

ORIGINAL

IN THE SUPREME COURT OF OHIO

The Lincoln Electric Company,)	Supreme Court Case
)	No. 2013-1088
Plaintiff-Petitioner,)	
)	On Consideration of the Certified Question
v.)	of State Law from the United States District
)	Court, Northern District of Ohio,
Travelers Casualty and Surety Company,)	Eastern Division
<i>et al.</i> ,)	
)	District Court Case No. 1:11CV2253
Defendants-Respondents.)	

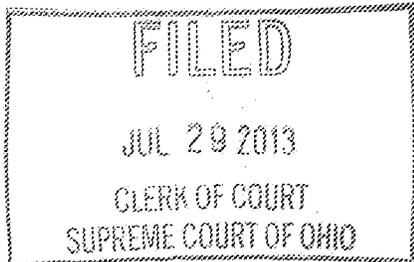
PRELIMINARY MEMORANDUM IN SUPPORT OF ACCEPTANCE OF THE CERTIFIED QUESTION OF STATE LAW OF AMICI CURIAE, THE OHIO MANUFACTURERS' ASSOCIATION; BRIDGESTONE AMERICAS TIRE OPERATIONS LLC; CHIQUITA BRANDS INTERNATIONAL, INC.; CLIFFS NATURAL RESOURCES INC.; DANA COMPANIES, LLC; DIEBOLD, INCORPORATED; DUKE ENERGY OHIO, INC.; EATON CORPORATION; FOREST CITY ENTERPRISES INC.; GOODRICH CORPORATION; THE GOODYEAR TIRE & RUBBER COMPANY; MATERION CORPORATION; MEADWESTVACO CORPORATION; MW CUSTOM PAPERS, LLC; NORDSON CORPORATION; NOVELIS CORPORATION; OWENS CORNING; PILKINGTON NORTH AMERICA, INC.; POLYONE CORPORATION; RPM INTERNATIONAL, INC.; THE SHERWIN-WILLIAMS COMPANY; WASTE MANAGEMENT, INC.

Paul A. Rose (0018185)
 (Counsel of Record)
 Clair E. Dickinson (0018198)
 BROUSE MCDOWELL
 388 S. Main Street, Suite 500
 Akron, Ohio 44311
 330.535.5711 – phone
 330.253.8601 – fax
prose@brouse.com
cdickinson@brouse.com

Caroline L. Marks (0071150)
 BROUSE MCDOWELL
 600 Superior Avenue East
 Suite 1600
 Cleveland, Ohio 44114
 216.830.6830 – phone
 216.830.6807 – fax
cmarks@brouse.com

Counsel for Amici Curiae

(Counsel continued on next page)



Anna P. Engh (*pro hac vice pending*)
Danielle S. Barbour (*pro hac vice pending*)
Jamar K. Walker (*pro hac vice pending*)
Sarah R. MacDonald (*pro hac vice pending*)
Timothy D. Greszler (*pro hac vice pending*)
Covington & Burling – Washington
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202.662.6000 – phone
202.778.5221 – fax
aengh@cov.com
dbarbour@cov.com
jwalker@cov.com
smacdonald@cov.com
tgreszler@cov.com

Nicholas A. DiCello (0075745)
William B. Eadie (0085627)
Dennis R. Lansdowne (0026036)
Spangenberg, Shibley & Liber
1001 Lakeside Ave., E., Suite 1700
Cleveland, OH 44114
216.696.3232 – phone
216.696.3924 – fax
ndicello@spanglaw.com
weadie@spanglaw.com
dlansdowne@spanglaw.com

Yvette McGee Brown (0030642)
Chad A. Readler (0068394)
(Counsel of Record)
Jones Day
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
614.469.3939 – phone
614.461.4198 – fax
yvmegeebrown@jonesday.com
careadler@jonesday.com

