁴ A petition for rehearing challenging the Massachusetts Supreme Judicial Court’s rejection of “all sums” in *Boston Gas Co.*, (OMA Br. at 18), was denied. See Docket No. SJC-10246, available at <http://www.ma-appellatecourts.org>.

Co. (2009), 170 Cal. App. 4th 160, 176, *review granted*, (Mar. 18, 2009), 91 Cal. Rptr. 3d 106. (OMA Br. at 15-19). Courts that have undertaken a new analysis of allocation since *Goodyear* have come down strongly in favor of pro rata allocation.

OMA also incorrectly argues that pro rata allocation would “severely limit important policyholder rights” and “impose substantial new burdens on policyholders.” (OMA Br. at 13). But a pro rata allocation requires a policyholder merely to comply with the contractual conditions of the insurance policies it purchased. If Ohio had applied pro rata allocation in this case and Park-Ohio had complied with its policies, Park-Ohio would have received the same coverage it received under the all sums approach.⁵ The only difference would have been that Park-Ohio would have had an incentive to notify all four of its insurers of the claim, as it was contractually obligated to do, in order to preserve its rights to coverage. Park-Ohio’s defense and settlement would have been covered (subject to applicable deductibles and retentions), but it would have received an easily calculable portion of those amounts from each insurer. Thus, Park-Ohio would have received the benefit of the coverage it purchased, and the insurers would have received the contractual protections to which they were entitled as conditions of that coverage. In addition, there would have been no need for the costly contribution litigation that has resulted, because the issue of what each insurer was required to pay would have been resolved up front. Such a system would be a vast improvement over *Goodyear* and should be adopted to eliminate the inequities and problems associated with “all sums.”

⁵ A policyholder would not receive payment for its entire claim if it had not purchased insurance in every year in which injury occurred or if one of its insurers became insolvent. But the policyholder *should not* be able to recover the entire amount of its claim in that situation. Just as insurance policies do not insure against injury occurring outside the policy period, they do not insure against the risk that a policyholder will not purchase sufficient or solvent coverage. The “all sums” rule creates a false equivalence between an insured that consistently purchased insurance and an insured that obtained less comprehensive coverage.

II. NO CLAIM FOR CONTRIBUTION MAY BE MADE HERE BECAUSE THE INSURED’S BREACH OF CONTINENTAL’S POLICY RENDERED IT “INAPPLICABLE” TO THIS CLAIM.

In the alternative, if this Court does not overrule *Goodyear*, it should clarify it to confirm that a targeted insurer may seek contribution from a non-selected insurer only if the non-selected insurer’s policy is “applicable.”⁶ In its brief, Penn General argues that this Court should ignore the policy language in determining whether or not Continental’s policy is “applicable” to this claim, but rely on it when determining the amount of contribution to which Penn General is entitled. Penn General has it backwards. Contribution should not lie unless both insurers owe an obligation *to the insured* to cover a particular loss. Thus, a court must first decide whether there is coverage for a claim based on all the terms of the non-selected policy. If there is no coverage (either because of an exclusion or because the insured has breached the policy conditions), there is no common obligation to the insured and therefore the targeted insurer has no right to seek contribution. Once a court determines that both insurers have a common obligation to the insured and that contribution is appropriate, principles of equity determine how the obligation should be shared—not language in contracts between the insured and the various insurers.

In addition, because the availability of contribution claims was one of the primary justifications for requiring a targeted insurer to pay for loss outside its policy period, this Court should clarify the obligations of both the targeted insurer and the insured. This Court should require a targeted insurer to enforce its policy provisions requiring an insured to cooperate. If

⁶ Penn General recognizes that “CNA’s revision appears to be substantively identical to the Proposition of Law accepted by this Court.” (Penn General Br. at 24 n.9). But OMA contends that Continental’s “Alternative” proposition of law is not properly before this Court because it is “largely a paraphrase” of “Proposition of Law No. II,” which this Court did not agree to review. (OMA Br. at 34). That is incorrect. Continental’s “Alternative” proposition is virtually identical to “Proposition of Law No. I,” which sought full compliance with the terms and conditions in a non-targeted insurer’s policy as a prerequisite to a claim for contribution against that non-targeted insurer.

the insured nevertheless fails to comply with its obligations, this Court should limit the insured's recovery from the selected insurer to a pro rata share and hold that the insured must pay any remaining shares of the non-selected carriers.

