

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE LINCOLN ELECTRIC COMPANY,) CASE NO. 2013-1088
)
) *Petitioner,*)
)
 v.) On Consideration of Certified Question from
) the United States District Court for the
) Northern District of Ohio, Eastern Division
) Case No. 1:11CV2253
 TRAVELERS CASUALTY AND)
 SURETY COMPANY, *et al.*,)
)
) *Respondents.*)

PETITIONER'S PRELIMINARY MEMORANDUM
 REQUESTING ANSWER TO CERTIFIED QUESTION OF LAW

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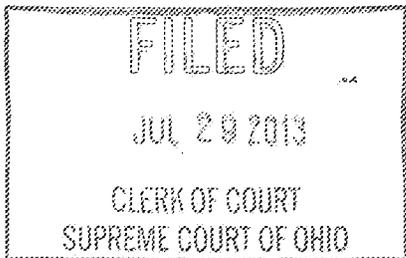


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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States District Court for the Northern District of Ohio certified to this Court a question of state insurance law that easily satisfies the Court's standard for review. This Court has not yet addressed the issue, and it is of "pivotal importance" in this case. *See* Certification Order at 1-2. The issue is one that will continue to arise and is important to other corporate insureds in Ohio. *See id.* at 2 (noting the "likelihood that this Ohio law question will be relitigated in state and federal courts"); *Brief Amici Curiae of Ohio Manufacturers Assoc. et al.* (filed July 29, 2013). The issue has divided the lower federal and state courts. *Compare GenCorp Inc. v. AIU Ins. Co.*, 6th Cir. Nos. 04-3244, 04-3377, 138 F. App'x 732 (July 7, 2005), with *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200. The issue invokes important public policy concerns, most notably, Ohio's public policy favoring settlements, including the resolution of insurance disputes. *See, e.g., Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85, 94-96, 2002-Ohio-64, 760 N.E.2d 392. The answer to the certified question would largely resolve the pending federal litigation. *See* Certification Order at 10. Accordingly, review is warranted.

A. The Certified Question Raises An Important Ohio Insurance Law Issue Regarding A Policyholder's Right To Pursue Excess Insurance Coverage On An "All Sums" Basis After Settling With Its Primary Insurer.

This insurance dispute stems from thousands of claims brought by individuals allegedly injured by exposure to substances in welding products manufactured by Cleveland-based Lincoln Electric Company. The exposure claims are known as "long tail" claims in the insurance context because the asserted injuries progress over time, and thus trigger multiple comprehensive general liability ("CGL") insurance policies. Lincoln purchased primary insurance from St. Paul Fire and Marine Insurance Company ("St. Paul"), and also purchased separate umbrella (first-layer excess) policies from St. Paul and from Aetna Casualty and Surety Company (n/k/a Travelers

Casualty and Surety Company) (“Travelers” or “Aetna”), each of which attaches at \$2 million. There is no dispute that these policies provide insurance coverage for Lincoln’s welding claims. In 2000, Lincoln reached a settlement with St. Paul under the primary policies only. Under this settlement, St. Paul pays only a portion of Lincoln’s defense costs and indemnity losses and is permitted to allocate its indemnity payments on a “pro rata” basis to each of its primary policies. Lincoln has paid substantial amounts that have not been reimbursed by any insurer. The unreimbursed indemnity losses exceed the attachment point of each umbrella policy at issue.

Under settled Ohio law, when multiple CGL policies are triggered by a single continuous injury claim, the insured may obtain coverage under a selected policy, which must pay “all sums” arising out of that claim, up to policy limits. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St.3d 512, 769 N.E.2d 835 (2002); *Penn. Gen. Ins. Co. v. Park-Ohio Indus.*, 126 Ohio St.3d 98, 99, 2010-Ohio-2745, 930 N.E.2d 800. Here, Lincoln seeks to utilize this all sums approach, allocating its unreimbursed indemnity costs vertically to a selected policy year, and pursuing coverage under the selected umbrella policy only for those costs incurred after the \$2 million attachment point of that umbrella policy was exceeded. But the insurers have resisted. They assert that, despite the established Ohio all sums rule, when an insured settles with its primary insurer and, as part of the settlement, allows the primary insurer to allocate its payments using a pro rata method, as was done here, the insured forfeits its rights to “fill the gap” and access its umbrella policies using the all sums rule.

The dispute resulted in litigation in federal court in the Northern District of Ohio. Following discovery, both Lincoln and the umbrella insurers filed motions for summary judgment on the key allocation issue. On July 3, 2013, while those motions were pending, the District Court issued an order seeking guidance on the allocation issue and certifying to this

Court the following question of Ohio law (*see* Certification Order at 11):

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?

B. The State And Federal Courts Have Split On This Question.

The Certification Order calls on the Court to resolve a key issue of Ohio insurance law, namely, how the established all sums principle applies to a policyholder who settles long tail claims with its primary insurer on a compromise basis for less than its full coverage rights, and subsequently pursues its excess insurers for coverage for unreimbursed losses that reach the excess layer. Ohio state and federal appellate courts have split over the issue. The Sixth Circuit, predicting how Ohio courts would resolve this state law issue, held that a policyholder who settles with a primary insurer for less than full coverage on a pro rata basis forfeits the right to access its excess policies under Ohio's all sums approach. *See GenCorp*, 6th Cir. Nos. 04-3244, 04-3377, 138 F. App'x 732 (July 7, 2005), *aff'g* 297 F. Supp. 2d 995 (N.D. Ohio 2003). The Sixth Circuit's rule requires a settling policyholder to "horizontally" exhaust *all* primary policy limits before it can access *any* of its excess policies.

The Ohio Court of Appeals subsequently disagreed and rejected the Sixth Circuit's grim prediction of Ohio law. Instead of following *GenCorp* and requiring horizontal exhaustion of all primary policies, the state appellate court permitted a policyholder to recover excess insurance on an all sums basis even though the policyholder had settled with its primary insurer for less than full coverage. *See Goodrich*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, 2008 WL 2581579, *review denied*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968. In *Goodrich*, the court allowed the policyholder to obtain coverage under a selected excess policy

after “vertically” exhausting the limits of only the directly underlying primary policy, rather than (as in *GenCorp*) requiring exhaustion of 20 years of primary coverage.

C. The Court Should Answer The Certified Question In The Affirmative, Applying Its Settled All Sums Approach In The Context Of A Policyholder Pursuing Excess Insurance After Settling With Its Primary Insurer.

The Court should accept the certified question for review and answer the question in the affirmative. *First*, Ohio law favors an all sums approach to resolving claims that invoke multiple policies. In *Goodyear*, the Court held that when claims against a policyholder involve injury or damage that continues over numerous policy periods, the policyholder is “permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim,” and the selected policy must then “cover[] ‘all sums’ incurred as damages . . . subject to that policy’s limit of coverage.” 95 Ohio St.3d at 516-517, 769 N.E.2d 835; *see also Park-Ohio*, 126 Ohio St.3d at 99, 2010-Ohio-2745, 930 N.E.2d 800 (reaffirming *Goodyear* and the all sums method of allocation). The *Goodyear* Court rejected the pro rata approach, advocated by the insurers, which would have required the policyholder to pursue separately a pro rata portion of its loss from each insurer that issued a triggered policy. 95 Ohio St.3d at 515. There is no basis for applying a different rule to a selected excess policy merely because an insured has settled with its primary insurer, so long as the insured can show that its unreimbursed losses exceed the limits of the underlying primary policy.

Second, in *Goodyear*, the Court emphasized that a policyholder “expect[s] complete security from each policy that it purchased.” *Id.* at 516. Although *Goodyear* did not squarely address what happens if a primary policy selected to pay all sums is exhausted, the Court stated, “[i]n the event that this [selected primary] policy does not cover [the] entire claim, then [the policyholder] may pursue coverage under other primary *or excess* insurance policies.” *Id.* at 517 (emphasis added). It follows that the policyholder may obtain coverage from a selected excess

policy as long as its unreimbursed losses are sufficient to exhaust the underlying policy, without first having to “horizontally” exhaust the limits of triggered primary policies in other years. This approach honors the policyholder’s expectation of “complete security,” while fully protecting the excess insurer’s contractual rights (such as the policy’s attachment point and policy limits).

Third, Ohio courts repeatedly have held that a policyholder’s settlement with its primary insurer effectively exhausts the primary policy limits, and that a policyholder can apply its unreimbursed losses to “fill the gap” between the amount the primary insurer paid and the attachment point of the excess coverage, and in that manner reach the excess layer (with the policyholder absorbing the “gap” for its own account). *See, e.g., Fulmer*, 94 Ohio St.3d 85, 96-97, 2002-Ohio-64, 760 N.E.2d 392; *Triplett v. Rosen*, 10th Dist. Franklin No. 92AP-816, 1992 WL 394867, at *7 (Dec. 29, 1992) (insured’s settlement with primary insurer for \$200,000 exhausted the \$300,000 primary policy limit and triggered the excess insurer’s obligations, where damages in underlying suit exceeded the primary limit, and where insured absorbed the gap between \$200,000 and \$300,000). This “fill the gap” rule avoids the prospect that a policyholder that reaches a settlement with its primary insurer will end up forfeiting its excess coverage.

Fourth, the all sums approach promotes Ohio’s strong public policy favoring settlement over unnecessary litigation. *See Fulmer*, 94 Ohio St.3d at 94-96 (noting Ohio’s policy of “avoiding unnecessary litigation”). A contrary rule would discourage settlement because an insured would have to absorb full limits for all primary policies (even though such policies were settled) before pursuing coverage under a single umbrella policy. The insured thus would have no incentive to settle with its primary insurer for less than full coverage, and primary insurers typically will not settle long tail claims for full coverage. Protracted litigation would result.

All told, under Ohio law, Lincoln should be allowed to allocate its unreimbursed losses vertically, on the all sums basis adopted in *Goodyear*, reaffirmed in *Park-Ohio*, and applied by the Court of Appeals in *Goodrich*. Following these precedents, Lincoln is entitled to umbrella coverage for its unreimbursed welding product losses that exceed the attachment point of a selected umbrella policy sitting directly above a settled primary policy, as well as a declaration of coverage for future losses based on the same approach.

While Ohio law seemingly points to only one conclusion here, the Court has yet to answer the precise question posed. Although the Ohio Court of Appeals in *Goodrich* rejected *GenCorp*'s forfeiture rule, insurers who sold excess policies to Ohio policyholders continue to rely on *GenCorp* to avoid their coverage obligations. Indeed, in this case, the insurers cite *GenCorp* to argue that Lincoln surrendered its rights to access the umbrella policies on an all sums basis merely by entering a settlement agreement with its primary insurer in which the insurer's payments are allocated to the primary policies on a pro rata basis.

The Court should answer the certified question to remove the confusion created by this split in authority and to reaffirm Ohio's public policy of encouraging settlements in lieu of litigation. The certified question, which will be largely determinative of the federal court proceeding, is and likely will continue to be an important issue in other pending and future coverage disputes under Ohio law. This case is, in short, deserving of the Court's attention.

STATEMENT OF FACTS

The pertinent facts are summarized in the Certification Order (at 2-4).

A. The Welding Product Claims.

Lincoln has been sued by thousands of claimants seeking damages for long-term bodily injury allegedly caused by exposure to harmful substances (*e.g.*, asbestos, manganese, and welding fumes) in Lincoln's welding products. In connection with these welding product claims,

Lincoln has incurred over \$12 million in indemnity costs (*i.e.*, payments of settlements and adverse judgments) for the period from July 1, 2000 through December 31, 2012; \$4.5 million of the indemnity costs have not been reimbursed by insurance. Lincoln has also incurred over \$179 million in defense costs for welding product claims from November 1, 1999 through December 31, 2012, of which more than \$86.7 million has not been reimbursed by insurance.