***Counsel for Plaintiff-Petitioner
The Lincoln Electric Company***

Matthew T. O'Connor
Michelle L. Hertz
Alexander B. Simkin
Bryce L. Friedman
Mary Beth Forshaw
Simpson, Thacher & Bartlett – New York
425 Lexington Avenue
New York, NY 10017
212.455.2000 – phone
212.455.2502 – fax
mcoconnor@stblaw.com
mhertz@stblaw.com
asimkin@stblaw.com
bfriedman@stblaw.com
mforshaw@stblaw.com

Michael E. Smith (0042372)
Frantz Ward
2500 Key Tower
127 Public Square
Cleveland, OH 44114
216.515.1660 – phone
216.515.1650 – fax
msmith@frantzward.com

***Counsel for Defendants-Respondents
Travelers Casualty and Surety Company
and St. Paul Fire and Marine Insurance
Company***

TABLE OF CONTENTS

I. INTEREST OF AMICI CURIAE..... 1

II. INTRODUCTION AND SUMMARY..... 2

III. STATEMENT OF THE CASE AND FACTS 3

IV. LAW AND ARGUMENT 4

 A. Controlling Principles of Law, Equity, and Public Policy 5

 1. Ohio’s Law on Trigger.....5

 2. Ohio’s Law on Allocation.....6

 3. Ohio’s Law on “Drop-Down” Liability6

 4. Ohio’s Law on Contribution.8

 5. Ohio’s Public Policy Considerations8

 B. Conflict between State and Federal Courts in Applying these
 Principles..... 9

V. CONCLUSION..... 14

I. INTEREST OF AMICI CURIAE

The Ohio Manufacturers' Association is a statewide association of approximately 1,600 manufacturing companies, which collectively employ the majority of the 610,000 men and women who work in manufacturing in the state of Ohio and account for almost 17% of Ohio's gross domestic product. The remaining amici curiae participating in this brief, which are listed in the caption hereto, are companies engaged in various businesses or industries in Ohio. They are incorporated and/or conduct substantial business operations in the state. As a result, they rely significantly upon general liability insurance policies in Ohio to provide coverage for their various risks and, correspondingly, upon the body of Ohio law that protects their insurance rights.

The certified question implicates a number of long-standing, fundamental insurance rights. These rights, forged by this Court over many decades based upon insurance policy language such as that at issue here, create an environment in which policyholders can conduct business in a sensible, reasonable manner and one that also is both fair and predictable for insurers. Ohio, accordingly, is a favorable venue both for policyholders to conduct business and for insurers to sell coverage to protect against risks inherent in those businesses.

These amici curiae include companies that have an interest in this case, therefore, both as policyholders, whose insurance coverage rights are implicated by the certified question, and as policy purchasers, whose insurance market choices, ultimately, would be reduced if Ohio's well-crafted insurance coverage jurisprudence were abandoned or distorted as advocated by the particular insurers in this case. Further, as commercial policyholders engaged in Ohio in many businesses and industries, the amici curiae are able to offer a broad perspective to this Court regarding the insurance coverage issues invoked by the certified question.

II. INTRODUCTION AND SUMMARY

The Federal District Court for the Northern District of Ohio has certified the following question to this Court:

May an insured who has accrued indemnity and defense costs arising from progressive injuries, and who settles resultant claims against primary insurer(s) on a pro rata allocation basis among various primary insurance policies, employ an “all sums” method to aggregate unreimbursed losses and thereby reach the attachment point(s) of one or more excess insurance policies?

The question implicates four different Ohio insurance issues, which commonly are referred to as the “trigger,” “allocation,” “drop-down,” and “contribution” issues. Regarding each, the rights of policyholders and corresponding duties of and protections for insurers have been established through substantial, consistent jurisprudence from this Court. Although the precise question certified has not been addressed directly by this Court, and although state and federal courts have disagreed regarding the question, the prior decisions of this Court will provide the answer.

In fashioning this law, this Court has been guided by multiple legal, equitable, and public policy principles that have served well both Ohio’s citizens and its court system. The principles include the mandate that contracts should be enforced as written, that settlements should be encouraged, that forfeitures should be avoided, and that judicial economy should be promoted.

