

IN THE SUPREME COURT OF OHIO

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

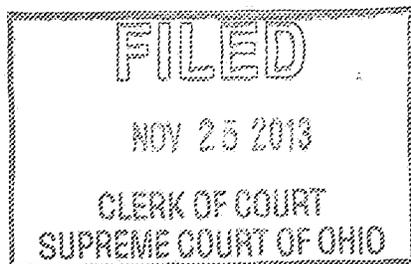
BRIEF OF AMICI CURIAE, THE OHIO MANUFACTURERS' ASSOCIATION; THE OHIO CHEMISTRY TECHNOLOGY COUNCIL; BRIDGESTONE AMERICAS TIRE OPERATIONS LLC; CHIQUITA BRANDS INTERNATIONAL, INC.; CLIFFS NATURAL RESOURCES INC.; DIEBOLD, INCORPORATED; DUKE ENERGY OHIO, INC.; EATON CORPORATION; FOREST CITY ENTERPRISES INC.; GOODRICH CORPORATION; THE GOODYEAR TIRE & RUBBER COMPANY; MATERION CORPORATION; MEADWESTVACO CORPORATION; MW CUSTOM PAPERS, LLC; NORDSON CORPORATION; NOVELIS CORPORATION; OWENS CORNING; PARKER HANNIFIN CORPORATION; PILKINGTON NORTH AMERICA, INC.; POLYONE CORPORATION; RPM INTERNATIONAL INC.; THE SHERWIN-WILLIAMS COMPANY; and WASTE MANAGEMENT, INC., IN SUPPORT OF PLAINTIFF-PETITIONER THE LINCOLN ELECTRIC COMPANY

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I. INTEREST OF AMICI CURIAE

The Ohio Manufacturers' Association is a statewide association of approximately 1,600 manufacturing companies, which collectively employ the majority of the 610,000 men and women who work in manufacturing in the state of Ohio and account for almost 17% of Ohio's gross domestic product. The Ohio Chemistry Technology Council is a statewide association representing 60 member companies, which collectively employ 45,685 Ohioans at over 120 facilities throughout the state, serving the public policy mission of promoting the highest standards of environmental, health, safety, and security performance.

The remaining amici curiae participating in this brief, which are listed in the caption, are companies engaged in various businesses or industries in Ohio. They are incorporated and/or conduct substantial business operations in the state. As a result, they rely significantly upon general liability insurance policies in Ohio to provide coverage for their various risks and, correspondingly, upon the body of Ohio law that protects their insurance rights.

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

These amici curiae include companies that have an interest in this case, therefore, both as policyholders, whose insurance coverage rights are implicated by the certified question, and as policy purchasers, whose insurance market choices, ultimately, would be reduced if Ohio's well-crafted insurance coverage jurisprudence were abandoned or distorted as advocated by the

particular insurers in this case. Further, as commercial policyholders engaged in Ohio in many businesses and industries, the amici curiae are able to offer a broad perspective to this Court regarding the insurance coverage issues invoked by the certified question.

II. INTRODUCTION AND SUMMARY

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

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

The question implicates four different Ohio insurance issues, which commonly are referred to as the “trigger,” “allocation,” “drop-down,” and “contribution” issues. Ohio law on these issues compels that the question be answered “yes.”

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

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

This body of law has permitted policyholders and their insurers in Ohio to sensibly and reasonably resolve claims in accordance with the applicable policy language, the law, and principles of equity, all to the great public policy benefit of the state and its citizens. Here, however, the excess insurers attempt to escape their coverage commitments, essentially arguing that the federal trial court should disregard or distort Ohio's law on allocation, "drop-down" liability, and contribution, resulting in a forfeiture of coverage that would moot any benefit the policyholder might derive from the subject policies being triggered. Although such an outcome would violate these highly evolved Ohio principles, certain federal courts—in contradiction to consistent rulings of this Court and other Ohio state courts—have done just that.

In fashioning the law that provides the answer to the certified question, this Court has been guided by legal, equitable, and public policy principles that have served well both Ohio's citizens and its court system. The applicable public policy principles include the mandate that contracts should be enforced as written, that settlements should be encouraged, that forfeitures should be avoided, and that judicial economy should be promoted. The amici address below these legal, equitable, and public policy principles, as well as their practical implications for Ohio's citizens and courts.

III. STATEMENT OF THE CASE AND FACTS

Lincoln Electric has been sued by thousands of persons who claim they have been injured by long-term exposure to allegedly hazardous substances contained in Lincoln Electric's welding products. This case, then, is typical of long-tail claims asserted against Ohio policyholders, in

that it involves multiple claims for injury or damage spanning multiple policy periods and penetrating into umbrella or excess layers of liability insurance coverage.¹

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

Lincoln Electric's settlement with its primary insurer has left it with unreimbursed costs for defense and indemnity. This, also, is typical, in that primary insurers, like all other settling parties, are motivated to settle only if the settlement will provide some benefit for them. Much like the policyholders in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, and *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, *appeal not accepted*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968, two cases cited by the Northern District of Ohio in its certification order, the policyholder here is proceeding to collect unreimbursed costs from its overlying excess insurers, which insured these same risks. The umbrella insurers in this case, however, seek to avoid their coverage responsibilities, even though they mirror the insurer responsibilities this Court recognized in *Goodyear* and the Ninth District Court of Appeals recognized in *Goodrich* in reliance upon *Goodyear*. As the certifying court noted in regard to this case, the *Goodrich* case “is directly on point.” (Certification Order, p. 7).