A. Continental's Policy Was Not Applicable To The DiStefano Loss

Penn General argues that it is entitled to contribution because all of the policies issued by Penn General, Continental and Nationwide were "triggered" by the *DiStefano* claim and therefore all insurers had a common liability. (Br. at 10-14). But Penn General confuses "trigger" with *Goodyear's* requirement of "applicability." Trigger in a general liability policy looks solely at whether bodily injury or property damage occurred during the policy period. *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 2005-Ohio-4746, 2005 Ohio App. LEXIS 4255, ¶ 10. Even if a policy is "triggered," however, it is not necessarily "applicable" to a particular claim. All of the terms and conditions to coverage must be examined to determine if an exclusion precludes coverage or a failure to comply with a policy condition vitiates coverage and renders the policy "inapplicable."

It is black letter law that to obtain contribution, there must be "a common liability upon the same obligation." *Assets Realization Co. v. Am. Bonding Co.* (1913), 88 Ohio St. 216, 253; *Republic Steel v. Glaros* (1967), 12 Ohio App. 2d 29, 33; *Nat'l Fire Ins. Co. v. Dennison* (1916), 93 Ohio St. 404, 410. As a leading insurance treatise explains: "[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*." Lee R. Russ, 15 COUCH ON INS. §217:4 (3d ed.) (emphasis added). Thus, the threshold question is whether Continental owed any obligation to pay Park-Ohio for the *DiStefano* claim. Because the answer is indisputably "no," contribution is not appropriate.

The only bases for requiring Continental to pay the *DiStefano* claim are the contracts of insurance Continental entered into with Park-Ohio. There is no dispute that Park-Ohio breached those policies by failing to give timely notice,⁷ refusing to allow Continental to select defense counsel and settling the claim without Continental's consent.⁸ Because of those breaches, Continental owed *no obligation* to Park-Ohio to pay the *DiStefano* claim. Thus, the basis for a contribution claim—the common obligation to the insured—did not exist, and it is manifestly unfair to Continental to impose any contribution obligation under these circumstances.

Penn General nevertheless makes a half-hearted attempt to argue that Continental suffered no prejudice and therefore coverage should still be afforded. (Br. at 16-19). Penn General relies on *Ferrando v. Auto-Owners Mut. Ins. Co.* (2002), 98 Ohio St. 3d 186, 2002-Ohio-7217, to support its argument. In *Ferrando*, however, the Court held that an insured's breach of conditions such as a consent-to-settle or notice provision is presumed prejudicial to the insurer absent evidence to the contrary. *Id.* at ¶ 88. The insured bears the burden of demonstrating that its breach did not prejudice the insurer—a burden neither Park-Ohio nor Penn General could meet here. See *Ruby v. Midwestern Indem. Co.* (1988), 40 Ohio St. 3d 159, 161.

⁷ Penn General argues that it did not violate the notice provisions or the 6-year statute of limitations for contribution actions because it had no contribution claim until it fully paid the *DiStefano* defense costs and settlement in late 2005. (Br. at 19-21). Penn General misses the point. Continental is not arguing that Penn General had obligations under Continental's policies or that a statute of limitations bars Penn General's claims. Rather, when Park-Ohio failed to meet its contractual duties to Continental, it relieved Continental of any obligation to pay the claim. Thus, there was no common liability between Penn General and Continental with respect to the *DiStefano* claim.

⁸ OMA suggests Park-Ohio may have been unaware of the identities of its other insurers before it settled the claim. (OMA Br. at 6-7). However, Park-Ohio never made that argument; it said that it had “an absolute right” to designate only the Penn General policies. (Supp. p. 122). Although it promised to identify other insurers, it did not do so for 14 months—and then only in response to formal discovery. (Supp. pp. 150-68). Moreover, even if Park-Ohio had misplaced its other policies, “the insured's delay in notifying the insurer will not be excused simply because the policy is lost.” *Helman v. Hartford Fire Ins. Co.* (1995), 105 Ohio App. 3d 617, 623.

There is ample evidence that Continental *was* prejudiced in this case. Park-Ohio's failure to provide timely notice, allow Continental to select counsel or defend the action, or obtain Continental's consent to the settlement all substantially prejudiced Continental in several ways:

- **Continental was not permitted to properly investigate the claim to determine if there were other potentially liable parties or defenses to its insured's liability.** By the time Continental received notice, the case had been settled more than two years earlier.
- **Continental was not permitted to select counsel.** Continental was given no opportunity to determine if the counsel selected by the insured was qualified or whether a different rate could have been negotiated. Continental has established relationships with capable defense counsel throughout the country but it was not permitted to utilize its expertise in the selection and retention of counsel.
- **Continental was not permitted to participate in the defense and strategy.** Continental employs experienced claims personnel who evaluate claims, advise on strategy and make reasoned settlement decisions. Continental was not permitted to utilize any of these resources in defending this claim.
- **Continental was not permitted to determine when to initiate settlement.** Penn General claims the case had to be settled because Park-Ohio was the last solvent tortfeasor. Had Continental been given timely notice of the claim, it could have tried to settle earlier to avoid having Park-Ohio be the "last defendant standing."
- **Continental was not permitted to determine the amount of settlement.** Although Penn General's counsel opined after the fact that the \$1 million settlement was not unreasonable, there were undoubtedly a number of settlement amounts that could be considered reasonable. Continental should have been given the right to negotiate to see if the case could have been settled for a lower amount within a "reasonable settlement range."