The certified question provides this Court an opportunity to explain how these integrated facets of Ohio insurance coverage law work together, particularly when applied in a manner consistent with guiding public policy principles. The question also provides the Court an opportunity to affirm and elaborate upon these fundamental concepts of Ohio insurance law, which increasingly have been under attack by various insurers, often in battles waged in federal courts. The benefit of this Court accepting and addressing the certified question would be

widespread, not only for Ohio policyholders and their insurers, but, as the certifying court has recognized, also for federal courts as they attempt to apply Ohio law.

III. STATEMENT OF THE CASE AND FACTS

Lincoln Electric has been sued by thousands of persons who claim they have been injured by long-term exposure to allegedly hazardous substances contained in Lincoln Electric's welding products. This case, then, is typical of long-tail claims asserted against Ohio policyholders, in that it involves multiple claims for injury or damage spanning multiple policy periods and penetrating into umbrella or excess layers of liability insurance coverage.

The insurance coverage program at issue also is typical for Ohio policyholders, particularly large commercial policyholders, in that it includes primary insurance at low limits of coverage—in this case \$2 million per year—and overlying umbrella coverage that attaches at this \$2 million level. As also is typical, the policyholder in this case has settled with its primary insurer and has agreed, under the terms of the settlement, that the primary insurer need pay only a portion of the defense and indemnity costs incurred in regard to the underlying claims.

Lincoln Electric's settlement with its primary insurer has left it with unreimbursed costs for defense and indemnity. This, also, is typical, in that primary insurers, like all other settling parties, are motivated to settle only if the settlement will provide some benefit for them. Much like the policyholders in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, and *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, two cases cited by the Northern District of Ohio in its certification order, the policyholder here is proceeding to collect its unreimbursed costs from its overlying umbrella insurers, which insured these same risks. The umbrella insurers in this case, however, seek to avoid their coverage responsibilities, even though they

mirror the insurer responsibilities this Court recognized in *Goodyear* and the Ninth District Court of Appeals recognized in *Goodrich* in reliance upon *Goodyear*. As the certifying court noted in regard to this case, the *Goodrich* case “is directly on point.” (Certification Order, p. 7).

As also noted in the certification order, Lincoln Electric is seeking to recover unreimbursed defense and indemnity costs from its umbrella insurers. These costs exceed \$50 million. The umbrella insurers have refused to honor Lincoln Electric’s claim, notwithstanding that their policies attach at \$2 million and Lincoln Electric is not seeking to recover costs below that level. As the basis for their denial, the umbrella insurers argue, in effect, that Lincoln Electric, by virtue of settling with its primary insurer, forfeited its overlying coverage.

IV. LAW AND ARGUMENT

Ohio has a highly developed, fully integrated body of insurance coverage law. This comprehensive, cohesive body of law, enviable among the states, consistently addresses all aspects of the certified question, and, accordingly, will provide the answer. The four cornerstones of Ohio’s jurisprudence on such matters, addressed below, are (1) Ohio’s law of “trigger,” which provides that all policies on the risk from the date of an underlying claimant’s first exposure to allegedly harmful substances through the date of manifestation of injury or disease are implicated by the claim; (2) Ohio’s law of “allocation,” which provides that the policyholder may allocate its insurance claim to any triggered policy, each of which provides coverage up to its stated limits for “all sums” the policyholder is legally obligated to pay; (3) Ohio’s law regarding “drop-down” liability, which provides that an umbrella insurer is not required to “drop down” to pay claims that do not reach its stated attachment point but must pay claims that do reach its attachment point, regardless of whether an underlying insurer has paid its

full limits; and (4) Ohio's law of contribution, which provides that a selected paying insurer has certain equitable rights of contribution against other triggered insurers.

This body of law has permitted policyholders and their insurers in Ohio to sensibly and reasonably resolve claims in accordance with the applicable policy language, the law, and principles of equity, all to the great public policy benefit of the state. Here, however, the umbrella insurers attempt to escape their coverage commitments, essentially arguing that the Northern District of Ohio should disregard or distort Ohio's law on allocation, "drop down" liability, and contribution to find a forfeiture of coverage, thereby mooting any benefit the policyholder might derive from the subject policies being triggered. Although such an outcome would violate these highly evolved Ohio principles, certain federal courts have done just that. The citizens of Ohio and state and federal courts applying Ohio law, therefore, would benefit greatly from the Court accepting the certified question to give further guidance on the operation and integration of these principles.