¹ Umbrella policies provide primary coverage in certain instances when no primary coverage is available and excess coverage when primary coverage is available. Because the coverage at issue in this case is excess coverage provided by the subject umbrella policies, amici will refer in this brief to the coverage of the Respondent insurers as “excess” coverage.

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

IV. LAW AND ARGUMENT

A. CONTROLLING PRINCIPLES OF OHIO LAW, EQUITY, AND PUBLIC POLICY

1. The First Cornerstone: Trigger

General liability policies, such as those at issue in this case, provide liability coverage for bodily injury or property damage. The existence of bodily injury or property damage during a policy's period, accordingly, is said to "trigger" that policy, making it responsive to the subject liability claim. Ohio has long followed the "continuous" trigger approach, under which the policies eligible to respond to a claim are those in effect from first exposure to allegedly damaging or harmful materials up through the discovery or manifestation of damage or injury. In *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, which involved environmental property damage that spanned many years, this Court observed that there were "multiple triggered insurance policies" and that "a continuous occurrence of environmental pollution triggers claims under multiple primary insurance policies" *Id.* at ¶ 5, ¶ 11; *see also Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, paragraph one of the syllabus, ¶ 1, ¶¶ 11-12, ¶ 21 (noting in asbestos claim insurance coverage case "loss or damage ... over time ... involves multiple insurance-policy periods and multiple insurers").

Ohio's continuous trigger law reflected in these decisions of this Court had long been understood and applied by Ohio's lower courts. *See, e.g., Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 74 Ohio Misc.2d 183, 212, 660 N.E.2d 770 (C.P.1995) (continuous trigger applied to liability claims for asbestos-related injuries); *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 12th Dist. Butler No. CA2004-12-298, 2005-Ohio-4746, ¶ 19 (continuous trigger applied to liability claim for property damage loss to a building); *Plum v. West Amer. Ins. Co.*, 1st Dist. Hamilton No. C-050115, 2006-Ohio-452, ¶ 24 (continuous trigger applied to liability claim for property damage loss to a building); *Hartford Ins. Co. v. Commercial Union Ins. Co.*, 6th Dist. Erie No. E-79-6, 1979 WL 207144, *1-*2 (June 15, 1979) (continuous trigger applied to case involving a continuing underground trespass of water). This trigger approach protects both policyholders facing risks in Ohio and insurers providing coverage for such risks. By recognizing that all policies along the established timeline are triggered by the claim, Ohio's law takes a broad view, as provided in the policy language, of the group of insurers required to pay a claim if chosen by the policyholder and, correspondingly, a broad view of the group of insurers from which the chosen insurer may obtain contribution. The policyholder's right to choose from among triggered insurers and the chosen insurer's right of contribution are discussed below.

2. The Second Cornerstone: Allocation

a. Ohio Long has Permitted a Policyholder to Select from among Triggered Policies to Receive Payment on a Claim.

The second cornerstone of Ohio's insurance coverage law is the policyholder's right to pick and choose the order in which its triggered policies will pay upon long-tail injury or property damage claims. Each selected policy is responsible to pay, up to its stated limits, "all sums" the policyholder is legally obligated to pay on the underlying claim or claims. As this Court determined in *Goodyear*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 7,

this is a right consistent with the language insurers include in their standard comprehensive general liability policies. “The policies covered Goodyear for ‘all sums’ incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence.” *Id.* at ¶ 9. Further, in following this “national majority rule,” this Court noted, “Goodyear expected complete security from each policy that it purchased.” *Id.* at ¶¶ 10-11.

This Court’s allocation determination in *Goodyear* was consistent with a long line of prior pronouncements from Ohio’s courts, including this Court. This Court, for instance, construed all sums in *Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 271 N.E.2d 924 (1971), an uninsured motorists insurance case. In that case, this Court unanimously held that when an insurance contract provides for the payment of all sums, the presence of other available insurance does not serve to “postpone[], reduce[], or eliminate[]” the coverage obligations of the all sums insurer. *Id.* at 223. In so holding, this Court declined “to change the meaning of language contained in an insurance contract when that wording is directly applicable to the facts under consideration,” unanimously rejecting the uninsured motorists carrier’s argument that the availability of other insurance excused it of its all sums payment obligation. (Citations omitted.) *Id.* at 226.

In addition, at the time *Goodyear* was decided, other courts applying Ohio law, in cases involving multiple triggered policies over a continuum of years, had consistently construed the plain language of standard liability insurance policies, which contain these same express contractual obligations to “pay all sums” and “defend any suit,” to mean that each triggered policy provides full indemnification and defense coverage up to the limits of that policy and that the policyholder may choose to apply its claim to any of these triggered policies. *See Owens-*

Corning, 74 Ohio Misc.2d at 216, 660 N.E.2d 770 (The policyholder “is permitted to, at its discretion, pursue its remedy in full against *one* insurer, regardless of the existence of other triggered policies.”) (Emphasis sic.); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd’s London*, 813 F.Supp. 576, 590, fn. 9 (N.D. Ohio 1993) (applying Ohio law and rejecting pro rata allocation in case involving prolonged exposure to lead paint); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F.Supp. 1515, 1524 (D.D.C. 1984) (applying Ohio law and holding an insured “may assign its liability for asbestos-related disease to a policy if any part of the injurious process associated with asbestos occurred while that policy was in effect”); *Morton Thiokol, Inc. v. Aetna Cas. & Sur. Co.*, Hamilton C.P. No. A-8603799, 1988 WL 1520456 (Dec. 28, 1988) (policyholder may “assign each asbestos claim to any Aetna policy”); *see also Commercial Cas. Ins. Co. v. Knutsen Motor Trucking Co.*, 36 Ohio App. 241, 246, 173 N.E. 241 (8th Dist. 1930) (the policyholder “had the right to pursue his remedy in its entirety” under one policy with no allocation). Thus, even prior to *Goodyear*, courts applying Ohio law consistently upheld the policyholder’s right to obtain full recovery under any triggered policy and resisted any invitation to fashion court-created pro rata allocation formulas.