B. Lincoln's Primary And Umbrella Insurance Policies.

From 1947 to 1985, Lincoln purchased primary insurance from St. Paul. Lincoln also purchased umbrella policies from Aetna from May 16, 1975 to August 1, 1981, and from St. Paul from April 1969 to May 16, 1975 and from August 1, 1981 to August 1, 1985. *See Coverage Chart (Ex. 1)*. Lincoln's primary and umbrella policies provide more than \$435 million in indemnity coverage limits for claims seeking damages for bodily injury occurring during the policy period. Each of the St. Paul primary policies underlying the Aetna and St. Paul umbrella policies has a \$2 million policy limit. At present, Lincoln's coverage claims are focused on the 1980-81 Aetna umbrella policy or, alternatively, the 1983-84 St. Paul umbrella policy, each of which is required to respond when Lincoln's indemnity losses covered by the underlying primary policy exceed \$2 million.

C. The Primary Policy Agreement.

In June 2000, Lincoln and St. Paul resolved disputes about coverage for welding product claims under Lincoln's primary policies by entering into a settlement agreement (the "Primary Policy Agreement"). That Agreement sets forth St. Paul's obligations, solely as Lincoln's primary insurer, with regard to welding product claims. Lincoln and St. Paul are the only parties to the Agreement. Under the Agreement, St. Paul pays only a portion of Lincoln's defense and indemnity costs, which decreases over time. No other insurer has reimbursed Lincoln for the substantial (and increasing) percentage of defense and indemnity costs not paid by St. Paul.

One of the compromises in the Primary Policy Agreement is that St. Paul is allowed to spread its indemnity payments under the Agreement across all primary policies. Under this pro rata method, based on St. Paul's records as of April 2013, the 1980-81 primary policy limit was eroded by St. Paul indemnity payments of \$717,528, and the 1983-84 primary limit was eroded by St. Paul indemnity payments of \$1,121,214. The Agreement does not include Lincoln's umbrella policies or address allocation of Lincoln's unreimbursed indemnity payments.

ARGUMENT

THIS COURT SHOULD DECIDE THE CERTIFIED QUESTION

The standard for answering a certified question is satisfied here. Ohio Supreme Court Rule 9.01(A) provides that the Court may answer a question of law certified to it by a federal court when "the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." As the District Court noted in its Certification Order (at 10-11), there is no controlling decision from this Court on the certified question, and "this issue will be largely determinative of [the federal] action." The certified question presents an important and recurring issue of Ohio law on which federal and state decisions are at odds. As Ohio insureds facing long tail claims seek protection under their CGL coverage, clarity from this Court on the availability of such coverage will enable insureds and their insurers to resolve coverage issues without the need for prolonged litigation.

A. There is a Conflict Between Ohio Federal and State Courts on the Question.

Goodyear requires Ohio courts to apply the all sums rule in cases involving insurance coverage for claims of progressive injury or damage under CGL policies. *Goodyear* superseded the prior decision in *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672 (6th Cir. 2000), where the Sixth Circuit incorrectly predicted that Ohio would adopt the pro rata allocation

method. The Court recently reaffirmed *Goodyear* in *Park-Ohio*. 126 Ohio St.3d at 99, 2010-Ohio-2745, 930 N.E.2d 800 (“We continue to adhere to the all-sums method of allocation adopted in *Goodyear* . . .”).

Neither *Goodyear* nor *Park-Ohio*, however, directly addressed coverage under excess policies after the policyholder has settled with the underlying primary insurer. In 2005, the Sixth Circuit addressed that issue when it summarily affirmed a magistrate judge’s decision in *GenCorp*. But the federal court again incorrectly predicted Ohio insurance law, and *GenCorp*—like *Lincoln Electric* before it—was superseded by the later Ohio appellate decision in *Goodrich*.

After settling with its primary insurers, the insured in *GenCorp* argued “that *Goodyear* allows it to allocate its liability . . . 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.” 297 F. Supp. 2d 995, 1006. The federal court disagreed, holding that *GenCorp* could not apply an all sums allocation because, by settling with its primary insurers on a pro rata basis, *GenCorp* had “already made its allocation” and had forfeited the right to use an all sums allocation to reach the excess insurers. *Id.* at 1007.

The Ohio Court of Appeals rejected *GenCorp* in its *Goodrich* decision. *Goodrich* involved factual and legal issues materially identical to those in *GenCorp*. At issue was environmental contamination, which triggered coverage under primary and excess liability policies in effect for more than 20 years. 2008 WL 2581579, at *1. Like *GenCorp*, *Goodrich* had also settled with all of its primary insurers, but that settlement did not cover all of *Goodrich*’s liabilities. Accordingly, pursuant to Ohio’s all sums approach, *Goodrich* sought coverage for its remaining liabilities under an excess policy attaching at \$20 million, which sat immediately above a settled primary policy. *Id.*

After trial, the jury awarded Goodrich \$42 million in damages under its excess policies. *Id.* In a post-verdict ruling, the trial court ordered that the judgment against the excess insurers “be reduced by \$20 million . . . because liability under the excess policies did not attach until Goodrich’s damages had reached \$20 million.” *Id.* at *2. The trial court “repeatedly stated throughout its judgment entry that its judgment against each [excess insurer] presumed selection under *Goodyear*.” *Id.* at *24. Applying the all sums rule, the trial court required Goodrich to exhaust the limits of only the single underlying primary policy—and not the many other triggered years of primary coverage—to access the targeted excess policy directly above it. *See id.* at *1-2, *24. Like Lincoln here and the insured in *GenCorp*, if Goodrich had been required to exhaust all of its primary coverage, it would have been unable to access any excess coverage.

On appeal, 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 all sums. *See* Exs. 2-4 (excerpts from insurer briefs). Goodrich responded that *GenCorp* should not be followed because it discouraged settlement and contradicted the all sums allocation approach adopted in *Goodyear*. *See* Ex. 5 (excerpts from Goodrich brief).

Although the opinion in *Goodrich* did not specifically mention *GenCorp*, the outcome of that case cannot be reconciled with the Sixth Circuit’s prior decision in *GenCorp*. Indeed, the appellate briefs in *Goodrich* (quoted in the Certification Order at 9; *see* Exs. 2-5) make clear that a principal dispute was whether the Ohio appellate court would follow *GenCorp*. *Goodrich* rejected the *GenCorp* rule, and held that a policyholder that had settled over 20 years of primary coverage could pursue all sums coverage under an excess policy, without first exhausting all triggered primary policies. The insurers in *Goodrich* sought review in this Court, asserting that

the Court of Appeals' decision conflicted with *GenCorp*. See 2008 WL 3980897. The Court denied review. See 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968; 121 Ohio St.3d 1411, 2009-Ohio-805, 902 N.E.2d 35 (denying motion for reconsideration).

A decision from the Court on the allocation issue would provide needed clarity and avoid unnecessary litigation. Despite *Goodrich*'s rejection of *GenCorp*, insurers nonetheless rely regularly on *GenCorp* to avoid their coverage obligations. See, e.g., *MW Custom Papers LLC v. Allstate Ins. Co.*, Montgomery C.P. No. 2012 CV 03228, 2012 WL 6565832 (Sept. 21, 2012). Acceptance of the *GenCorp* approach in Ohio would significantly undermine the Court's all sums rulings in *Goodyear* and *Park-Ohio*. This point is underscored by the fact that courts in other all sums jurisdictions have found that *GenCorp* is antithetical to the all sums rule. For instance, in *Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 917-18, 327 Wis.2d 120 (Wis. Ct. App. 2010), the insurers relied on *GenCorp* and advocated "a pro rata approach to allocating [] responsibility across all the years of occurrence, which the [i]nsurers described as 'horizontal exhaustion.'" The Wisconsin Court of Appeals rejected the insurers' argument, noting that "the Insurers relied on *GenCorp*" but "[w]e do not find that case useful. The relevant law in this state [all sums] has been decided Horizontal exhaustion, which is another name for pro rata allocation, has been rejected by our supreme court. We are bound by that decision." *Id.* Similarly, in *Dana Companies LLC v. Am. Employers' Ins. Co.*, No. 49 D14-1012-PL-053501 (Ind. Super. Ct. May 8, 2013) (Ex. 6), the court refused to apply horizontal exhaustion where the policyholder settled with its primary insurers and sought to access a targeted excess policy based on the all sums approach. The court rejected *GenCorp*, noting that the court in *GenCorp* "did not explain how its result could be harmonized with the 'all sums' authorities like *Goodyear*," and concluded that "*GenCorp*, at best, is an outlier opinion that wrongly interprets

the meaning of Ohio's 'all sums' scope of coverage." *Id.* at 18.

B. The Certified Question Implicates Ohio's Public Policy Favoring Settlements.

The Court should also accept certification because this case directly implicates Ohio's strong public policy favoring settlements. *See, e.g., Fulmer*, 94 Ohio St.3d at 94-96, 2002-Ohio-64, 760 N.E.2d 392; *Triplett*, 1992 WL 394867, at *7; *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, 679 F.3d 456, 463 (6th Cir. 2012); *Bondex Int'l, Inc. v. Hartford Acc. & Indem. Co.*, N.D. Ohio No. 1:03-CV-01322, 2007 WL 405938, at *4 (Feb. 1, 2007). In accord with this public policy, under Ohio law, a policyholder may settle with its primary insurer for less than full limits and then vertically allocate its unreimbursed payments (using the all sums rule) to access its excess coverage, so long as the policyholder absorbs the "gap" between the amount paid by the primary insurer and the attachment point of the excess policy. *See, e.g., Fulmer*, 94 Ohio St.3d at 96-97; *Triplett*, 1992 WL 394867, at *7; *Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F. Supp. 2d 483, 500 (N.D. Ohio 2006); *accord, e.g., Trinity Homes LLC v. Ohio Cas. Ins. Co.*, 629 F.3d 653, 658-59 (7th Cir. 2010); *Zeig v. Mass. Bonding & Ins. Co.*, 23 F.2d 665 (2d Cir. 1928); *Archer Daniels Midland v. Aon Risk Servs., Inc. of Minn.*, D.Minn. Civ. No. 97-2185, 1999 WL 34818933 (Feb. 25, 1999); *Rummel v. Lexington Ins. Co.*, 123 N.M. 752, 945 P.2d 970, 981 (1997).

Under Ohio law, Lincoln has the right to select policies to respond to its welding product claims in full, up to their limits. But, if *GenCorp* is followed, Lincoln may not access *any* of its excess coverage until *all* of its primary policies are exhausted and it will have forfeited its rights under its excess policies *solely* because it settled coverage under its primary policies. That is so because the rule in *GenCorp* forbids policyholders that have settled with primary insurers to access their excess coverage vertically, using all sums. As the *GenCorp* court acknowledged, but for *GenCorp*'s settlement with its primary insurers, using an all sums approach to reach the

excess layer “would not be problematic.” 297 F. Supp. 2d 995 at 1007 (N.D. Ohio 2003). Thus, *GenCorp*’s effect is to discourage settlements, because an Ohio policyholder that settles with its primary insurer thereby forfeits its otherwise clear right to access its excess coverage using an all sums/vertical exhaustion approach and must instead exhaust all triggered primary policies before accessing any excess policies.

Further, under a *GenCorp* rule, a policyholder will not enter into settlement agreements, because doing so would interfere with its rights under other contracts in at least two ways. First, the *GenCorp* rule would retroactively change the terms of excess policies, even though such policies are wholly distinct contracts from any settlement agreement with a primary insurer. Here, application of *GenCorp* would retroactively change Lincoln’s rights under its umbrella policies by preventing it from (1) relying on its express right in the policy to access excess coverage after paying out of its own pocket any “gap” between the amount paid by its primary insurer and the attachment point of an umbrella policy, *see, e.g.*, Aetna 1980-81 Umbrella Policy (policy can be reached when “the amount of the applicable underlying limit has been paid by or on behalf of the insured”); and (2) using Ohio all sums law to reach the umbrella policies.