A. Controlling Principles of Law, Equity, and Public Policy

1. Ohio's Law on Trigger

General liability policies, such as those at issue in this case, provide liability coverage for bodily injury or property damage. The existence of bodily injury or property damage during a policy's period, accordingly, is said to "trigger" that policy, making it responsive to the subject liability claim. Ohio has long followed the "continuous" trigger approach, under which the policies eligible to respond to a claim are those in effect from first exposure to allegedly damaging or harmful materials up through the discovery or manifestation of damage or injury. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, paragraph one of the syllabus, ¶ 1, ¶¶ 11-12, ¶ 21; *Goodyear Tire & Rubber Co. v.*

Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 5, ¶ 11; *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 212, 660 N.E.2d 770 (C.P.1995).

This approach protects both policyholders facing risks in Ohio and insurers providing coverage for such risks. By recognizing that all policies along the established timeline are triggered by the claim, Ohio's law takes a broad view, as provided in the policy language, of the group of insurers required to pay a claim if chosen by the policyholder and, correspondingly, a broad view of the group of insurers from which the chosen insurer may obtain contribution. The policyholder's right to choose from among triggered insurers and the chosen insurer's right of contribution are discussed below.

2. Ohio's Law on Allocation

Ohio long has permitted a policyholder with a claim that triggers multiple policies to select from among triggered policies to receive payment on the claim. *Park-Ohio* at paragraph one of the syllabus, ¶ 1, ¶¶ 11-12, ¶ 21; *Goodyear* at ¶ 11; *Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 223, 226, 271 N.E.2d 924 (1971). Various phrases are used to describe this allocation method, including "all sums," "joint and several," and "pick-and-choose." As this Court has noted, this allocation both " 'promotes economy' " and is "designed to streamline the recovery process for the insured * * *." *Park-Ohio* at ¶ 12, ¶ 21, quoting *Goodyear* at ¶ 11. The approach also is eminently sensible, in that insurance policies are assets purchased by policyholders to be used in their discretion when and as their circumstances might warrant.

3. Ohio's Law on "Drop-Down" Liability

Under Ohio law, if the full amount of underlying coverage is not available for any reason, such as settlement by or insolvency of the underlying insurer, the attachment point of the

overlying coverage nonetheless is preserved, and the overlying coverage is not required to “drop down” to pay claims below the bargained-for level. *Rushdan v. Baringer*, 8th Dist. Cuyahoga No. 78478, 2001 WL 1002255, at *4 (Aug. 30, 2001); *Wurth v. Ideal Mut. Ins. Co.*, 34 Ohio App.3d 325, 328, 518 N.E.2d 607 (12th Dist.1987); *Value City, Inc. v. Integrity Ins. Co.*, 30 Ohio App.3d 274, 280, 508 N.E.2d 184 (10th Dist.1986). Although excess policies are not required to “drop down” to pay claims that have not reached their attachment points, they nonetheless must pay claims that actually reach their attachment points and penetrate into their coverages.

Overlying insurers are not permitted to avoid their coverage obligations if underlying insurers settle claims against them for less than the full limits of the underlying coverage; in such instances, the settling policyholders merely become self-insured for any resulting gaps. The rationale for this doctrine was best expressed by Judge Augustus Hand in *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665, 666 (2d Cir.1928):

[T]he [overlying insurer] had no rational interest in whether the insured collected the full amount of the [underlying burglary insurance], so long as it was only called upon to pay such portion of the loss as was in excess of the limits of those policies. To require an absolute collection of the primary insurance to its full limit would in many, if not most, cases involve delay, promote litigation, and prevent an adjustment of disputes which is both convenient and commendable. A result harmful to the insured, and of no rational advantage to the insurer, ought only to be reached when the terms of the contract demand it.