The “all sums” method recognized in *Goodyear*, also known as vertical allocation, “permits the policyholder to seek coverage from any policy in effect during the time period of injury or damage . . . up to that policy’s coverage limits.” *Goodyear*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 6. If the chosen policy does not cover the entire claim, the policyholder can then “pursue coverage under other primary or excess insurance policies” until the full claim has been satisfied. *Id.* at ¶ 12. The alternative method, which was rejected in *Goodyear*, is known as the pro rata or horizontal allocation method, and it attempts to divide at the outset the loss among all triggered policies. Rather than permitting the policyholder to

choose a single policy to respond, as the policy language provides, the pro rata allocation method “divides ‘a loss ‘horizontally’ among all triggered policy periods, with each insurance company paying only a share of the policyholder’s total damages.” *Id.* at ¶ 6, quoting Paar, *Recovery is in the Details: Hot Issues in the Administration and Application of General Liability Insurance Policies*, 86 Practising Law Inst., N.Y. Prac. Skills Course Handbook Series 199, 217 (2000). This method is not based on any language found in standard liability policies, gives policyholders less than the policies expressly require, and has been consistently rejected by this Court.

Under standard language used in general liability policies, insurers agree to pay on behalf of an insured “all sums” the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by a covered occurrence. As this Court recognized in *Goodyear*, that language gives a policyholder the right to collect the full amount of its damages from any triggered policy, up to that policy’s limits:

There is no language in the triggered policies that would serve to reduce an insurer’s liability if an injury occurs only in part during a given policy period. The policies covered Goodyear for “all sums” incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence. Therefore, we find that the “all sums” allocation approach is the correct method to apply here.

Goodyear at ¶ 9.

Long-tail injuries, such as those at issue here, extend over time and can take place during numerous policy periods, thereby triggering numerous policies. As this Court has noted, however, there is no language in the standard liability policy that reduces its coverage “if an injury occurs only in part during a given policy period.” *Id.* The language insurers include in their standard liability policies, therefore, permits a policyholder to choose any triggered policy

to cover “all sums” resulting from an occurrence, up to the policy’s limits. As this Court also has noted, the “all sums” method “promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible.” *Id.* at ¶ 11.

Under the pro rata or horizontal allocation method, in contrast, the policyholder must attempt to collect under all triggered policies and, in doing so, is restricted to collecting under each policy less than the “all sums” the insurer agreed to pay. This imposes upon the policyholder, even when it purchases full coverage for every year, the risk that it cannot obtain a full recovery, a result that could arise for various reasons, such as one of its insurers becoming insolvent. The pro rata method rejected by this Court, therefore, permits insurers to pay less than they agreed to pay and does not assure that the policyholder will receive all to which it is entitled. Hence, when the parties in *Park-Ohio*, 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800, asked this Court to overrule *Goodyear* and adopt the pro rata method of allocation, this Court declined to do so. *Id.* at ¶ 2.

b. Settling with an Insurer is not an Election for Allocation Purposes.

A policyholder’s settlement with an underlying insurer does not affect the applicability of “all sums” allocation provided by the clear language in the overlying excess policies and Ohio law. An insurance policy “is a contract between the insured and the insurer wherein the obligations of each party to the other are clearly defined....” *Conold v. Stern*, 138 Ohio St. 352, 364, 35 N.E.2d 133 (1941). Consequently, “the language of the policy controls the rights and obligations of the parties.” *Weemhoff v. Cincinnati Ins. Co.*, 41 Ohio St.2d 231, 234-235, 325 N.E.2d 239 (1975), *overruled on other grounds*, *Auto-Owners Mut. Ins. Co. v. Lewis*, 10 Ohio St.3d 156, 462 N.E.2d 396 (1984), paragraph one of the syllabus. If an insurance policy is clear and unambiguous, it must be enforced as written. *Goodyear*, 95 Ohio St. 3d 512, 2002-Ohio-

2842, 769 N.E.2d 835, at ¶ 8 (“It is well settled that ‘insurance policies should be enforced in accordance with their terms as are other written contracts. Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.’”), quoting *Rhoades v. Equitable Life Assur. Soc. of the U.S.*, 54 Ohio St.2d 45, 47, 374 N.E.2d 643 (1978); *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638, 597 N.E.2d 499 (1992) (“When the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties.”) (Citation omitted.).