That Penn General was given notice and an opportunity to defend does not mitigate the prejudice to Continental. Penn General failed to exercise its contractual rights to appoint counsel, participate in the defense of the case and engage in settlement negotiations. Continental should not be bound by Penn General's inaction.

Ohio courts have recognized that the prejudice sustained by Continental is precisely the type of prejudice that voids coverage. In a closely analogous case, for example, one court found

that a targeted insurer could not receive contribution from another insurer that had not been given notice of the suit until two months after it was dismissed. *State Hous. Auth. Risk Pool Ass'n, Inc. v. Erie Ins. Group*, 2004-Ohio-7223, 2004 Ohio App. LEXIS 6741. The court ruled the targeted insurer could not rebut the presumption of prejudice to the non-selected insurer (Erie), noting that "Erie had no opportunity to investigate the facts, investigate coverage, or pursue its own litigation strategies." *Id.* at ¶ 24. The court noted that had Erie received notice of the underlying suit, "it may have been able to manage the litigation with less expenditure," resulting in lower defense costs overall. *Id.* at ¶ 25. *See also Bellaire TV Cable Co. v. Valley Constr. Co.*, 2002-Ohio-3203, 2002 Ohio App. LEXIS 3231, ¶ 46 (prejudice because insurer was "deprived of the opportunity to control or even influence the pretrial strategy"); *Copper v. Willis* (April 17, 2000), 2000 Ohio App. LEXIS 1674 at *12 (notice three years after accident 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"); *United Nat'l Ins. Co. v. Admiral Ins. Co.* (E.D. Pa. Aug. 19, 1992), 1992 U.S. Dist. LEXIS 12336 at *17 (settling insurer could not obtain payment from coinsurer that did not receive notice of the underlying claim until after the claim had been settled, holding as a matter of law that an insurer is prejudiced when "notice is first supplied when the insured's liability is a *fait accompli*").

Penn General made no attempt to prove that Park-Ohio's policy breaches did not prejudice Continental. The trial court accordingly found that Continental was in fact prejudiced:

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

The Court in *Ormet* rejected the argument that the Plaintiff handled the underlying claim in the most efficient and cost-effective manner possible, and the insurers were indeed prejudiced by the delay in giving notice. Just as the insurers in *Ormet* were precluded from having any say in the terms of the settlement regarding cleanup, so too were the Defendants in the captioned matter regarding the terms of settlement of the DiStefano lawsuit.

(Apx. pp. 35, 39). On appeal, the Eighth District did not take issue with the factual basis for the Court's finding, but found that Continental could not be prejudiced as a matter of law because *Goodyear* had eliminated all of Continental's rights under the policies. As noted above, the court determined that "Park-Ohio had no duty to notify Nationwide and Continental of the DiStefano claim," and "[i]n 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." (Apx. 20-22). Thus, the appellate court's finding that there was no prejudice was based not on the facts of this case, but on its erroneous determination that *Goodyear* should be interpreted to eliminate all of the non-targeted insurers' contractual rights to notice, an opportunity to defend and the right to control settlement. Because such a wholesale abrogation of the policies is unconstitutional, this Court at a minimum should clarify that *Goodyear* does not compel such a result even if it does not overrule *Goodyear* outright.

Park-Ohio's breach of contract thus eliminated any obligation Continental would have had to pay the *DiStefano* claim and bars Penn General from obtaining contribution from Continental because the essential prerequisite of a "common obligation" is missing. See *Truck Ins. Exch. v. Unigard Ins. Co.* (2000), 79 Cal. App. 4th 966, 974 ("absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy"); *United Nat'l Ins. Co.*, 1992 U.S. Dist. LEXIS 12336 at *17 (settling insurer could not obtain contribution from coinsurer that did not receive timely notice); *Allstate Ins. Co.*

v. United Servs. Auto Ass'n (Va. 1995), 452 S.E.2d 859, 861 (no contribution when breach of policy condition eliminated any “common obligation” to the insured); *Comm'rs of State Ins. Fund v. Ins. Co. of N. Am.* (1992), 80 N.Y.2d 992, 994 (no contribution action where exclusion in one insurer’s policy barred coverage because no common obligation); *IFA Ins. Co. v. Atl. Mut. Ins. Co.* (N.J. Super. Ct. 2000), 751 A.2d 610, 612 (same); Appleman, *INS. L & PRAC.* § 4921 (1981) (“[I]f one policy is . . . unenforceable because of a failure to give notice of the accident or suit, a lack of cooperation, or any one of many other possible exceptions or policy defenses, contribution cannot be compelled by the one insurer which is still liable against the other”).