Second, contrary to Ohio law, the *GenCorp* rule essentially makes umbrella insurers third-party beneficiaries of any compromise agreement between a policyholder and its primary insurers, even though the umbrella insurers are strangers to such an agreement. *See, e.g., Huff v. FirstEnergy Corp.*, 130 Ohio St.3d 196, 200-02, 2011-Ohio-5083, 957 N.E.2d 3 (non-parties to a contract have no rights under that contract absent a clear intent to benefit such a non-party). Here, *GenCorp* would permit the umbrella insurers to delay their otherwise clear obligation to respond to Lincoln’s welding product claims until such time (if ever) that the full limits of all primary policies are paid by St. Paul. In this way, *GenCorp* has the undesirable effect of

rewarding recalcitrant excess insurers who refuse to participate in settlement negotiations by providing them, without any consideration, the benefit of a collateral settlement between a policyholder and its primary insurers.

In short, the *GenCorp* rule imposes on the policyholder a forfeiture of its excess coverage based on a primary policy settlement. This, in turn, produces a strong disincentive for policyholders to compromise with primary insurers for anything less than their full coverage rights and thus encourages them to litigate claims against primary insurers to conclusion. In contrast, the rule adopted in *Goodrich* preserves the ability of policyholders and their primary insurers to compromise their disputes—thereby avoiding litigation risks and costs and freeing up judicial resources—without forcing policyholders to forfeit their all sums rights under excess policies and without allowing excess insurers to enforce the terms of settlements to which they are not parties. Such a result accords with the basic purpose of insurance, which is to protect the policyholder from having to bear the costs arising from covered risks. *See, e.g.*, Appleman, Insurance Law and Practice Section 1.03 (2013) (“In an insurance contract, the primary purpose of the contract is *to transfer risk*.”) (emphasis in original); 16 Couch, Insurance Section 223:136 (3rd ed. 2012) (“the principal purpose of an insurance contract[] [is] to protect an insured from loss”). That purpose, of course, is enshrined in this Court’s decisions adopting and reaffirming the all sums rule, which affords the policyholder the full ability to access all insurance for which it paid premiums.

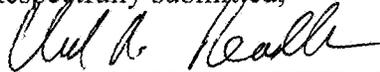
Finally, contrary to the suggestion in *GenCorp*, vertical exhaustion of a policyholder’s unreimbursed indemnity losses is not only consistent with *Goodyear*’s all sums rule and Ohio’s public policy promoting settlements, but also is fair to the targeted excess insurer. The excess insurer will be called upon only if the policyholder’s unreimbursed losses trigger the selected

excess policy and exceed the attachment point of that policy. All of the excess policy's terms and limits continue to apply, and the excess insurer will pay no more than it bargained to pay. Moreover, there is no risk that the policyholder will obtain a "windfall" double recovery from two separate insurers: under Ohio law, a non-settling excess insurer is entitled to a settlement credit for the full amount that the policyholder has received from its primary insurer in settlement for the same claim. See *Goodrich*, 2008 WL 2581579, at *7 (under "undisputed principles" of Ohio law, a "[s]et-off of settlement funds has been recognized as a means to protect against the danger of a double recovery"); *Bondex*, 2007 WL 405938, at *4 (holding that non-settling insurers, while barred from pursuing contribution from settling insurers, could still seek settlement credits in the amounts paid by settling insurers to avoid a windfall). By allocating only its unreimbursed losses to reach the umbrella layer, Lincoln is providing precisely this form of settlement credit to the umbrella insurers in this case.

CONCLUSION

For the foregoing reasons, this Court should answer the certified question.

Respectfully submitted,



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July 29, 2013

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ATTACHMENT NOT SCANNED

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C.A. Nos. 23585, 23586

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

GOODRICH CORPORATION fka
THE B.F. GOODRICH COMPANY
Appellee

v.

COMMERCIAL UNION INSURANCE CO., et al.,
Appellants

APPEAL FROM THE COMMON PLEAS COURT
SUMMIT COUNTY, OHIO
CASE No. CV 1999 02 0410

(AMENDED) BRIEF OF APPELLANT COMMERCIAL UNION INSURANCE
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CLERK OF COURTS
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II. THE TRIAL COURT ERRED WHEN IT DENIED CU'S MOTION FOR APPLICATION OF CREDITS AND SETTLEMENT SETOFFS.

The correct measure of damages, including the application of setoffs based on settlements, presents a question of law subject to de novo review. See, e.g., *Hess v. Norfolk S. Ry. Co.* (2005), 106 Ohio St.3d 389.

Goodrich's contamination of the groundwater at its Calvert City site began in 1959 and continued throughout the policy periods of all settling insurers. (Tr. 2150-51.) It is undisputed that Goodrich recovered over \$55.8 million in settlements from the two dozen insurers it sued to recover the costs for cleaning up that contamination. (See CU Br. Supp. Settmt. Credits (4/5/06), Exh. B, 'Rog 2.) The settlements greatly exceed the amount the jury awarded for Goodrich's past cleanup costs (\$40 million) at that site, and Goodrich admittedly released the settling insurers from liability for the same costs considered by the jury. Yet in an unprecedented ruling in conflict with Ohio law and the great weight of precedent elsewhere, the Trial Court ruled that CU was not entitled to *any* credit or setoff beyond AMICO's underlying \$20 million limit,² despite acknowledging that "each of the individual propositions of CU appears to have merit and to be supported by case law." (Appx., Tab B, p. 4.) The Trial Court failed to cite a single Ohio decision, and never even mentioned the leading case applying Ohio law to adjudicate the effect of settlements in a multi-insurer environmental coverage action: *GenCorp, Inc. v. AIU Ins. Co.* (N.D. Ohio 2003), 297 F.Supp.2d 995, *aff'd* (C.A.6, 2005), 138 Fed.Appx. 732.

A. The Trial Court Erred by Failing to Allow Settlement Credits For the Limits of Primary and Lower Level Settled Policies (*GenCorp*).

The first step in understanding how prior settlements affect complex coverage litigation is Ohio's adoption of the "all sums" approach for allocating coverages to pollution claims. See

² CU's excess coverages only attach above the \$20 million primary and umbrella liability limits for the AMICO policy directly beneath CU's excess coverage.

Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St.3d 512. Instead of the rule that limits a policy's coverages to the "pro rata" amount of coverage available to the insured, the "all sums" approach allows the insured "to secure coverage from a single policy of its choice ***." *Id.* at 516. The "chosen" insurer then bears the burden "of obtaining contribution" from other triggered policies. *Id.* As confirmed by the cases cited in *Goodyear*,³ the choice given insureds under the all sums approach does not change the fundamental rule that an insured is only allowed *one recovery*.

Although *Goodyear* did not discuss how the "all sums" allocation rule affects settlement setoffs or credits, federal courts have done so, in cases applying Ohio law. Those courts uniformly hold that consistent with *Goodyear*, the nonsettling excess insurer is liable only for insured losses that exceed the combined limits of all settled primary and lower level excess policies. See *GenCorp*, 297 F.Supp.2d at 1007-1008; *Goodyear v. Hartford Acc. Indem. Co.* (Apr. 4, 2005), W.D. Pa. No. 979-33 at 10⁴ (applying Ohio law; citing *GenCorp*); *Bondex Int'l v. Hartford Acc. & Indemn. Co.* (Feb. 1, 2007), N.D. Ohio No. 1:03-CV-01322, 2007 WL 405938, at *4 (nonsettling excess insurers "are also able to assert that the settlement from [a primary insurer] should reduce whatever award is made against them"). No Ohio case has held otherwise; the Trial Court erred when it failed to apply Ohio law.

³ E.g., *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C. 1981), 667 F.2d 1034, 1050, and *J.H. France Refractoris Co. v. Allstate Ins. Co.* (Pa. 1993), 626 A.2d 502, 508, cited and followed in *Goodyear*, 95 Ohio St.3d at 516 and n.4. Accord *Owens-Corning Fiberglas v. American Centennial Ins. Co.* (C.P. 1995), 74 Ohio Misc.2d 183, 219-220 (under the "all sums" approach, insured remains "limited to one recovery"); *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.* (C.A.3, 1996), 98 F.3d 1440, 1442 (applying the "fundamental principle of insurance law which prohibits insurance contracts from conferring a benefit greater than the insured's loss (i.e., a 'double recovery')" to Pennsylvania's "all sums" rule).

⁴ Attached to Goodrich's Br. on Settmt. Credits (4/5/06).

The District Court decision in *GenCorp* (which was expressly affirmed and adopted by the Sixth Circuit), begins by reiterating that under Ohio law, excess coverage is triggered at the level of underlying policy limits, even if the insured settled for less than underlying limits. That is, “GenCorp’s excess insurers have the same obligation to pay GenCorp’s environmental-related liabilities as they would have had if GenCorp’s primary insurers had paid GenCorp the maximum amount covered by GenCorp’s policies.” 297 F.Supp.2d at 1006. Accord *Fulmer v. Insura Property & Cas. Co.* (2002), 94 Ohio St.3d 85, 96 (when an insured settles with an underlying insurer for less than policy limits, the excess insurer is required to pay only damages above the underlying policy’s limits). The “all sums” rule extends the “policy limits” rule to *all* settled primary and lower level excess and umbrella policies. If the insured settles for less than policy limits, it must absorb the difference. This rule correctly places the risk of settling too low where it belongs – on the insured that controls the negotiations and chooses to settle – rather than on a stranger to the settlement. See *Bondex*, at *4.

In short, *GenCorp* recognizes the *consequences* that flow from the “choices” made by insureds under the “all sums” approach. An insured cannot ignore its own allocation choices to reach nonsettling excess policies. If an insured’s “choice” is to allocate liability among multiple primary insurers (instead of a single policy), excess policies do not attach until the insured’s losses exceed the policy limits of all the settled primary policies. The Sixth Circuit summarized this commonsense rule as follows:

GenCorp’s position is that, since it can no longer look to its primary insurers for coverage because of the settlements, it has exhausted that coverage, and *Goodyear* thus allows it to look to one or more of its excess policies to cover the rest of its liabilities. The district court rejected this argument. It determined that by settling with its primary and umbrella insurers, GenCorp had made the choice to allocate its liability as broadly as possible, which meant that it had to demonstrate that its liabilities would exceed

the cumulative limits of all the [settled] primary and umbrella policies before it could trigger the excess policies.

GenCorp, 138 Fed.Appx. at 733-34. The quid pro quo is equally logical: by settling with multiple primary insurers, the insured has exhausted those policies and deprived excess insurers of contribution rights granted under *Goodyear*. As a consequence, the insured's losses must exceed the policy *limits* of the settled policies *before* excess policies are triggered:

Had GenCorp not settled with the primary insurers *** the excess insurers would then turn to the untapped primary insurers for contribution, as the *Goodyear* court presumed they would do.

* * *

But GenCorp's settlements eliminated this possibility. The settlements extinguished all claims related to the issues in dispute in *GenCorp I* against the primary insurers. The excess insurers, therefore, cannot seek contribution from GenCorp's primary insurers because those insurers have no remaining liability to GenCorp. The result of GenCorp's interpretation of *Goodyear*, then, would be to saddle the excess insurers with more than their contracted-for share of GenCorp's liability and give them no recourse for reducing their burden.