Further, as this Court has recognized, a separate contract between different parties cannot be used to abrogate the clear language of a contract. See *TRINOVA Corp. v. Pilkington Bros., P.L.C.*, 70 Ohio St.3d 271, 275-277, 638 N.E.2d 572 (1994) (noting that “[i]t is generally recognized that a contract is binding only upon the parties to that contract” and that the doctrine of integration “is not meant to allow distinct contracts to be used to contradict unambiguous language”). Indeed, courts have observed that even when an insurance policy is ambiguous, a separate agreement, such as a subsequent claims handling or settlement agreement, cannot be used to interpret or alter the terms of the policy itself. See, e.g., *Employers Reinsurance Co. v. Superior Court*, 161 Cal.App.4th 906, 74 Cal.Rptr.3d 733 (2008) (holding that a policyholder’s performance under certain settlement and claims-handling agreements with its insurers could not be used to interpret the insurance policies issued by those same insurers); see generally *Fid. & Cas. Co. of New York v. Gray*, 181 Okla. 12, 16, 72 P.2d 341 (1937) (“It is obvious * * * that the practical construction of a contract by the parties thereto is peculiar to their contract and can have no relation to another, similar, or identical contract unless the parties thereto have also placed the same practical construction on the instrument.”); 2 Plitt, Maldonado, Rogers & Plitt, *Couch on*

Insurance, Section 21:7 (3d Ed.2013). A settlement agreement is merely a contract between a policyholder and its insurer and is separate and distinct from the insurance policies themselves.

Here, the rights and obligations of Lincoln Electric and its excess insurers are defined by *the excess policies*. Those policies unambiguously provide that they will pay “all sums” which the insured becomes legally obligated to pay as damages (or contain legally equivalent language). Under this Court’s holdings in *Goodyear* and *Park-Ohio*, the “all sums” language, as a matter of law, gives a policyholder the right to collect the full amount of its damages from any triggered policy, up to that policy’s limits. *Goodyear* at ¶ 9; *Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 1. Lincoln Electric’s settlement agreement with its primary insurer did not and could not have altered these express terms of the excess policies. The settlement agreement, instead, could only have set forth the terms of the settlement between Lincoln Electric and its primary insurer as to matters within the scope of that settlement. Because the settlement agreement was a distinct contract, it did not define the rights and obligations of Lincoln Electric and its excess carriers under the excess insurance policies, which were written years earlier, by different parties, for a different purpose.

Accordingly, Lincoln Electric’s settlement with its primary insurer has absolutely no bearing on the applicability of the “all sums” language in the excess policies. Under *Park-Ohio* and *Goodyear*, this language provides Lincoln Electric the right to choose which policy or policies must respond, and in what order, to its welding product claims, and each selected policy must pay “all sums” for which Lincoln Electric is liable, up to its limits. The insurers here are attempting to circumvent their clear obligations under their excess policies and the law as articulated by this Court in *Park-Ohio* and *Goodyear*. They, however, agreed to provide

coverage on an “all sums” basis to Lincoln Electric, which paid substantial premiums for such coverage, and these insurers should be held to their bargain.

3. The Third Cornerstone: “Drop-Down” Liability

The third cornerstone of Ohio’s insurance coverage law, discussed below, is that an excess insurer is not required to “drop down” to pay claims below its “attachment point.” The term “attachment point” refers to the dollar amount at which an excess policy’s obligation to pay arises, usually the point when the policyholder’s liabilities exceed the limits of underlying insurance specified in the excess policy. The rule that an excess insurer is not required to “drop down” to pay claims below its attachment point typically applies when the underlying insurance is unavailable for any reason, such as settlement by or insolvency of the underlying insurer. In such instances, the attachment point of the excess policy is preserved and the policyholder absorbs any gaps in coverage between the full limits of the underlying insurance and the attachment point of the excess policy. The excess policy, however, remains liable to pay claims that actually reach its attachment point and penetrate into its layer of coverage. As will be explained below, this rule protects the interests of both excess insurers and policyholders.

a. Ohio Courts have not Judicially Imposed “Drop-Down” Liability on Excess Insurers.

A standard excess insurance policy provides “vertical coverage”—coverage that is above and in addition to the limits of the policyholder’s directly underlying coverage. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 875 N.E.2d 31, 2007-Ohio-4917, ¶ 5. A standard excess policy, unlike an umbrella policy, does not provide coverage that “drops down” to provide primary coverage if the underlying insurance provides no coverage.² *Id.* A standard

² Umbrella policies “provide both excess coverage ... and primary coverage” *Cincinnati Ins. Co.* at ¶ 5. As noted above, while this case involves certain umbrella policies

excess policy, therefore, is not obligated to pay a claim until its attachment point is reached. See *Essad v. Cincinnati Cas. Co.*, 7th Dist. No. 00 CA 199, 2002-Ohio-2002, ¶ 11 (“Liability of the excess insurer does not arise until the amount of loss or damage is in excess of the coverage provided by the primary insurance policy.”); see generally *B.F. Goodrich Co. v. Commercial Union Ins. Co.*, 9th Dist. No. 20936, 2002-Ohio-5033, ¶ 12-13 (an insured’s duty to notify its excess insurer is not triggered until the insured has reason to believe that its liability will exhaust its coverage under the primary insurance policy).

If the full amount of underlying coverage is not available for any reason—such as settlement by or insolvency of the underlying insurer—Ohio law preserves the attachment point of the excess policy and does not require such policy to “drop down” to pay claims below this bargained-for level. For example, in *Wurth v. Ideal Mut. Ins. Co.*, 34 Ohio App.3d 325, 518 N.E.2d 607 (12th Dist.1987), the Ohio Twelfth District Court of Appeals considered whether an excess policy should be required, as a matter of Ohio public policy, to “drop down” below its attachment point to provide primary coverage due to the primary insurer’s insolvency, as the policyholder had argued. In rejecting this argument, the Twelfth District reasoned that modifying an excess insurer’s stated attachment point in such a circumstance would constitute “a rewriting of an excess insurer’s general contractual undertaking simply to fulfill ‘notions of abstract justice.’” *Id.* at 328, quoting *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355, 385 N.E.2d 1280 (1978). Accordingly, the Twelfth District held that an excess insurer is not required to “drop down” to pay claims below its attachment point: “‘drop down’ liability protection

issued to Lincoln Electric, it concerns only the excess coverage offered by those umbrella policies.

should not be judicially imposed on Ohio excess insurance providers as a matter of public policy.”³ *Wurth* at 328.