* * *

The plaintiff should have been allowed to prove the amount of his loss, and, if that loss was greater than the amount of the expressed limits of the primary insurance, he was entitled to recover the excess to the extent of the policy in suit.

This doctrine is widely followed because it promotes settlement at all levels of a coverage program and also avoids forfeiture of coverage. Ohio long has followed this doctrine. *See, e.g., Fulmer v. Insura Property & Cas. Co.*, 94 Ohio St.3d 85, 760 N.E.2d 392 (2002), paragraph two of the syllabus; *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St.3d 22, 521 N.E.2d 447 (1988),

paragraph two of the syllabus, *overruled in part on other grounds*, *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927; *Triplett v. Rosen*, 10th Dist. Franklin Nos. 92AP-816, 92AP-817, 1992 WL 394867, *7 (Dec. 29, 1992).

4. Ohio's Law on Contribution

If a policy is triggered, its attachment point is reached, and the insurer pays the claim on an “all sums” basis, that insurer has certain equitable rights of contribution against other insurers. *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 11 (Selected insurer permitted to “seek contribution from other responsible parties when possible.”); *Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 11 (“The targeted insurer is then able to file a later action against any other insurers * * * to obtain contribution.”). In appropriate circumstances, contribution may even be sought from settled insurers. *See Foremost Ins. Co. v. Motorists Mut. Ins. Co.*, 167 Ohio App.3d 198, 2006-Ohio-3022, 854 N.E.2d 552, ¶ 23 (8th Dist.). Because contribution is an equitable doctrine, its application will be fact-specific. This fourth cornerstone, however, completes the foundation of Ohio coverage law, balancing all interests of the policyholder and its various insurers to the full extent equity will permit.

5. Ohio's Public Policy Considerations

These principles of law and equity applicable to insurance claims in Ohio, including large, long-tail claims such as those at issue in this case, have been shaped by multiple public policy considerations, and these considerations would be equally applicable in this case. For instance, Ohio has a long, consistent public policy favoring settlements and, correspondingly, promoting judicial economy. As this Court stated in *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 69, 567 N.E.2d 1291 (1991), “Given the explosion of litigation so characteristic of the modern era, it is essential that the settlement of litigation be facilitated, not impeded.” This Court also has

noted that “settlement is part of the essential core of our judicial process” and that courts should not adopt rules that would hinder that process. *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 128, 748 N.E.2d 1111 (2001). Accordingly, any disincentive to settle would be directly at odds with this strong public policy. *See Fulmer*, 94 Ohio St.3d at 94, 760 N.E.2d 392 (citing *Bogan*, 36 Ohio St.3d at 25-26, 521 N.E.2d 447).

Further, this Court has noted that the first priority is to make the injured party whole. *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St.3d 601, 612, 597 N.E.2d 474 (1992). For insurance claims, that priority is to make the policyholder whole. *James v. Michigan Mut. Ins. Co.*, 18 Ohio St.3d 386, 481 N.E.2d 272 (1985), paragraph one of the syllabus; *accord N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210, ¶¶ 25-30.

A corollary to these public policy considerations is that forfeitures long have been disfavored under Ohio law. As this Court noted in an insurance case 100 years ago, “The law abhors a forfeiture * * *.” *Ensel v. Lumber Ins. Co. of New York*, 88 Ohio St. 269, 281, 102 N.E. 955 (1913). This Court further stated in *Kitt v. Home Indemn. Co.*, 153 Ohio St. 505, 511-512, 92 N.E.2d 685 (1950), “It should be noted that it has always been a principle of the law of insurance that forfeitures are not looked upon with favor * * *.”

These public policy considerations have guided this Court in developing the extensive body of insurance coverage law, addressed above, that applies to this dispute. They will be instrumental in shaping any further development of the law necessitated by the certified question.