GenCorp reaches this problematic result because it overlooks a key piece of the puzzle: *GenCorp has already made its allocation of liability among its primary insurers.* GenCorp made that allocation when it settled with its primary insurers. GenCorp could have settled with just one or two of its primary insurers or sought a partial settlement with any of those insurers. GenCorp did not do this. Instead, GenCorp settled with all primary insurers and released them from any further liability. In so doing, GenCorp exhausted its primary coverage. It exhausted that coverage as to all primary insurers, as to all primary insurance policies, and as to all policy years. It is not possible for GenCorp now to decide to allocate its liability to one policy or to one policy year because this would be contrary to the settlements it has reached.

297 F.Supp.2d at 1007-1008 (court's emphasis).

Here, the Trial Court triggered CU's excess coverages based solely upon exhaustion of the \$20 million primary and umbrella liability limits for the AMICO policy directly beneath

CU's excess coverage. (See Appx., Tab A, ¶ 1.) The Trial Court failed to credit the policy limits of the other primary and umbrella policies exhausted by Goodrich, based on rulings directly contrary to *GenCorp's* analysis. The ruling states, for example, that "[i]f an insurer thinks it is entitled to contribution from other insurers, let it proceed against them." (Appx., Tab B, p. 5.) But the whole point of *GenCorp* is that an insured's "choice" to allocate liability broadly *deprives* excess insurers of contribution rights. *GenCorp*, 297 F.Supp.2d at 999. See, also, *Bondex*, *supra* (dismissing contribution claims against settling insurers.)

The Trial Court's approach of withholding settlement credits from insurers who go to trial is also contrary to public policy, as noted by *GenCorp*:

GenCorp's argument is unpersuasive and, perhaps, itself steps on public policy. By GenCorp's logic, all defendants who do not settle should be penalized for their reluctance regardless of the merits of their claims. As defendants note, Ohio law *encourages* settlement; it does not *require* it. Nothing in the cases cited by GenCorp supports the proposition that a party with meritorious or even arguable claims should be penalized for failing to compromise its position rather than take those claims to trial.

297 F. Supp.2d at 1001 (court's emphasis).

B. The Trial Court Erred by Also Refusing to Deduct the Dollar Amount of Any Settlement.

The Trial Court should have reduced the jury verdict by: 1) the *limits* of settled policies *under* the attachment point of the CU policies (*GenCorp.*, *supra*); and 2) the *dollar amount* of settled policies *over* the level of the CU policies. The Trial Court not only ignored *GenCorp*, but also ignored fundamental Ohio law⁵ prohibiting double recoveries by refusing to deduct *any* settlement amounts.

⁵ The rule limiting insureds with multiple policies to a single recovery is applied universally. See generally 15 *Couch on Insurance* (3d Ed. 2005) § 217:1.

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COURT OF APPEALS
DANIEL M. HORRIGAN

2007 JUN 26 11:12:00

Case No. 23585, 23586

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS

GOODRICH CORPORATION fka
THE B.F. GOODRICH COMPANY
Appellee,

v.

COMMERCIAL UNION INSURANCE COMPANY, et al.
Appellants

APPEAL FROM THE COMMON PLEAS COURT
SUMMIT COUNTY, OHIO
CASE NO. CV 1999 02 0410

(AMENDED) BRIEF OF APPELLANTS ACCIDENT & CASUALTY CO.;
COMMERCIAL UNION ASSURANCE CO.; EDINBURGH ASSURANCE CO.; UNITED
SCOTTISH INSURANCE CO.; LTD., VICTORIA INS., CO. LTD.; ROAD
TRANSPORT, GP AV; WINTERTHUR SWISS INSURANCE CO.; WORLD
AUXILIARY INS. CORP. LTD., AND YASUDA FIRE & MARINE INS. CO. (UK) LTD.
COLLECTIVELY REFERRED TO AS CERTAIN LONDON MARKET INSURERS

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Transport, GP AV; Winterthur Swiss Insurance Co.; World Auxiliary Ins. Corp. Ltd., and
Yasuda Fire & Marine Ins. Co. (Uk) Ltd.

While the Certain London Market Insurers believe that post-judgment interest is not applicable to this case, the amount awarded by the court was incorrect and unjust. Post-judgment interest must be calculated on a policy-by-policy basis and not on a figure exceeding the maximum available policy limits or maximum insurer liability. The trial court entered judgment against the Certain London Market Insurers for post-judgment interest in an amount of \$3616.43 *per diem*. This amount was calculated based upon a figure of \$22 million, an amount that far exceeds applicable remaining coverage limits. If Goodrich were to select any Certain London Market Insurer, the interest should be calculated against that insurer at the time of selection based upon that insurer's portion of the risk. For example, if Goodrich were to select Accident and Casualty Co., interest should be calculated at the statutory rate for the coverage limit of \$71,400.00, since that is the maximum amount of coverage available from this entity under this policy.¹⁶

Given post-judgment interest is not due and owing from the Certain London Market Insurers and the trial court calculated the interest on an amount in excess of the policy limits, it is respectfully requested that the judgment awarding post-judgment interest be reversed.

IV. THE TRIAL COURT ERRED WHEN IT DENIED CERTAIN LONDON MARKET INSURER'S MOTION FOR APPLICATION OF CREDITS AND SETTLEMENT SET-OFFS.

The correct measure of damages, including the application of set-offs based on settlements, presents a question of law subject to *de novo* review. See, e.g., *Hess v. Norfolk S. Ry. Co.* (2005), 106 Ohio St.3d 389.

The case of *GenCorp Inc. v. AIU Ins. Co.*, 297 F. Supp.2d 995(N.D. Ohio 2003), *aff'd* 138 Fed. Appx. 732 (6th Cir. 2005), interpreting Ohio law, is clearly dispositive on this issue. In

¹⁶ See *London's Resistance and Opposition to Goodrich's Proposed Entry of Final Judgment*.

GenCorp the court held that nonsettling excess insurers are only liable for the insured losses that exceed the combined limits of all settled primary and lower level excess policies. *Id.* At 733-34 (Applying Ohio law and determining how the “all sums” approach adopted in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St. 3d 512 should be applied); See *Goodyear v. Hartford Acc. Indem. Co.*, No. 979-33 (W.D. Pa. April 14, 2005); See also *Bondex Int'l v. Hartford Acc. & Indemn Co.*, 2007 WL 405938, *4 (N.D. Ohio Feb. 1, 2007) No Ohio environmental coverage cases have held to the contrary.

The trial court’s ruling that the Certain London Market Insurers were not entitled to any credit or set-off beyond AMICO’s underlying \$20 million limit was clearly in conflict with Ohio law and against the great weight of authority. In fact, as noted in the Statement of Facts, Judge Bond acknowledged that based on the law the defendants should prevail. However, she chose to rule sans this authority. *GenCorp* was assigned to Judge Dowd, written by Magistrate Hemann and unanimously affirmed by a Sixth Circuit panel in an opinion authored by Judge Batchelder. With all due respect to the trial Judge, those are five very excellent judges whose unanimous legal opinions she disregarded. All are very well qualified to interpret Ohio law and their opinions are highly persuasive.¹⁷

As part of her rationale for denying settlement credits, Judge Bond concluded that a finding of bad faith against CU somehow distinguished this case from *GenCorp* and others. Certain London Market Insurers did not act in bad faith. In fact, Certain London Market Insurers received a directed verdict on that issue. If anyone acted in bad faith it was Goodrich, which

¹⁷ At the time of the Goodrich settlements with its excess carriers, shortly before or during trial Goodrich was well aware of *GenCorp*. Counsel for Goodrich was also counsel in *GenCorp*. The arguments made to and accepted by the trial court in this case were the same arguments made to and rejected by the Courts in *GenCorp*.

denied carriers the necessary information to appropriately investigate the claim. To the extent that bad faith is found to distinguish this case from *GenCorp*, it was error for the trial court to apply that rationale to any Certain London Market Insurer.

Pursuant to *GenCorp* and fundamental Ohio law, the trial court should have deducted the limits of primary and lower level settled policies and the dollar-for-dollar settlement amounts of settled policies above the Certain London Market Insurer's policies. Alternatively, the second option would be to deduct all settlement dollar amounts. The trial court's failure to employ either option violates Ohio law and should be reversed, or in the alternative the case be remanded to have settlement credits applied.

V. THE TRIAL COURT ERRED BY DENYING CERTAIN LONDON MARKET INSURER'S SET-OFFS FOR AMOUNTS PAID BY OTHER LONDON MARKET SUBSCRIBERS.

As noted in section IV, the issue of set-offs presents a question of law subject to de novo review. See, e.g., *Hess*, 106 Ohio St.3d 389. Certain London Market Insurers reiterate that any use of bad faith to justify a denial of set-offs is inapplicable to them.

Other subscribers in the London Market have paid Goodrich almost \$15 million under the various London Market policies, yet the trial judge did not credit a cent of that money as a set-off to remaining insurers. As previously noted, credit was not given for the Lloyd's of London payments, which also should have applied to the remaining subscribers since they applied to the same policies. The failure of the trial court to apply these particular credits, regardless of other *GenCorp* credits or set-offs, is error. These set-offs should be applied as a matter of law.

From a public policy point of view, the trial court's failure to apply any credit or set-off, contrary to Ohio law, will result in unjust enrichment to Goodrich and is likely to result in increased litigation. It is unlikely that any future Plaintiff involved in this type of litigation would

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C.A. Nos. 23585, 23586

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CLERK OF COURTS

GOODRICH CORPORATION fka
THE B.F. GOODRICH COMPANY,
Appellee,

v.

COMMERCIAL UNION INSURANCE CO., et al.,
Appellants.

APPEAL FROM THE COMMON PLEAS COURT
SUMMIT COUNTY, OHIO
CASE No. CV 1999 02 0410

**REPLY BRIEF OF APPELLANT COMMERCIAL UNION INSURANCE
COMPANY n/k/a ONE BEACON AMERICA INSURANCE COMPANY
IN SUPPORT OF ITS APPEAL**

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2 (“The decision to proceed to trial is not ‘intransigence’ or in some way reprehensible conduct deserving of sanction”).

Nor does Goodrich explain how cases from other jurisdictions are relevant when Ohio applies contract – not tort or equity principles – to resolve insurance coverage disputes. See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512 (hereinafter “*Goodyear*”); *Pilkington North America, Inc. v. Travelers Cas. & Sur. Co.* (2006), 112 Ohio St.3d 482, ¶ 23 (“the relationship between the insurer and the insured is purely contractual in nature”). Goodrich’s own authority agrees. *Weyerhaeuser Co. v. Commercial Union Ins. Co.* (Wash. 2001), 15 P.3d 115, 126 (refusing to apply “tort principles” to settlement credits).

III. GENCORP IS CORRECT AND ON POINT. (Assign. II)

Goodrich’s analysis of *GenCorp* is flawed from beginning to end. First, it claims that “set-off” is an “equitable claim or defense” reviewed for abuse of discretion. (Opp. Br., p. 11.) Its own case, however, dismisses that very argument as a “confusion in the nomenclature.” *United Technologies Corp. v. American Home Assur. Co.* (Opp. Br., p. 14) (D.Conn. 2001), 237 F.Supp.2d 168, 171-172 (the affirmative defense of setoff is based on “mutual debts between the parties” and is inapplicable to settlement credits in insurance coverage disputes). Accord *Walter v. Nat’l City Bank of Cleveland* (1975), 42 Ohio St.2d 524, 525.

Similarly, Goodrich errs when it characterizes the “all sums” allocation method adopted in *Goodyear* as including “equitable” contribution rights that may or may not apply. Nowhere does *Goodyear* refer to “equitable” rights of contribution. To the contrary, the sentence Goodrich cites (Opp. Br., p. 12) adopts the allocation approach of *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C., 1981), 667 F.2d 1034. *Keene* accords rights of contribution based on contract language, not “equitable” contribution.