Ohio courts consistently have rejected the judicial imposition of “drop down” liability and, in doing so, have preserved the attachment points of excess insurance policies. *See Rushdan v. Baringer*, 8th Dist. Cuyahoga No. 78478, 2001 WL 1002255, *4 (Aug. 30, 2001) (citing *Wurth* and stating that the excess policy would not “drop down” to provide coverage below its attachment point due to the insolvency of primary insurer); *Essad* at ¶ 11 (“[T]he excess insurance policy does not ‘drop down’ and act as the primary insurance policy when the primary insurer becomes insolvent.”); *Value City, Inc. v. Integrity Ins. Co.*, 30 Ohio App.3d 274, 280, 508 N.E.2d 184 (10th Dist.1986) (“[W]e conclude that the excess insurance contract does not obligate Integrity to step into the shoes of the primary carrier and bear the risk of loss of paying and defending claims within the limits of the underlying insurance upon the event of insolvency of a primary insurance carrier.”).

b. Excess Insurers Nonetheless Remain Obligated for Claims that Reach and Penetrate into their Coverage Layers.

To ensure that their excess policies will not be called upon to “drop down,” excess insurers sometimes include in their policies “exhaustion clauses” in addition to the excess insuring agreements. These clauses provide additional support for the rule against “drop down” liability, but will not absolve insurers from paying claims that actually reach the attachment points of, and penetrate into, their excess policies. Some insurers, nonetheless, argue that the applicability and effect of such clauses goes beyond the “drop down” issue alone. They contend

³ In *Wurth*, the Twelfth District recognized that a policyholder and an excess insurer may contract for “drop down” liability in the event of the primary insurer’s insolvency and include express language in the excess policy reflecting their intent to do so. *Wurth* at 328. However, where, as here, the excess policies do not include such express language, “drop down” liability will not be judicially imposed. *Id.*

that the failure of an underlying insurer to pay its full limits, such as when it settles with the policyholder, will cause a forfeiture of the excess coverage. Such is not the law of Ohio.

A typical exhaustion clause provides that the insurer shall not be obligated to pay until after the limits of the directly underlying insurance have been exhausted by payment of judgments or settlements. *See, e.g., Fulmer v. Insura Property & Cas. Co.*, 94 Ohio St.3d 85, 87, 760 N.E.2d 392 (2002), fn. 1 (addressing an exhaustion clause that stated, “We will pay under this coverage only if * * * [t]he limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements....”). Lincoln Electric’s excess policies contain variations of such language, providing, for example, that they will pay when “the applicable underlying limit has been paid by or on behalf of the insured” or when there is an “ultimate net loss in excess of the underlying limit.”

Under Ohio law, when the underlying insurer does not pay its full limits but the amount of loss penetrates into the excess insurer’s layer of coverage, the policyholder is permitted to recover from the overlying excess policy by absorbing the variance between the amounts paid by the underlying insurer and the full limits of the underlying policy. *See Fulmer* at paragraph two of the syllabus; *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St.3d 22, 521 N.E.2d 447 (1988), paragraph two of the syllabus, *overruled on other grounds in Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927; *Triplett v. Rosen*, 10th Dist. Nos. 92AP-816, 92AP-817, 1992 WL 394867, *7 (Dec. 29, 1992). Ohio law, thus, allows a policyholder to be, in effect, self-insured for any such gap in coverage. The rationale for this rule was best expressed by Judge Augustus Hand in *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F.2d 665, 666 (2d Cir.1928):

[The excess insurer] had no rational interest in whether the insured collected the full amount of the [underlying insurance], so long as it was only called upon to

pay such portion of the loss as was in excess of the limits of those policies. To require an absolute collection of the primary insurance to its full limit would in many, if not most, cases involve delay, promote litigation, and prevent an adjustment of disputes which is both convenient and commendable.

According to Judge Hand, “[t]he [insured] should have been allowed to prove the amount of his loss, and, if that loss was greater than the amount of the expressed limits of the primary insurance, he was entitled to recover the excess to the extent of the policy in suit.” *Id.*

Ohio has long followed this doctrine because it promotes settlement at all levels of a coverage program and avoids a forfeiture of coverage, all without prejudicing the excess insurer, which does not pay a dollar more or a moment sooner than its policy limits and attachment point require. For instance, in 1988, this Court addressed whether an insured could settle with an underinsured tortfeasor’s insurance carrier for less than the stated limits of the tortfeasor’s insurance policy and then seek uninsured/underinsured motorists (“UM/UIM”) insurance coverage for those amounts in excess of the underinsured tortfeasor’s policy limits. *Bogan* at 27-28. This Court held:

An injured insured satisfies the ‘exhaustion’ requirement...when he receives from the underinsured tortfeasor’s insurance carrier a commitment to pay an amount in settlement with the injured party retaining the right to proceed against his underinsured motorist insurance carrier only for those amounts *in excess of* the tortfeasor’s policy limits.