B. Conflict between State and Federal Courts in Applying these Principles

Given these principles, the answer to the certified question can be readily devised. The determinative facts are set forth in the certification order. There is no dispute that the

policyholder's claims fall within the coverage grant of the subject umbrella policies, that all such policies attach at \$2 million, and that the policyholder's unreimbursed costs far exceed the \$2 million attachment point of any policy it could choose under Ohio's "all sums" allocation law. Hence, the coverages of the umbrella insurers are reached, without any need for these insurers to "drop down" to pay these claims.

In regard to these determinative facts, as with the controlling law discussed above, there can be no reasonable dispute. The application of the public policy principles is as clear. Policyholders would be strongly disincentivized to settle with their primary insurers if doing so would lead to forfeiture of their umbrella coverage. Without settlements, these complex cases will populate and clog court dockets for long periods. Contrastingly, permitting complete resolution by the parties through a series of settlements simply enables the parties to achieve through negotiation the exact result favored by Ohio's law of contribution. Moreover, because overlying insurers' attachment points are preserved, they are not prejudiced.

As the certifying judge has indicated, however, different courts have reached different results on the precise question certified. The principal conflict lies between Ohio's state and federal courts, as illustrated by two irreconcilable decisions on strikingly similar facts: the Ohio Ninth District Court of Appeals' decision in *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, *appeal not accepted*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968, and the federal magistrate judge's decision in *GenCorp, Inc. v. AIU Ins. Co.*, 297 F.Supp.2d 995 (N.D. Ohio 2003), *aff'd*, 138 Fed.Appx. 732 (6th Cir.2005).

In nearly all material respects, the *GenCorp* and *Goodrich* cases are functionally identical. In both cases, policyholders settled long-tail claims with underlying insurers for less than the total amount of the combined limits of all underlying policies. In both cases, the

policyholders had uncompensated defense and indemnity costs that exceeded the attachment points of the overlying coverages. Yet the courts in these two cases reached opposite results. In *GenCorp*, decided by the Northern District of Ohio, the magistrate judge held that the policyholder, in effect, forfeited its overlying coverage. In *Goodrich*, decided later by the Summit County trial and appellate courts, the courts held that the policyholder by virtue of its settlements did not effectively forfeit any coverage and could recover from its non-settling umbrella and excess insurers its uncompensated defense and indemnity costs to the extent they reached and penetrated into the overlying policies.

The *GenCorp* decision is fundamentally at odds with this Court's decision in *Goodyear*. In *GenCorp*, the trial court began by stating that this Court's "all sums" allocation holding in *Goodyear* "contradicted the [Sixth Circuit's] holding in" *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672 (6th Cir.2000). *GenCorp*, 297 F.Supp.2d at 999. Contrastingly, the certifying judge here has acknowledged that this Court is the final authority on Ohio law and that *Goodyear*, accordingly, "supersedes," rather than contradicts, the Sixth Circuit's allocation decision in *Lincoln Electric*, and he further noted that *Lincoln Electric* "incorrectly predicted Ohio law." (Certification Order, p. 6). The *GenCorp* trial court, however, seemed less inclined than the certifying court here to accept the full implications of this Court's decision in *Goodyear*. Perhaps for this reason, the insurers in this case, notably, have continued to argue in motions to dismiss and for summary judgment that the now-superseded *Lincoln Electric* "pro rata" allocation decision from the Sixth Circuit should continue to apply to this case.

Even though it acknowledged to some extent the "all sums" ruling of this Court in *Goodyear*, the *GenCorp* trial court declined to apply it. It is highly instructive to compare this Court's holding in *Goodyear* with the *GenCorp* trial court's discussion of that holding. In

Goodyear, this Court held that under Ohio's "all sums" allocation approach, an insured may choose from among all triggered policies:

For each site, Goodyear should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim. In the event that this policy does not cover Goodyear's entire claim, then Goodyear may pursue coverage under other primary or excess insurance policies. * * * Since Goodyear may find it necessary to seek excess insurance coverage, we find that the lower court erred in granting directed verdicts in favor of the excess insurers.