Here, as in *GenCorp* and *Keene*, the question on appeal is the correct rule of law: 1) to be applied to the jury's findings that Goodrich proved \$42 million in past clean-up and underlying defense costs; the \$22 million judgment on that jury verdict; and the \$35.8 million in settlements already received by Goodrich;² 2) consistent with Ohio's "continuous trigger" of coverages for environmental liabilities, and "all sums" method for allocating coverages.³ *Keene* rejects Goodrich's assertion that the "all sums" approach permits an insured to "choose" multiple triggered policies and "stack" those policies in a series of settlements, without affecting excess coverages. *Keene*, 667 F.2d at 1049 ("all sums" indemnity "does not require that Keene be entitled to 'stack' applicable policies' limits of liability. *** Therefore, we hold that only one policy's limits can apply to each injury"). *Keene* establishes that Goodrich violated the very "all sums" approach upon which it relies when it "chose," "stacked," and settled numerous triggered primary and excess policies.

² Goodrich disputes (Opp. Br., p. 8) the \$55.8 million settlement figure set forth in its own Trial Court filings, claiming that the \$20 million limit of the underlying AMICO policy must first be deducted. Using Goodrich's terminology, CU will refer to a \$22 million judgment (after deducting the AMICO policy limits) and \$35.8 million in settlements.

³ Cases formulating a rule of law for settlement credits within the context of a "manifestation trigger" rule (i.e., *Kayser-Roth*, supra) or "pro rata" allocation (e.g., *E.R. Squibb & Sons, Inc. v. Lloyd & Cos.* (C.A.2, 2001), 241 F.3d 154, 172; *Cascade Corp. v. American Home Assur. Co.* (Or. App. 2006), 135 P.3d 450) are based on different rules and policies. Under the "manifestation" trigger, for example, only policies in effect in the year pollution "manifests" are triggered. Under the "pro rata" allocation approach, each insurer owes only its *proportionate fraction* of the total coverages in that "layer." The insured's decision to settle with one or more insurers on or below that level is irrelevant because each insurer will have already received the benefit of multiple triggered policies by having its liability reduced proportionately. *Pub. Service Co. of Colorado v. Wallis & Cos.* (Colo. 1999), 986 P.2d 924, 942 (insurer that has received benefit of pro rata allocation "is not also entitled to a set-off for the amounts that [the insured] received in settlement agreements with its other insureds.") More relevant is *Massachusetts Elec. Co. v. Commercial Union Ins.* (Mass. Super.), 20 Mass. L.Rptr. 193, 2005 WL 3489874 (see Opp. Br., p. 15), a case expressly applying the "all sums" approach and reducing the judgment "pro tanto" (dollar-for-dollar) in the amount of settlements received – an alternative the Trial Court rejected in this case.

Goodrich's attempt to paint *GenCorp* as a rogue decision also must fail. Its suggestion that *GenCorp* provides "no guidance" because it was affirmed in an unpublished decision, for example, is contradicted by the Sixth Circuit opinion itself:

Because the district court's opinion carefully and correctly sets out the law governing the issues raised, and clearly articulates the reasons underlying its decision, issuance of a full written opinion by this court would serve no useful purpose.

138 Fed. Appx. 732. The panel's approval of the district court's analysis was further supported by the Sixth Circuit's rejection of *GenCorp*'s request for *en banc* review. *Id.* Accord *Bondex Int'l v. Hartford Acc. & Indem. Co.*, N.D. Ohio No. 1:03-cv-01322, 2007 WL 405938.

Goodrich's argument that *GenCorp* is inconsistent with *BP Exploration & Oil Co. v. Maintenance Services, Inc.* (C.A.6, 2002), 313 F.3d 936 (Opp. Br., p. 17) is also incorrect. *BP Exploration* holds that Ohio's joint tortfeasor statute does not apply to parties that are "not 'liable in tort for the same injury.'" *Id.* at 941-942. This case does not involve joint tortfeasors or Ohio's joint tortfeasor statute. Nor have other jurisdictions rejected *GenCorp*. The only case cited by Goodrich that even mentions *GenCorp* is *Massachusetts Elec. Co.*, *supra*, 2005 WL 3489874 (Opp. Br., p. 16, n. 19), which simply cites to *GenCorp* as a "but see" example of what happens when the "all sums" method cannot be applied due to the insured's broad allocation.

Goodrich's claim that *GenCorp* has "analytical flaws," and misapprehends the holding of *Goodyear*, is based on incomplete and misleading excerpts from the opinion. The district court's full holding explains that *GenCorp*'s late-in-the-day invocation of the "all sums" approach conflicted with prior rulings in the litigation based on Ohio law, prior rulings that "must be read in light of the holding in *Goodyear* to understand the conflict between the parties ***." 297 F.Supp.2d at 1006. Because (pursuant to those rulings) *GenCorp*'s settlements extinguished claims against the primary insurers, and the excess insurers' obligations were to remain the same

as if policy limits had been paid, the *only* logical conclusion was that excess policies would be triggered only when losses exceeded the policy limits of settled policies. *Id.*

That is exactly the situation here. Goodrich wants all of the advantages of the “all sums” approach, but none of the constraints. Goodrich itself rejected the “all sums” approach when it “chose,” “stacked” and settled multiple triggered policies, extinguishing contribution claims against those insurers (claims integral to the all sums method) while declaring that the settlements nevertheless comprised “exhaustion” that triggered excess coverages. Having succeeded on its claim that the settlements triggered excess coverage, Goodrich must live with the “triggering” language of excess policies – i.e., coverage is triggered upon the incurrence of costs exceeding the settled policies’ limits.

Finally, Goodrich argues that its settlements released liabilities under multiple theories, but does not dispute that *all* liabilities are Calvert City pollution liabilities. The *only* case Goodrich offers to support its claim – *Weyerhaeuser Co. v. Commercial Union Ins. Co.* (Wash. 2001), 15 P.3d 115 (Opp. Br., pp. 14-15) – involved 42 polluted sites, and applied state law that prohibits the production of settlement agreements to establish appropriate credits (*id.* at 127). Here, only *one* site is at issue and Ohio requires production of settlement agreements. See *Ohio Consumer’s Council v. Public Utilities Comm’n* (2006), 111 Ohio St.3d 300, at ¶ 87-94. And while Goodrich also claims that the releases include “future” liabilities (Opp. Br., p. 7), “future” financial obligations are non-existent – they have been transferred to PolyOne. But even if this Court were to affirm the declaration that CU is liable for future remediation costs, that would not prevent the application of settlements to future costs.

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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

COURT OF APPEALS
DANIEL H. HOFFMAN
2007 JUL 16 PM 3:21
SUMMIT COUNTY
CLERK OF COURTS

GOODRICH CORPORATION,)	CONSOLIDATED APPEALS CASE
)	NOS. 23585 and 23586
Appellee/Cross-Appellant,)	
)	SUMMIT COUNTY
vs.)	COMMON PLEAS CASE
)	NO. CV 1999 02 0410
COMMERCIAL UNION INSURANCE,)	
CO., et al.,)	
)	
Appellants/Cross-Appellees.)	

**BRIEF OF APPELLEE, GOODRICH CORPORATION,
IN RESPONSE TO APPEAL OF CERTAIN LONDON MARKET INSURERS
(Accident and Casualty Company; Commercial Union Assurance Company; Edinburgh
Assurance Co.; United Scottish Insurance Company Limited; Victoria Ins. Co. Ltd.; Road
Transport, GP AV; Winterthur Swiss Insurance Company; World Auxiliary Insurance
Corporation Limited; Yasuda Fire and Marine Insurance Company)**

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*Attorneys for Appellee/Cross-Appellant,
Goodrich Corporation*

The non-settling insurers ask the Court to reward them for not settling the case and give them the benefit of monies paid by the settling defendants. A rule allocating such a windfall to non-settling insurers would encourage insurers to refuse to settle and force the case to trial, knowing that they will never be required to pay more than what they are legally obligated to pay and hoping that they can reap a windfall if settlements by other insurers prove to be in excess of their legal obligation. The courts should not encourage that type of “dog in the manger” approach to litigation.

Squibb, 1997 WL 251548. at *3. The Second Circuit noted that non-settlers were not prejudiced, because their attachment points had not changed and they were not being required to pay more than they would have had to pay if there had been no settlements. *Squibb*, 241 F.3d at 172.

In *Weyerhaeuser*, the court also rejected the arguments London makes here and noted that, as in this case, the settlements were much broader than was the verdict:

As the settlements “paid Weyerhaeuser for a release from an unquantifiable basket of risks and considerations,” ... we cannot say the settlements simply constituted payment for Weyerhaeuser’s cleanup costs.

Weyerhaeuser, 142 Wash.2d at 126.

D. The Insurers’ Limited Authority Provides no Useful Guidance.

London relies principally upon *GenCorp, Inc. v. AIU Insurance Company* (N.D. Ohio 2003), 297 F.Supp.2d 995, affirmed by (6th Cir. 2003), 138 Fed. Appx. 732.¹¹ The trial court herein, however, appropriately disregarded that case. The *GenCorp* court¹² stated it was not

¹¹ *GenCorp* also is not being followed by other courts. Although the Western District of Pennsylvania in *Goodyear Tire & Rubber Co. v. Hartford Accident and Indem. Co* (March 15, 2005), W.D. Pa. No. 97-933, a case cited by London, denied summary judgment to the policyholder on allocation issues and, in so doing, inaccurately assumed that *GenCorp* stated the law of Ohio, it cited no Ohio authority supporting such a conclusion. London also cites *Bondex Int’l. v. Hartford Acc. & Indem. Co.* (Feb. 1, 2007), N.D. Ohio No. 1:03-CV-01322, 2007 WL 405938, a case that cited *GenCorp* only in regard to its holding, also contrary to Ohio law, on the rights of insurers to contribution *inter se*. *Id.* at * 3. That issue is not before this court.

¹² London has suggested that *GenCorp* be given deference because of the involvement of Judge Dowd and the Sixth Circuit. (London Br., p. 17). In actuality, Judge Dowd had no involvement, and the Sixth Circuit affirmed, largely without opinion, in a decision that it has determined to be not suitable for publication. London also states, in error, that Goodrich’s counsel served as counsel for *GenCorp* in that case. (*Id.*, n. 17). In actuality, none did.

addressing settlement credits. *Id.* at 1001, 1008. In addition, that case was factually distinguishable. Unlike in this case, the policyholder had not obtained a judgment. Further, no party had submitted to the court any of the prior settlement agreements. *Id.* at 998. Hence, the *GenCorp* court was unable to compare the scope of any judgment to the scope of any settlement agreement or to determine, as did the trial court in this case, that there was no double recovery.

GenCorp also does not reflect the law of Ohio. Most fundamentally, the court misapprehended the decision of the Supreme Court of Ohio in *Goodyear*:

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.... *These positions are not supported by Goodyear.*

Id. at 1006-1007. (emphasis added). In other words, the court described the precise holding in *Goodyear*, then stated that *the very holding of Goodyear* was “not supported by *Goodyear*.” That departure from the law of Ohio at this first step of the analysis led the court to veer further off course with each subsequent step.¹³ *GenCorp*, in short, was without precedent in Ohio insurance jurisprudence, as explained at length to the trial court.