(Emphasis added.) *Id.* at paragraph two of the syllabus. In reaching its holding, this Court reasoned that the insurer’s “clear” objective of the exhaustion clause was “to absolve the insurer from liability for those uncollected amounts which were below the stated limits of the underinsured tortfeasor’s policy”—*i.e.*, those amounts below the UM/UIM policy’s attachment point. *Id.* at 28. In doing so, this Court concluded that “[t]he exhaustion clause must be construed as it was intended, *i.e.*, a threshold requirement and not a barrier to underinsured motorist insurance coverage.” *Id.*

Fourteen years later, this Court in *Fulmer*, 94 Ohio St.3d 85, 760 N.E.2d 392, paragraph two of the syllabus, reaffirmed that a settling policyholder may absorb any gaps in coverage resulting from a settlement below limits and thereby satisfy an exhaustion provision in an insurance policy:

An insured satisfies the exhaustion requirement in the underinsured motorist provision of her insurance policy when she receives from the underinsured tortfeasor's insurance carrier a commitment to pay any amount in settlement with the injured party retaining the right to proceed against her underinsured motorist insurance carrier only for those amounts in excess of the tortfeasor's available policy limits. (*Bogan v. Progressive Cas. Ins. Co.* 1988, 36 Ohio St.3d 22, 521 N.E.2d 447, paragraph two of the syllabus, clarified and followed.)

This Court reiterated that its holding gives the insured the ability "to take into account all of the factors important to her in determining how much she is willing to accept to settle her claim," while, at the same time protecting the excess insurer "from paying more than it bargained for by giving it credit for the full amount of the tortfeasor's available policy limit." *Fulmer* at 95. Moreover, in rejecting one of the insurer's arguments, this Court noted that "even if the insured does settle for \$.01, the underinsurer is not prejudiced because it still has to pay only the amount it contracted to pay, *i.e.*, the insured's damages in excess of the tortfeasor's available limits up to the insured's policy limit."⁴ *Id.* at 96. This Court, therefore, recognized that it is of

⁴ After *Bogan*, several Ohio appellate courts held that a policyholder failed to exhaust an underlying policy when it accepted significantly less than the underlying limits in settlement, because, in the now-rejected view of those courts, such a settlement amounted to an abandonment of the claims against the underlying insurer. See, e.g., *Fields v. Midwestern Indem. Co.*, 8th Dist. No. 70421, 1996 WL 502144, *2 (Sept. 5, 1996); *Hansen v. United Ohio Ins. Co.*, 6th Dist. No. OT-95-005, 1995 WL 386495, *3 (June 30, 1995); *Donovan v. State Farm Auto. Ins. Co.*, 105 Ohio App.3d 282, 287, 663 N.E.2d 1022 (3d Dist.1995); *Motorists Mut. Ins. Cos. v. Grischkan*, 86 Ohio App.3d 148, 152-153, 620 N.E.2d 190 (8th Dist.1993); *Stahl v. State Farm Mut. Auto. Ins. Co.*, 82 Ohio App.3d 599, 604, 612 N.E.2d 1260 (3d Dist.1992); *Queen City Indem. Co. v. Wasdovich*, 8th Dist. No. 56888, 1990 WL 71536, *2-*3 (May 31, 1990). In *Fulmer*, this Court overruled this line of cases, holding that an exhaustion requirement is satisfied by a commitment to pay "*any* amount in settlement[.]" (Emphasis sic.) *Fulmer* at paragraph two of the syllabus.

no consequence from the UM/UIM insurer's perspective whether the tortfeasor's insurer pays the full limits of its policy or, instead, pays part of its limits in settlement, provided that the policyholder absorbs the remainder of those limits. This is because, in such instances, the UM/UIM insurer's rights and obligations—including its attachment point, its policy limits, the breadth of its coverage, and the terms of its coverage obligations—all remain the same.

The Ohio Tenth District Court of Appeals has followed *Bogan* and applied it in a case involving liability insurance coverage for deaths caused by an apartment fire. *See Triplett*, 10th Dist. Nos. 92AP-816, 92AP-817, 1992 WL 394867, *7. In *Triplett*, the Tenth District held that a less-than-limits settlement between the policyholder, his primary insurer, and the tort-plaintiffs exhausted the primary coverage, thereby triggering the duties and obligations of the excess insurer to assume the defense of any claims still pending against the policyholder. In reaching its holding, the Tenth District emphasized that the excess insurer was “in no worse position because of the settlement agreement” between the primary insurer and the policyholder, as the amount of the policyholder's liability exceeded the primary policy limits. *Id.*

Ohio insurance coverage law, therefore, has been clear for a quarter of a century that an excess insurer is not required to “drop down” to pay claims below its attachment point but that it may not avoid its coverage obligations if the attachment point of its policy is actually reached by the subject claims. The policyholder, in turn, is responsible for and becomes self-insured for any gaps in coverage resulting from the unavailability of the insurance directly underlying the excess policy. This rule protects the excess insurer by preserving the attachment point of its policy, while simultaneously affording the policyholder the excess insurance protection for which it paid a premium. The fact that a policyholder can settle with an underlying insurer without affecting the attachment point of its excess policies or the availability of coverage under them encourages

settlement of coverage disputes. Accordingly, like trigger and allocation, this cornerstone of Ohio insurance coverage law constitutes another vital feature of that law.

4. The Fourth Cornerstone: Equitable Contribution

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

5. Ohio’s Public Policy Considerations

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

noted that “settlement is part of the essential core of our judicial process” and that courts should not adopt rules that would hinder that process. *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 128, 748 N.E.2d 1111 (2001), *superseded by statute as recognized in Bush v. Senter*, 141 Ohio Misc.2d 1, 2006-Ohio-7155, 866 N.E.2d 1152 (C.P.). Accordingly, any disincentive to settle would be directly at odds with this strong public policy. *See Fulmer*, 94 Ohio St.3d at 94, 760 N.E.2d 392 (citing *Bogan*, 36 Ohio St.3d at 25-26, 521 N.E.2d 447).