Goodyear, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 12. The *GenCorp* trial court, however, apparently without fully considering this language, indicated that *Goodyear* did not stand for its own holding:

GenCorp believes that *Goodyear* allows it to allocate its liability during a particular policy period to a single primary policy, exceed the coverage provided by that policy without exhausting the coverage provided by other primary policies, and "rise up" to the coverage provided by the excess insurers. * * * GenCorp also seems to believe *Goodyear* allows GenCorp to allocate its liability during a particular policy period to the coverage provided in a single year by a single primary policy and "rise up" to the excess coverage without exhausting other primary coverage. In either case, GenCorp apparently believes that *Goodyear* then requires the excess insurers to indemnify GenCorp for the entirety of its remaining liability. *These positions are not supported by Goodyear.*

(Emphasis added.) *GenCorp*, 297 F.Supp.2d at 1006-1007.

After having begun its analysis with the false premise that *Goodyear*, contrary to its express holding, did not permit a policyholder to proceed against an excess insurer after recovering from a primary insurer, the trial court then veered further off course with each subsequent step. A sampling of these misguided steps, all without precedent in Ohio law, includes the court's determinations that (1) settlements by policyholders with underlying insurers actually were allocation decisions as to overlying insurers, (2) recoveries from overlying insurers in accordance with the express language of their policies would be "windfalls," and (3) requirements that excess insurers pay in strict conformity with the language of their policies were

requirements that they pay more than their contracted-for fair share. *Id.* at 1003, 1007. The Sixth Circuit affirmed the trial court's decision, albeit in a brief opinion it determined not to be appropriate for publication. *GenCorp Inc. v. AIU Ins. Co.*, 138 Fed.Appx. 732 (6th Cir.2005).

The analytical defects in *GenCorp* have been evident to courts in multiple jurisdictions. Such courts, for instance, have concluded that the approach taken in *GenCorp* is fundamentally inconsistent with "all sums" allocation. *See, e.g., Westport Ins. Corp. v. Appleton Papers Inc.*, 327 Wis.2d 120, 2010 WI App 86, 787 N.W.2d 894, ¶ 31, ¶ 76 (holding it did "not find [the *GenCorp*] case useful" and affirming the trial court's conclusion that the policyholder's "prior settlements of insurance policies in various years ha[d] no bearing on [its] right now to select triggered policies on a vertical, by-year basis"); *Dana Cos., LLC v. Am. Employers' Ins. Co.*, Ind.Super. No. 49D14-1012-PL-053501 (May 8, 2013) (Slip op.), ¶ 39 (attached as Exhibit 6 to the Petitioner's Preliminary Memorandum) ("[*GenCorp*] did not explain how its result could be harmonized with the 'all sums' authorities like *Goodyear* or *Dana III*. *GenCorp*, at best, is an outlier opinion that wrongly interprets the meaning of Ohio's 'all sums' scope of coverage. To the extent *GenCorp* is inconsistent with that settled meaning, this Court holds that it misstates Ohio law and is of no persuasive value as to the law in Indiana."); *Massachusetts Elec. Co. v. Commercial Union Ins. Co.*, Mass.Super. No. 9900467B, 2005 WL 3489874, at *2 (Oct. 25, 2005) (recognizing *GenCorp* as being inconsistent with "all sums" allocation).

In the *Goodrich* case, which proceeded through the Ohio state court system, the insurers cited *GenCorp* at length in both the trial and appellate courts. The state courts recognized the analytical flaws in *GenCorp* and rejected its reasoning and holding, coming to the exact opposite conclusion, as the certifying judge in this case has observed. Notwithstanding extensive briefing addressing *GenCorp*, the *Goodrich* trial and appellate courts did not deem it necessary to cite it,

much less discuss it. The certifying judge in this case fairly summarized the relevant portions of the *Goodrich* record and holdings as follows:

On appeal to the Ninth District, the excess insurers relied heavily on *GenCorp*, arguing that because Goodrich had settled with its entire primary layer, it was required to use a pro rata allocation approach to reach the excess policies and had forfeited the right to use the all sums allocation method. Stated another way, the insurers asserted that the non-settling excess insurer would be liable only for losses that exceeded the combined limits of all settled primary and lower level excess policies.