Further, the Sixth Circuit itself, applying Ohio law, addressed a similar setoff issue in *BP Exploration & Oil Co. v. Maintenance Services, Inc.* (6th Cir. 2002), 313 F.3d 936, 942, a case in which a tortfeasor sought setoff for an insurance payment made to the judgment creditor. The court held that setoff is inappropriate where, as in Goodrich’s case, there is a disparity between

¹³ Among the analytical flaws in the analysis were the following: (1) reasoning that requiring insurers to pay in accordance with their stated attachment points and limits was to require them to pay *more* than “their own contracted-for share” (*Id.* at 1007); (2) determining that policyholders would receive a “windfall” if insurers were required to pay under their policies as drafted (*Id.* at 1003); and (3) determining that insurers would not receive a windfall if a court raised their attachment points by disregarding *Goodyear* and requiring policyholders to horizontally allocate their losses among all their triggered policies (*Id.* at 1002-1003).

scope of judgment and the scope of the earlier settlement: "Applying Ohio law, we agree with BP that a setoff is not required when the claims against the settling defendant and the judgment against the non-settling defendant involve different injuries." *Id.*

E. Ohio Public Policy Compels Rejection of the Requested Settlement Credits.

A policyholder and its insurers should be free to settle on any basis they can negotiate, without fear of forfeiture. London, however, is arguing that Goodrich's settlements operate as a forfeiture of its London coverages, regardless of London's breaches of contract, Goodrich's significant uncompensated loss, and the great disparity between the broad scopes of Goodrich's settlements and its very narrow judgment against London.

Forfeitures are greatly disfavored under Ohio law, particularly in insurance cases. *Kitt v. Home Indemnity Co.* (1950), 153 Ohio St. 505, 511-512. Forfeiture arising from settlements such as Goodrich's would provide great disincentive to policyholders to settle, and any disincentive to settle would be at odds with the strong public policy of Ohio. *Bland v. Graves* (9th Dist. 1994), 99 Ohio App.3d 123, 136; *Krischbaum*, 58 Ohio St.3d at 69.

Similarly, under *GenCorp* an insurer would have incentive not to settle, in the hope that other settlements would cause the policyholder to forfeit coverage. The insurers that hold out the longest would have the greatest chance of reaping such a windfall. Any ruling that so discourages settlement by policyholders, incentivizes intransigence by insurers, and thereby perpetuates coverage litigation is greatly at odds with Ohio public policy.

The trial court managed this case for eight years, considered all of the evidence, and analyzed the extensive arguments presented by the parties. Its decision is in accordance with the language of the insurance policies at issue, Ohio law and public policy, and the overwhelming weight of law and public policy throughout the country. It did not act unreasonably, arbitrarily, or unconscionably and, accordingly, did not abuse its discretion in denying set-off.

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D14-1012-PL-053501

DANA COMPANIES, LLC,
Plaintiff,

v.

AMERICAN EMPLOYERS'
INSURANCE COMPANY BY
PENNSYLVANIA GENERAL
INSURANCE COMPANY,
Defendant.

FILED
10 MAY 08 2013
Elizabeth d. White
CLERK OF THE MARION CIRCUIT COURT

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF

Plaintiff Dana Companies, LLC (“Dana”) and Defendant American Employers’ Insurance Company by Pennsylvania General Insurance Company (“American Employers”) have cross-moved for partial summary judgment on legal issues regarding the construction and effect of the “other insurance” and “non-cumulation” clauses incorporated in certain insurance policies issued by American Employers, as well as the scope of coverage for defense costs under those policies. In an Order dated December 27, 2012 (“December 2012 Order”), this Court previously granted Dana’s motion for partial summary judgment on issues of choice of law, trigger, and scope of coverage. Oral argument on the cross-motions was held on April 9, 2013. Having reviewed the briefs and the materials presented, the Court now GRANTS Dana’s cross-motion and DENIES the cross-motion of American Employers.

I. FACTUAL BACKGROUND

1. Dana seeks insurance coverage under excess insurance policies issued by American Employers for certain environmental and asbestos-related liabilities. Those liabilities

include Dana's defense costs and indemnity obligations for (1) a Stipulation and Order with the Environmental Protection Agency dated September 12, 2008, resolving the EPA's proofs of claim in the bankruptcy proceeding of Dana's predecessor, Dana Corporation,¹ and (2) past and future lawsuits alleging bodily injury as a result of exposure to asbestos-containing products that Dana Corporation allegedly produced, manufactured, or sold. December 2012 Order ¶ 16-17.

A. The Excess Liability Insurance Policies Purchased by Dana from American Employers

2. On or about May 23, 1969, Dana Corporation purchased excess liability insurance policy no. A228500320 from American Employers (the "1969 Policy"), along with three policies from other insurers that formed a \$20 million quota-share layer of coverage in excess of Dana's existing \$30 million of umbrella coverage. *Id.* ¶ 2; Coverage Chart, Exhibit 1 to Affidavit of Justin F. Lavella dated October 8, 2012 (hereinafter "Lavella Aff."). The 1969 Policy consists of three annual periods running from May 23, 1969 to May 23, 1972. December 2012 Order ¶ 2. On or about May 23, 1972, and again on or about April 1, 1973, Dana Corporation purchased two additional periods of excess liability coverage from American Employers (collectively with the 1969 Policy, the "American Employers Policies"). *Id.* Together, the American Employers Policies provide coverage to Dana from May 23, 1969 to June 1, 1973. *Id.* The quota share layer of coverage including the American Employers Policies was the first general liability insurance purchased by Dana providing coverage in excess of \$30 million. Coverage Chart, Exhibit 1 to Lavella Aff.

3. The American Employers Policies state that American Employers agrees to insure Dana "except as herein provided, subject to all the terms and conditions of" the underlying

¹ Dana is the successor by merger to Dana Corporation, an automotive parts manufacturer. December 2012 Order ¶ 1. Dana Corporation voluntarily entered into chapter 11 bankruptcy in 2006 and on January 31, 2008 was merged into the newly-formed Dana pursuant to its Third Amended Plan of Reorganization. *Id.*

umbrella policy (i.e., the “Followed Policy”). December 2012 Order ¶ 5; American Employers Policies, Exhibit 2 to Lavella Aff. The Followed Policy was initially the London Market policy no. CU6002 (the “London Policy”). December 2012 Order ¶ 5. After its expiration on April 1, 1970, the London Policy was replaced as the Followed Policy with the substantively identical umbrella policy no. 9792342 issued by The Home Insurance Company (the “Home Policy”). *Id.*

B. The Policy Provisions at Issue

4. The policy language relevant to the parties’ cross-motions is standard form commercial general liability language incorporated from the Followed Policy underlying the American Employers Policies. American Employers promised, in relevant part:

to indemnify [Dana] for all sums which [Dana] shall be obligated to pay, by reason of the liability

- (a) imposed upon [Dana] by law, or
- (b) assumed under contract or agreement by [Dana] . . .

for damages, direct or consequential and expenses, all as more fully defined by the term “ultimate net loss” on account of:

- (i) Personal Injuries, including death at any time resulting therefrom,
- (ii) Property Damage, . . .

caused by or arising out of each occurrence happening anywhere in the world.

Home Policy, Exhibit 4 to Lavella Aff.

5. The term “Occurrence” is defined as “an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury [or] property damage . . . during the policy period.” *Id.*

6. “Ultimate net loss” is defined, in relevant part, to mean:

the total sum which the Insured, or any company as his insurer, or both become obligated to pay by reason of personal injury [or] property damage . . . claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal

bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

Id.

7. The "Other Insurance" provision states, in its entirety that:

If other valid and collectible insurance with any other insurer is available to the insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. Nothing herein shall be construed to make this policy subject to the terms, conditions and limitations of other insurance.

Id.

8. The "Prior Insurance and Non Cumulation of Liability" provision states, in relevant part, that:

It is agreed that if any loss covered hereunder is also covered in whole or in part under any excess policy issued to the insured prior to the inception date hereof the limit of liability herein as stated in Item 2 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.

Id.

9. The "Loss Payable" provision states, in its entirety, that:

Liability under this policy with respect to any occurrence shall not attach unless and until [Dana], or [Dana's] underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. [Dana] shall make a definite claim for any loss for which [American Employers] may be liable under the policy within twelve (12) months after [Dana] shall have paid an amount of ultimate net loss in excess of the amount borne by [Dana] or after [Dana's] liability shall have been fixed and rendered certain either by final judgment against [Dana] after actual trial or by written agreement of [Dana], the claimant, and [American Employers]. If any subsequent payments shall be made by [Dana] on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and

payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

Id.

II. DISCUSSION AND ANALYSIS

A. Legal Standards Governing the Cross-Motions

10. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). The moving party has the initial burden to demonstrate the absence of a genuine factual issue. *Myers v. Irving Materials, Inc.*, 780 N.E.2d 1226, 1228 (Ind. Ct. App. 2003). However, “[o]nce this burden has been met, the non-moving party must respond by setting forth specific facts demonstrating a genuine need for trial, and cannot rest upon the . . . pleadings.” *Id.*

11. The interpretation of an insurance policy is a question of law for the Court to determine and for which summary judgment is “particularly suitable.” *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 851-52 (Ind. 2012).

12. Indiana courts have adopted a set of rules of construction for interpreting insurance policies. The most fundamental of these is that “[a]n insurance policy should be so construed as to effectuate indemnification . . . rather than to defeat it.” *Masonic Accident Ins. Co. v. Jackson*, 164 N.E. 628, 631 (Ind. 1929). As a result, the terms in an insurance policy may not be construed in a manner that is “repugnant to the purposes of the policy as a whole.” *Prop. Owners Ins. Co. v. Hack*, 559 N.E.2d 396, 402 n.5 (Ind. Ct. App. 1990) (citation omitted). If there is any ambiguity in a policy term, it must be interpreted in favor of the policyholder and in favor of coverage. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470-71 (Ind. 1985). Under Indiana law, an insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language. *Id.* Moreover, several Indiana courts have held that

conflicting authority regarding the interpretation of policy language is “evidence that more than one reasonable interpretation . . . is possible.” *Hartford Accident & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295, 298 (Ind. Ct. App. 1997) (“*Dana I*”); *see also Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 938 (Ind. Ct. App. 1999). Finally, if a policyholder’s interpretation of a policy term is reasonable, then that construction governs as a matter of law. *Id.* Conversely, in order to prevail in a denial of coverage, an insurer must demonstrate that its construction of the insurance policy is the only plausible or reasonable reading. *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 144 (Ind. Ct. App. 1981) (“Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured’s indemnification for a loss covered by general language, that construction will be given.”).

B. Dana Is Entitled to Summary Judgment That the American Employers Policies’ “Other Insurance” and “Non-Cumulation” Clauses Do Not Impinge Dana’s Right to “All Sums” Scope of Coverage

13. The first issue raised by the parties’ cross-motions is the application of the “other insurance” and “non cumulation” clauses incorporated by reference in the American Employers Policies. American Employers has argued that one or both of these clauses permit it to pay last of all of Dana’s insurers, or perhaps not to pay at all. For the reasons set forth below, the Court finds that American Employers’ interpretation of these provisions would negate its promise to indemnify Dana for “all sums.” The Court therefore grants partial summary judgment on this issue to Dana.

1. Indiana Law Requires American Employers to Pay “All Sums”²

14. Consistent with established, long-settled Indiana law, this Court has already interpreted the language used in the American Employers Policies to require American

² This Court has already ruled that Indiana law governs the interpretation of the American Employers Policies. Because American Employers nonetheless relies primarily on decisions interpreting or applying Ohio law to support its positions, the Court will treat the Ohio decisions cited by American Employers and Dana as persuasive authority.