The Ohio Tenth District Court of Appeals recognized this compelling public policy principle in *Triplett*, 10th Dist. Nos. 92AP-816, 92AP-817, 1992 WL 394867. That court held, in a liability insurance coverage case over deaths resulting from an apartment fire, that a less-than-limits settlement between the policyholder and his primary insurer effectively exhausted the primary coverage:

The resolution of this case does not depend so much upon a legal interpretation of the issues or the contracts of insurance as it does on public policy considerations. It is uncontroverted that public policy favors settlements. When parties agree to settle cases, litigation is avoided, costs of litigation are contained, and the legal system is relieved of the burden of resolving the dispute with the resulting effect of alleviating an already overcrowded docket. When the amount of the settlement is less than the policy limits, the unpaid amount may represent a significant cost savings since litigation was avoided or curtailed. Moreover, settlements favor victims who need their compensation money for living expenses and spares them the anxieties associated with protracted litigation. Thus, separate from the contract of insurance, considerations of public policy generally favor settlements.

Id. at *7, citing *Bogan*, 36 Ohio St.3d at 26, 521 N.E.2d 447. The court further noted that in such a situation the excess insurer was “in no worse position because of the settlement agreement.” *Triplett* at *7.

A corollary to these public policy considerations is that forfeitures long have been disfavored under Ohio law. As this Court noted in an insurance case 100 years ago, “The law abhors a forfeiture * * *.” *Ensel v. Lumber Ins. Co. of New York*, 88 Ohio St. 269, 281, 102 N.E.

955 (1913). This Court further stated in *Kitt v. Home Indemn. Co.*, 153 Ohio St. 505, 511-512, 92 N.E.2d 685 (1950), “It should be noted that it has always been a principle of the law of insurance that forfeitures are not looked upon with favor * * *.”

The certified question implicates all of these principles, as well as the four cornerstones of Ohio insurance coverage law fashioned under their operation. This is evident when Lincoln Electric’s efforts are viewed in their totality and full context. First, Lincoln Electric asserted its coverage rights under all triggered policies, adhering to Ohio’s law on continuous trigger as described by this Court. Next, Lincoln Electric settled with its primary insurer, avoiding further coverage litigation with that insurer and reaching a compromise, which served the interests of Lincoln Electric, its primary insurer, and Ohio’s judicial system. This settlement did not compensate Lincoln Electric for all its losses, and Lincoln Electric sought further recovery from its overlying excess insurers under the “all sums” allocation approach long followed in Ohio and twice confirmed in recent years by this Court. When it pursued these claims against its overlying excess policies, Lincoln Electric proceeded under the assumption that it had not forfeited this coverage by settling with its primary insurer. It also was careful to honor the attachment points of the excess policies, thus respecting Ohio’s limitations on insurer “drop-down” liability.

If Lincoln Electric is permitted to continue its case in the federal court against its excess insurers, and if those insurers also settle, Lincoln Electric would obtain a partial but nonetheless substantial recovery, accomplishing through a series of business negotiations the type of contributions by various insurers this Court in *Goodyear* and *Park-Ohio* specifically permitted policyholders and their insurers to accomplish, if necessary, through the less efficient process of serial trials. In opposing Lincoln Electric’s efforts, the excess insurers, in effect, argue Lincoln Electric should not be permitted to accomplish through a series of settlements the equitable

contribution among legally liable insurers this Court twice in recent years has authorized and encouraged.

In addition, because contribution is an equitable right, and because insurers that reasonably settle in good faith could defend against a contribution claim on that basis, the remaining insurers will be incentivized to enter into fair, equitable settlements. If the excess insurers do not settle and Lincoln Electric, rather, obtains an “all sums” judgment against them, any excess insurer chosen by Lincoln Electric to pay the judgment will have contribution claims against any insurer that is determined to be jointly liable but not chosen. Regardless, then, of whether this case proceeds to settlement or judgment in the federal court, each insurer whose policies are triggered and whose attachment points are reached will pay an equitable share, while the policyholder’s legal rights to assert claims against the “all sums” coverage of every triggered policy will be protected. This lattice work of Ohio insurance law concepts has taken decades to craft, and its operation here speaks to the breadth of the concepts and the elegance of their integration.

The insurers in this case, in effect, seek to disregard or undermine one or more of Ohio’s insurance law cornerstones, in violation of long-standing, compelling public policy principles, apparently because of a perceived short-term benefit to them in the pending federal court case. The long-term damage in Ohio of such an outcome, however, would be considerable. Because these insurers likely will continue to issue policies in Ohio, such damage would operate to their detriment, as well.

B. APPLYING THESE INTEGRATED PRINCIPLES OF OHIO LAW TO THE CERTIFIED QUESTION COMPELS THE CONCLUSION THAT GOODRICH, NOT GENCORP, ACCURATELY REFLECTS OHIO LAW.

1. The *Goodrich* Decision

The effective operation of Ohio's four cornerstones of insurance law can be seen in *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, *appeal not accepted*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 968. In that case, Goodrich sued a number of insurers who had provided it excess liability coverage, seeking reimbursement for expenses it incurred in remediating environmental contamination at a manufacturing plant. Much as in Lincoln Electric's case, before Goodrich commenced its action against its excess insurers it had settled with its sole primary insurer, which had provided Goodrich primary insurance coverage for decades. *Id.* at ¶ 2, ¶ 5.