* * *

The Ninth District Court of Appeals ultimately rejected the insurers' arguments that relied on *GenCorp* and held that a policyholder can pursue an excess insurer on an all sums basis without the requirement of exhausting all other primary policies, even after the policyholder had settled with its primary insurers for 20 years of primary coverage.

(Certification Order, p. 9).

In seeking discretionary review in this Court, the insurers in *Goodrich* again relied heavily upon the *GenCorp* decision in arguing that there was error below. This Court declined jurisdiction and subsequently denied a motion for reconsideration. *Goodrich Corp. v. Commercial Union Ins. Co.*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968, *reconsideration denied*, 121 Ohio St.3d 1411, 2009-Ohio-805, 902 N.E.2d 35.

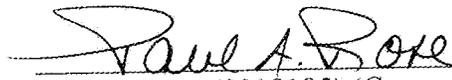
V. CONCLUSION

The carefully integrated principles of Ohio insurance coverage law implicated by the certified question have for decades served well Ohio policyholders, insurers, and courts. They assure that all policies triggered by long tail claims are eligible to fully compensate the policyholder who purchased the policies. They also assure that no insurer has to pay a dollar more or a moment sooner than its policy limits and attachment points require and, further, that if and when an insurer is chosen to pay a claim, it has the potential to receive contribution from

other insurers. These principles, accordingly, have been very effective in providing appropriate compensation for policyholders and claimants alike while protecting insurers, promoting settlements, and avoiding forfeitures. The insurers here, however, apparently for a perceived potential short-term benefit, have advocated disregarding or distorting Ohio's law on allocation, drop-down liability, and contribution. Further, their arguments would render moot Ohio's law on trigger in this context, because there would be no benefit to triggering forfeited policies. Significantly, some insurers have had success in such efforts, particularly in federal courts. Accordingly, this Court should accept the certified question to preserve, apply, and even more clearly articulate Ohio's carefully crafted insurance coverage law that would provide the answer.

Respectfully submitted,

BROUSE MCDOWELL


Paul A. Rose (0018185) (Counsel of Record)
Clair E. Dickinson (0018198)
388 S. Main Street, Suite 500
Akron, Ohio 44311
330.535.5711 – phone
330.253.8601 – fax
prose@brouse.com
cdickinson@brouse.com
Attorney Counsel for Amici Curiae

Caroline L. Marks (0071150)
BROUSE MCDOWELL
600 Superior Avenue East
Suite 1600
Cleveland, Ohio 44114
216.830.6830 – phone
216.830.6807 – fax
cmarks@brouse.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Preliminary Memorandum in Support of Acceptance of the Certified Question of State Law Question of Amici Curiae was served by regular U.S. Mail this 29th day of July, 2013, upon the following counsel:

Anna P. Engh
Danielle S. Barbour
Jamar K. Walker
Sarah R. MacDonald
Timothy D. Greszler
Covington & Burling – Washington
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Nicholas A. DiCello
William B. Eadie
Dennis R. Lansdowne
Spangenberg, Shibley & Liber
1001 Lakeside Ave., E., Suite 1700
Cleveland, OH 44114

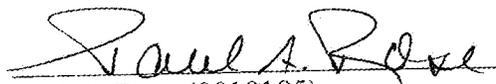
Yvette McGee Brown (0030642)
Chad A. Readler (0068394)
Jones Day
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215

*Counsel for Plaintiff-Petitioner,
The Lincoln Electric Company*

Matthew T. O'Connor
Michelle L. Hertz
Alexander B. Simkin
Bryce L. Friedman
Mary Beth Forshaw
Simpson, Thacher & Bartlett – New York
425 Lexington Avenue
New York, NY 10017

Michael E. Smith
Frantz Ward
2500 Key Tower
127 Public Square
Cleveland, OH 44114

*Counsel for Defendants-Respondents,
Travelers Casualty and Surety Company
and St. Paul Fire and Marine Insurance
Company*


Paul A. Rose (0018185)
Counsel of Record for Amici Curiae