Employers to pay “all sums” that Dana is obligated to pay in connection with its environmental and asbestos-related claims. December 2012 Order ¶ 25-30 (relying on *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001) (“*Dana III*”); *S. Ind. Gas & Elec. Co. v. Admiral Ins. Co.*, No. 49D05 0411 PL 2265, slip op. at 2 (Marion Cnty. Super. Ct. Oct. 31, 2011); *Eli Lilly & Co. v. Aetna Cas. & Sur. Co.*, Cause No. 49D12 0102 CP 000243, slip op. 2 (Marion Cnty. Super. Ct. July 15, 2002) (“*Eli Lilly & Co.*”); *Wolf Lake Terminals, Inc. v. Mut. Marine Ins. Co.*, 433 F. Supp. 2d 933, 948 (N.D. Ind. 2005)). Pursuant to this “all sums” scope of coverage, Dana is permitted to “select the policy or policies from among those that have been triggered to pay Dana’s defense costs and liabilities in connection with particular environmental and asbestos-related claims.” December 2012 Order ¶ 31. Once selected, American Employers must then pay “‘all sums’ that Dana is obligated to pay . . . subject only to its applicable limit of liability.” *Id.*

15. American Employers’ attempt to use the “other insurance” or “non-cumulation” clauses to avoid its contractual “all sums” obligation to Dana is inconsistent with this settled precedent, and at a minimum, results in inconsistencies and ambiguities in the American Employers Policies that must be interpreted in favor of coverage. *Eli Lilly*, 482 N.E.2d at 470-71 (Ind. 1985); *Masonic Accident*, 164 N.E. at 631; *see also Liggett*, 426 N.E.2d at 144 (“Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured’s indemnification for a loss covered by general language, that construction will be given.”).

2. The “Other Insurance” Clause Does Not Modify American Employers’ Obligation to Fully Indemnify Dana

16. While conceding that Indiana applies the “all sums” scope of coverage, American Employers nevertheless seeks to avoid its import by arguing that its policies’ “other insurance” clauses modify its obligations. Am. Empl. Memo. at 19-25. This argument fails, first and

foremost, because Indiana has already decided that an “other insurance” clause can only be reconciled with an insurer’s promise to pay “all sums” by limiting the application of the clause to determining an insurer’s contribution rights after the insured has been fully compensated. As explained by the Indiana Supreme Court, the primary purpose of insurance is to fully indemnify the policyholder. *Masonic Accident*, 164 N.E. at 631. Only once that has occurred can an insurance company seek contribution from the policyholder’s other insurers. *Dana III*, 759 N.E.2d at 1057-58 (specifically rejecting “other insurance” argument and holding that no language in the policies’ coverage grants required proration).

17. The Indiana Supreme Court’s ruling in *Dana III* is consistent with opinions from other states—including Ohio—that apply the plain meaning of the “all sums” language and require a selected carrier to pay “all sums” rather than only a pro rata share of liability. *See Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 794 (Ohio Ct. C.P. 1995) (holding that the “other insurance” clause comes in effect only when “determining the rights and duties of competing excess insurers”).³

³ *See also Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1050 (D.C. Cir. 1981) (holding that “other insurance” clauses “must govern the allocation of liability among the insurers in any particular case of asbestos-related disease. However, the primary duty of the insurers whose coverage is triggered by exposure or manifestation is to ensure that [the policyholder] is indemnified in full.”); *Dayton Indep. Sch. Dist. v. Nat’l Gypsum Co.*, 682 F. Supp. 1403, 1411 nn.21 & 23 (E.D. Tex. 1988) (holding that “other insurance” clauses “relate only to the rights of each Carrier against the other” and that the policyholder “is not obligated to first exhaust all underlying insurance in every policy period before it can proceed to obtain indemnification from its excess carriers. The requirement of exhaustion applies only to those policies which share the same policy period.”), *rev’d on other grounds sub nom. W.R. Grace & Co. v. Cont’l Cas. Co.*, 896 F.2d 865 (5th Cir. 1990); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 56-57 (1996) (noting that apportionment among insurers was based on “other insurance” clause and that such apportionment “has no bearing upon the obligations of the insurers to the insured”); *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909, 942 (Cal. 1997) (Chin, J., dissenting) (noting that majority opinion found “other insurance” clauses to be “without effect” under California’s “all sums” scheme); *Am. L. Prod. Liab.* 3d § 58:51 (3d ed. 2012)).

18. In response, American Employers asks this Court to ignore these factually similar cases and instead apply the rationale from automobile insurance cases and other cases involving concurrent coverage claims. Am. Empl. Mem. at 22-24; *see* Dana Reply at 9-10. Such “concurrent” coverage cases, however, are inapposite. Such cases involve a prioritization of competing insurance policies that were never designed to be in the same insurance program, such as the respective insurance policies of two policyholders involved in an automobile accident or the respective policies of a contractor and subcontractor. In connection with mass tort liabilities, which implicate multiple years of the same policyholder’s coverage, Indiana courts and courts elsewhere have recognized the right of the policyholder to select the policy or policies that are obligated to first respond to its covered liabilities.

19. In sum, “other insurance” clauses are not a means for an insurer to escape its contractual promise to pay “all sums.”

3. The “Non-Cumulation” Clause Is Both an Unenforceable Escape Clause and Otherwise Inapplicable

20. For all the reasons discussed in connection with the “other insurance” clause, American Employers’ interpretation of the “non-cumulation” clause also cannot be reconciled with the “all sums” scope of coverage applied under Indiana law. However, American Employers’ interpretation of the “non-cumulation clause” also must be rejected for a number of additional reasons.

21. First, American Employers’ interpretation renders the “non-cumulation” clause an unenforceable “escape” clause. *See Greene, Tweed & Co. v. Hartford Accident & Indem. Co.*, No. 03-3637, 2006 WL 1050110, at *13-16 (E.D. Pa. Apr. 21, 2006). American Employers has argued variously that the “non-cumulation” clause “requires all other insurance to exhaust” before American Employers can be obligated to pay, Am. Empl. Mem. at 22, or results in “the

policy limits” of its policies being “reduced by the amount of prior coverage,” Am. Empl. Reply at 23. Dana correctly points out that, under American Employers’ interpretation, if multiple policy periods are implicated American Employers will never have any obligation under its policies. This is because the American Employers Policies provide coverage in excess of \$30 million (i.e., the American Employers Policies’ “attachment point”), but only provide in the aggregate \$25 million of coverage (i.e., their “limit of liability”). Therefore, because the American Employers Policies’ attachment point is greater than their total limits of liability, the available limits of the policies would necessarily reduce to zero whenever a claim implicates multiple policy periods. As applied by American Employers, then, the “non-cumulation” clause does not simply reorder or delay American Employers’ payments, but results in American Employers completely avoiding payment. As such, the “non-cumulation” clause is an “escape” clause, and this Court concurs with other courts that have found such clauses unenforceable as a matter of law. See *Greene, Tweed & Co.*, 2006 WL 1050110, at *13-16; *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co. (In re Asbestos Ins. Coverage Cases)*, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct. Jan. 24, 1990), reprinted in *Mealey’s Litig. Rep.: Ins.*, aff’d in part, rev’d in part on other grounds sub nom. *Armstrong World Indus. v. Aetna Cas. & Sur. Co.*, 26 Cal. Rptr. 2d 35 (Cal. Ct. App. 1993), vacated on other grounds, 904 P.2d 370 (Cal. 1995).⁴

22. Second, and in the alternative, this Court finds persuasive *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 104 (2d Cir. 2012), which interprets an identical “non-

⁴ In Indiana, likewise, a Court should not enforce an interpretation of policy language that makes coverage illusory. *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996) (finding pollution exclusion contained in general liability policies ambiguous and unenforceable, and therefore construing in favor of coverage because otherwise the exclusion “would negate virtually all coverage”). American Employers’ interpretation of the “non-cumulation” clause would make its promise to pay “all sums” to Dana illusory, and therefore, for this additional reason cannot be adopted by this Court.

cumulation” clause and holds that such clause does not “apply to prior insurance policies at a lower level of excess coverage.” As the Second Circuit noted:

Reducing [an insurer’s] liability on an excess policy at the \$30.3 million level because of damages paid by a policy, for example, at the \$20 million level would conflict with the terms of the higher-level excess policy, since the intent of purchasing insurance at the \$30.3 million level is to be indemnified only when lower-level policies are unable to fully indemnify a particular loss and the total damages reach that higher-level policy’s attachment point.

Id. Thus, the “non-cumulation” clause’s phrase “loss covered hereunder” refers to a loss in excess of underlying limits, in this case a “loss [in excess of \$30 million] covered hereunder.” Because Dana does not have any prior insurance policies providing coverage *below* the American Employers Policies’ \$30 million attachment point, Coverage Chart, Exhibit 1 to Lavella Aff., no prior insurance policy insures a “loss covered hereunder,” and the limits of the American Employers Policies cannot be reduced.

23. At a minimum, the Second Circuit’s interpretation of an identical “non-cumulation” clause in *Olin* is persuasive “evidence that more than one reasonable interpretation [of the non-cumulation clause] is possible.” *Dana I*, 690 N.E.2d at 295; *see also Summit Corp.*, 715 N.E.2d at 938. Accordingly, Dana’s interpretation of the “non-cumulation” clause is reasonable and must be adopted as a matter of Indiana law. *E.g., Eli Lilly*, 482 N.E.2d at 470-71 (Ind. 1985).

24. Finally, Dana raises a number of additional arguments in support of its interpretation of the “non-cumulation” clause, including that the “non-cumulation” clause:

(a) should only apply to prior payments made by American Employers, not to payments made by other insurers;

(b) does not reduce American Employers' policy limits "by the amount of prior coverage" as American Employers has argued, but only by the amount "due," or paid, to Dana for specific claims; and

(c) cannot apply as plainly written because its reference to reducing "the limit of liability . . . as stated in Item 2 of the Declarations," incorporated from the Followed Policy, is unenforceable since "Item 2 of the Declarations" in the American Employers Policies is the policy period, not the limits of liability.

25. Because this Court has already granted Dana's motion as to the application of the "non-cumulation" clause, the Court will not address each of these arguments in detail. Suffice to say, these arguments further highlight the ambiguous language used in the "non-cumulation" clause, especially when considered alongside American Employers' promise to pay "all sums." This ambiguity would be an additional reason for adopting Dana's interpretation and finding in favor of coverage. *E.g., Eli Lilly*, 482 N.E.2d at 470-71 (Ind. 1985).

26. For all of the above reasons, the Court grants Dana's motion for partial summary judgment that the "other insurance" and "non-cumulation" clauses do not impinge Dana's right to select American Employers to pay "all sums" that Dana is liable to pay as a result of its asbestos and environmental liabilities. American Employers' cross-motion on this issue is denied.

C. American Employers Has an Obligation to Pay Dana's Defense Costs

27. The second issue raised by the parties' cross-motions is the American Employers Policies' coverage for Dana's defense costs. American Employers raises two separate arguments for why its policies allegedly do not provide such coverage. The first is another "other insurance" argument and is incorrect for all the reasons discussed in connection with the American Employers' Policies' true "other insurance" clause above.

28. The second argument is that Dana is not entitled to defense coverage for any asbestos claim⁵ that does not result in liability—i.e., that Dana *only* has coverage for defense costs if its defense of the underlying claim is unsuccessful. Because American Employers' theory is contrary to the terms of the policies, Indiana law, and common sense this Court finds that American Employers must pay Dana's defense costs once one or more of its policies are reached and until its policies are exhausted, for all claims alleging potential occurrences, including those that do not result in an adverse judgment or settlement.

29. American Employers rests its position on a misinterpretation of the policies' definition of "Ultimate Net Loss" and its argument has already been addressed and rejected by Indiana courts, including this state's Supreme Court. *See Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571, 577 (Ind. 2007) ("*Cinergy I*") ("To the extent that [an excess carrier] may have a responsibility with respect to defense costs, such obligation is independent of whether or not the plaintiffs in the [underlying] lawsuit are ultimately successful in obtaining a judgment or settlement against [the policyholders]."); *S. Ind. Gas & Elec. Co.*, No. 49D05 0411 PL 2265, slip op. at 4-5 (Marion Cnty. Super. Ct. Nov. 8, 2010) (following *Cinergy I* and holding that insurers are "required to pay the costs of defense as incurred").