B. This Court Should Also Clarify The Rights And Obligations Of The Targeted Insurer And The Insured Under *Goodyear*

If this Court declines to overrule *Goodyear*, it should also make clear that the availability of contribution for the targeted insurer is critical to the “all sums” rule. As discussed above, the availability of a contribution claim requires full compliance with the non-selected insurers’ policies in order to protect the contractual rights of the non-selected insurers. The obligation to comply with the policy conditions rests largely with the insured, and the Court should clarify that insureds must take all necessary steps to preserve the targeted insurer’s contribution claim. If the insured does not comply with its obligations to all insurers (both targeted and non-selected), it should bear the consequences. If a targeted insurer cannot obtain contribution because of the insured’s actions, the insured should be limited to obtaining a pro rata share from the selected insurer, and the insured must pay the shares of the non-selected carriers.

If the insured fails to meet its obligations under the non-selected insurers’ policies, the Court should also make clear that the targeted insurer has both the ability and the responsibility to protect its contribution rights. *Goodyear* does not extinguish the targeted insurer’s contractual

rights against the insured, including its rights to require the insured to cooperate. Here, as the trial court recognized, Penn General did not take any action to preserve its contribution rights:

The record shows that Penn General did not even request these insurers be put on notice until four months after the settlement occurred. By February 2003, Penn General was aware that a number of other insurers would potentially be triggered, but it nevertheless paid Park-Ohio's defense costs and settlement in October and December 2003, before obtaining *any* information on other insurers. This eliminated any defense on the late notice and voluntary payments provisions that Penn General might have had. Plaintiff should not have waited until it was sued for breach of contract and bad faith to seek other insurance information from Park-Ohio. Instead, Plaintiff should have made certain the other insurers were notified before the DiStefano case was settled. Its failure to do so provides no equitable reason for this Court to endorse that failure.

(Apx. 37-38). If Penn General had simply enforced its contractual provisions and denied coverage based on the insured's failure to cooperate, no contribution action would have been required. Thus, Penn General must also bear the responsibility for its own inaction.

CONCLUSION

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

Date: October 26, 2009

Respectfully Submitted,



PAUL J. SCHUMACHER (#0014370)

TIMOTHY J. FITZGERALD* (#0042734)

**Counsel of Record*

GALLAGHER SHARP

1501 Euclid Avenue – Sixth Floor

Cleveland, OH 44115-2108

Tel: (216) 241-5310

Fax: (216) 241-1608

E-mail: pschumacher@gallaghersharp.com

tfitzgerald@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
E-mail: 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
E-mail: kathleensullivan@quinnemanuel.com
janebyrne@quinnemanuel.com

*Counsel for Defendant-Appellant,
Continental Casualty Company*

PROOF OF SERVICE

A copy of the foregoing *Reply Brief of Appellant Continental Casualty Company* was sent by regular U.S. Mail, postage pre-paid, this 26th day of October, 2009 to the following:

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

Elaine Whiteman Klinger, Esq.
CHRISTIE PARABUE MORTENSEN
YOUNG, PC
1880 JFK Boulevard, 10th Floor
Philadelphia, PA 19103

*Counsel for Plaintiff-Appellee
Pennsylvania General Insurance Co.*

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

Laura A. Foggan, Esq.
Gregory J. Langlois, Esq.
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006

*Counsel for Amicus Curiae Complex
Insurance Claims Litigation Association*

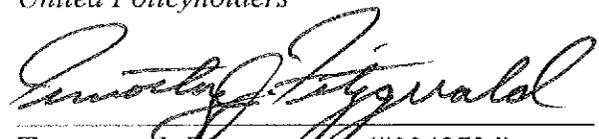
John T. McLandrich, Esq.
Thomas S. Mazanec, Esq.
Frank H. Scialdone, Esq.
MAZANEC, RASKIN, RYDER & KELLER
CO., L.P.A.
100 Franklin's Row
34350 Solon Road
Cleveland, OH 44139

*Counsel for Defendant-Appellant
Nationwide Ins. Co.*

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

Keven Drummond Eiber, Esq.
Caroline L. Marks, Esq.
BROUSE MCDOWELL
1001 Lakeside Avenue, Suite 1600
Cleveland, OH 44114-1151

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


TIMOTHY J. FITZGERALD (#0042734)