30. In *Cinergy I*, as here, the insurance policies contained a coverage clause expressly covering both "damages" and "expenses," as well as a definition of "Ultimate Net Loss" that similarly included coverage for both such amounts. 865 N.E.2d at 574-76. The Court thus finds that *Cinergy I* controls the interpretation of the similar policy language at issue in the American Employers Policies, and that American Employers' "responsibility with respect to defense costs

⁵ This argument applies only to Dana's asbestos-related claims because all of the environmental liabilities at issue in this case were resolved through a settlement with the EPA. Amend. Compl., Ex. F.

... is independent of whether or not the plaintiffs in the [underlying] lawsuit[s] are ultimately successful in obtaining a judgment or settlement against” Dana.

31. Ignoring the similarity between the American Employers Policies and the policies at issue in *Cinergy I*, American Employers instead argues that this Court should adopt the result of a second *Cinergy* decision from the Court of Appeals. See *Cinergy Corp. v. St. Paul Surplus Lines Ins. Co.*, 873 N.E.2d 105 (Ind. Ct. App. 2007) (“*Cinergy II*”). That decision, however, addressed very different policy language from that at issue here and in *Cinergy I*. The policies at issue in *Cinergy II* not only did not provide coverage for defense costs within the coverage clause, but expressly excluded defense costs from the definition of “Ultimate Net Loss.” *Id.* at 110-111. The very limited coverage for defense costs provided by the *Cinergy II* policies was contained in a separate provision that explicitly tied such coverage to the payment of liability—i.e., the result American Employers requests here. Specifically, the *Cinergy II* policies required the insurer only to “contribute to the costs in the ratio that their proportion of the liability for such claim or claims as fully adjusted bears to the whole amount of such claim or claims.” *Id.* at 111.⁶ No such language is contained in the American Employers Policies. Therefore, not only is *Cinergy II* inapposite, but it proves that other policy language could have been adopted by American Employers if it truly had wanted to explicitly tie coverage for defense costs to a payment of liability. See *Flexdar*, 964 N.E.2d at 851-52 (interpreting policy exclusion against the drafting insurer by referencing other available policy language and noting “[b]y more careful drafting [the insurer] has the ability to resolve any question of ambiguity”).

32. American Employers raises a number of arguments allegedly peculiar to its policy language, but none withstands scrutiny. For example, American Employers argues that coverage

⁶ The *Cinergy II* court ultimately determined that there was no liability because there was no “occurrence,” and therefore the ratio of costs also had to be zero. *Id.* at 115.

for defense costs is subject to an “adjudication or compromise” requirement that is not met for cases where Dana prevails in its defense of a claim. But American Employers’ argument is irreconcilable with the definition of “Ultimate Net Loss,” which plainly imposes an “adjudication or compromise” requirement only on the portion of the definition involving liability (i.e., the language before the “and” in the definition). As a result, the portion of the definition providing coverage for defense costs (i.e., the language after the “and” in the definition) has no similar “adjudication or compromise” requirement.⁷

33. American Employers’ policy language argument thus comes down to the meaning of “occurrence covered hereunder” as used in the defense costs component of the “Ultimate Net Loss” definition. American Employers’ interpretation of this phrase, however, cannot be reconciled with its policies’ “Loss Payable” provision, which states that Dana should make a claim for payment from American Employers within twelve months after having “paid an amount of ultimate net loss . . . or after the Insured’s liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement,” after which American Employers must pay Dana within thirty days. Home Policy, Exhibit 4 to Lavella Aff. (emphasis added). Because amounts are to be submitted by Dana either when paid “or” after final judgment or compromise, the policies simply cannot require a finding of liability before defense costs are owed. At a minimum, again, Dana’s reading of the “Ultimate Net Loss” definition and “Loss Payable” provision is reasonable, and therefore should be followed under Indiana’s rules of insurance policy construction. *E.g., Eli Lilly*, 482 N.E.2d at 470-71.

⁷ Moreover, even if the “Ultimate Net Loss” definition did require “adjudication or compromise” before defense costs are covered, American Employers offers no basis in law or its policy language to find that the “adjudication or compromise” requirement is met only by an “adjudication or compromise” detrimental to Dana. “Adjudication” certainly encompasses a final judgment in Dana’s favor, and “compromise” encompasses a plaintiff’s agreement to dismiss his or her claim. Accordingly, to the extent “adjudication or compromise” is ambiguous, this is an alternative reason for granting summary judgment to Dana. *E.g., Eli Lilly*, 482 N.E.2d at 470-71 (Ind. 1985).

34. Finally, American Employers' duty to pay Dana's defense costs (and thus, what is "covered" under the policies) is not determined based on the success or failure of each individual claim,⁸ but rather whether the claims against Dana allege an "occurrence" as defined in the policies, i.e. "an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury [or] property damage . . . during the policy period." The occurrence or occurrences giving rise to Dana's various asbestos-related claims are alleged exposures to Dana's asbestos-containing products. These "occurrence" or "occurrences" are unquestionably covered under American Employers' policies. If American Employers had wanted to require that each and every "claim and suit" be "covered" before being obligated to pay for defense costs, the definition of "Ultimate Net Loss" could have been drafted differently to do so, as the policies in *Cinergy II* were. American Employers failed to include such language, and should not be permitted to redraft its policies now.

35. For all of the above reasons, this Court declares that American Employers' policies require it to pay defense costs for all claims alleging potential occurrences, regardless of the final disposition of those claims.

D. Dana's Settlements with Its Other Insurers Do Not Permit American Employers to Avoid Its "All Sums" Obligations

36. The third and final issue raised by the parties' cross-motions is the effect—or the lack of effect—of Dana's prior settlements with other carriers. American Employers argues that by settling with its other insurers, Dana has somehow waived its right to utilize the "all sums" scope of coverage and to select American Employers to pay its unreimbursed defense costs and

⁸ The Court also notes the lack of common sense in a construction that makes coverage for defense costs dependent upon the policyholder losing the underlying claim. Such a construction undoubtedly creates perverse incentives.

liability amounts arising from its environmental and asbestos-related claims. This argument, however, is inconsistent with Indiana law. The federal court case, purporting to apply Ohio law, that American Employers relies on is not consistent with Ohio law as interpreted by Ohio state courts. Accordingly, American Employers cannot carry its burden, and its motion is denied.

37. American Employers' position is inconsistent with Indiana law and ignores several on point authorities. See *Eli Lilly & Co.*, No. 49D12 0102 CP 000243, slip op. at 3 (Marion Cnty. Super. Ct. July 15, 2002); *S. Ind. Gas & Elec. Co.*, No. 49D05 0411 PL 2265, slip op. at 4-5 (Marion Cnty. Super. Ct. Oct. 31, 2011). For example, in *Eli Lilly & Co.*, an action also involving coverage for long-tail environmental losses, the "question presented [was] whether a last nonsettling insurer – if it is found liable to provide coverage – can by a contribution action against settling insurers obtain 'pro rata' reallocation where that would leave the policyholder with less than a full recovery for its losses." No. 49D12 0102 CP 000243, slip op. at 3. The *Eli Lilly & Co.* court explained that the insurer's desired result was tantamount to a "pro rata allocation" that Indiana has rejected in favor of the "all sums" scope of coverage:

This is a significant issue. If Lexington were to prevail on this issue, it would enable Lexington to spread Lilly's claims across all triggered years, pro rata, a result with resounding consequences and one which has been firmly rejected by our state's Supreme Court.

Id. In rejecting the insurer's argument, the *Eli Lilly & Co.* court explained that the non-settling insurer would be entitled only to a "pro tanto" offset, or "reduction for amounts Lilly received in settlement from its other insurers, thus leaving the limits of Lexington's policies to satisfy the remaining portion of Lilly's claims, until Lilly is fully indemnified for its losses." No. 49D12 0102 CP 000243, slip op. at 2, 4-5. American Employers, though framing the issue differently, seeks the same result as the insurer in *Eli Lilly*—a result that repeatedly has been "firmly rejected" by Indiana courts.

38. American Employers also fails to reconcile its theory with the fact that the leading “all sums” authorities in Indiana and Ohio held that a policy year can be selected for full payment by the policyholder, despite prior settlements with other carriers in other years. *See, e.g., Dana III*, 759 N.E.2d at 1052, 1063 (noting that Dana had “settled with all of its insurers except Allstate”); *Goodrich Corp. v. Commercial Union Ins. Co.*, Nos. 23585, 23586, 2008 WL 2581579, at *7-8 (Ohio Ct. App. June 30, 2008) (rejecting insurers’ argument that they should be entitled to settlement credits for settled policies in other policy periods; allowing “offset” to reflect only the excess policies’ attachment points; noting that “[s]etoff of settlement funds has been recognized as a means to protect against the danger of a double recovery,” not to circumvent the “all sums” scope of coverage (citation omitted)); *Owens-Corning*, 660 N.E.2d at 775, 794, 800 (where all but three insurers had settled with the policyholder, requiring exhaustion of underlying limits only in the years for which the excess insurer provided coverage, and requiring no other policies in preceding or subsequent years to exhaust first; rejecting insurer’s “other insurance” argument). In each of these cases, the court acknowledged the existence of settlements with other insurers but still applied an “all sums” scope of coverage without requiring the policyholder to offset or exhaust the full policy limits of the settled insurers.

39. The federal court case on which American Employers relies, *GenCorp, Inc. v. AIU Insurance Co.*, 297 F. Supp. 2d 995 (N.D. Ohio 2003), *aff’d*, 138 F. App’x 732 (6th Cir. 2005), 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. *See also OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, 679 F.3d 456, 461 (6th Cir. 2012) (criticizing *GenCorp*); *Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 907, *review denied*, 791 N.W.2d 66 (Wis. 2010) (same).

40. For these reasons, Dana's prior settlements with other carriers provide American Employers no basis to avoid paying "all sums" as required under Indiana law and previously set forth in this Court's December 2012 Order. Therefore, American Employers' cross-motion as to this issue is denied.

III. CONCLUSION

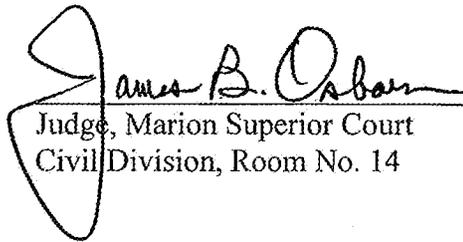
41. For the foregoing reasons, this Court denies American Employers' cross motion for summary judgment in all respects, including with respect to the construction and effect of the "other insurance" and "non-cumulation" clauses incorporated in the American Employers Policies, the scope of coverage for defense costs under the policies, and the effect of Dana's prior settlements with other carriers.

42. The Court instead grants Dana partial summary judgment as set forth herein regarding the construction and effect of the "other insurance" and "non-cumulation" clauses and the scope of coverage for Dana's defense costs. In sum, the Court declares that:

- Neither the "other insurance" and "non-cumulation" clauses contained in the American Employers Policies modify or restrict American Employers' duty to pay "all sums" that Dana is legally obligated to pay in connection with Dana's environmental and asbestos-related claims; and
- The American Employers Policies require American Employers to pay Dana's defense costs once one or more of its policies are reached and until its policies are exhausted, for all claims alleging potential occurrences, including those that do not result in a judgment or settlement.

IT IS THEREFORE ORDERED that partial summary judgment is GRANTED against American Employers and in favor of Dana as set forth above. American Employers' cross motion for partial summary judgment is DENIED.

SO ORDERED this 6th day of May, 2013



Judge, Marion Superior Court
Civil Division, Room No. 14

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