Goodrich also settled with many of its excess insurers prior to and during trial, and it proceeded at trial to obtain judgment against two non-settling excess insurers or insurer groups, Commercial Union Insurance Company and Certain London Market Insurers. *Id.* at ¶ 5. At trial, Goodrich was found to have sustained \$42 million covered costs. *Id.* Because the Commercial Union and London policies at issue were excess policies with \$20 million attachment points, the trial court determined that Goodrich could only recover the \$22 million of this \$42 million amount that reached and penetrated into the excess policies that attached at \$20 million. In other words, the excess insurers got full credit for the amount below their attachment points, and they were not required to drop down. *Id.* at ¶ 5, ¶ 7. Notably, Goodrich was *not* required to show that it had incurred covered costs exceeding the total of all of its primary policy limits in all years, which would have exceeded \$50 million. Rather, to reach a chosen excess policy attaching at

\$20 million, Goodrich was required to show only that it had covered costs that exceeded the \$20 million necessary to hit the attachment point of the chosen excess policy. *Id.* at ¶ 7.

On appeal, the insurers did not contest Ohio's law on continuous trigger or "all sums" allocation, and they did not address their possible claims against each other for contribution. Rather, they made various "settlement credit" arguments, which correspond to the arguments at issue here. The *Goodrich* court, however, rejected those arguments under the facts of that case and, in regard to the issue now before this Court, pointed out that each policy selected by the policyholder would be required to pay up to its limits, and no more, such that the insurers would be paying only the amounts they bargained to pay:

In other words, under *Goodyear*, Goodrich has the right to select the policy or policies under which it wishes to pursue coverage, but its right to such coverage is necessarily limited by the liability limits of the selected policies, pursuant to the explicit language of *Goodyear*. The trial court's journal entry also states repeatedly that, in the event Goodrich chooses different coverage (coverage under the other insurer's policy or policies), a given insurer is obligated to pay up to the applicable limits of a selected policy, with interest to be calculated thereon. Therefore, the trial court did not order the London Market Insurers to pay Goodrich a damage award in excess of the aggregate limits of its remaining policies.

Id. at ¶ 131.

In *Goodrich*, as here, the fact that excess policies on the risk were liable for "all sums" that reached the policy attachment points permitted the policyholder to accept less than 100% of its potential recovery from its multiple-year primary insurer while retaining its ability to proceed against the overlying insurers for its unreimbursed losses. This made a settlement with the primary insurer possible, and Goodrich's subsequent judgment against its excess insurers respected the attachment points and limits of the excess insurers' policies. In effect, Goodrich, through its primary insurance settlement and "all sums" election made under its excess insurance judgment, spread its losses among multiple triggered insurers on the risk, thereby accomplishing

the same type of contribution from multiple triggered insurers that this Court envisioned in *Goodyear* and *Park-Ohio*.

2. The *GenCorp* Decision

Although the *Goodrich* decision does not mention *GenCorp Inc. v. AIU Ins Co.*, 297 F.Supp.2d 995 (N.D. Ohio 2003), as Judge Nugent indicates in his certifying order, the *GenCorp* case was cited and briefed extensively in *Goodrich*, and the *GenCorp* analysis was rejected by the *Goodrich* court. A careful reading of *GenCorp* reveals why. While *Goodrich* demonstrates how Ohio's four insurance law cornerstones work together to encourage settlements and outcomes that are sensible for both insurers and policyholders, *GenCorp* demonstrates that failure to properly apply those cornerstones can produce results that discourage settlements and are contrary to the interests of insurers and policyholders.

GenCorp sued a number of excess liability insurers seeking reimbursement for environmental remediation costs at six sites. According to the defendants, remediation costs ranged from \$416,000 at one site to more than \$28 million at another. *Id.* at 997-998. Each of the defendants had provided insurance for at least part of the period between 1960 and 1982. *Id.* at 998. By November of 2000, *GenCorp* had settled with its primary and umbrella insurers, leaving only its excess insurers as defendants. *Id.*

As discussed previously, in *Goodyear* this Court confirmed that "all sums" was the allocation law of Ohio. Prior to the *Goodyear* decision, however, the Sixth Circuit, in *Lincoln Electric Co. v. St. Paul Fire and Marine Ins. Co.*, 210 F.3d 672, 689 (6th Cir. 2000), predicted that this Court would adopt the pro rata or horizontal allocation method. In *GenCorp*, the district court, in reliance on *Lincoln Electric*, initially dismissed without prejudice *GenCorp*'s claims against its excess insurers, "[finding] it unlikely that *GenCorp* would incur sufficient liability in a

single year on the environmental claims to trigger the coverage provided by any of the remaining secondary insurers.” *GenCorp* at 999. The district court apparently made that finding based on an assumption that GenCorp’s expenses at a given site would have to exceed, in a single year, \$64 million (the combined coverage of all its triggered primary and umbrella policies) in order to reach its excess coverage. *Id.* at 998-999.

Following this Court’s decision in *Goodyear* confirming Ohio’s long-standing “all sums” method of allocation, GenCorp re-filed its action against its excess insurers. The excess insurers moved for summary judgment on GenCorp’s claims against them. They argued that they were entitled to a credit in the full amount of the stated coverage under all the settled primary and umbrella policies. *GenCorp*, 297 F.Supp.2d at 1000. The federal magistrate judge granted them summary judgment. In doing so, the magistrate misapplied Ohio’s insurance law and reached a result that, if it were the law, would strongly discourage settlements and make many settlements impossible.⁵ That result would be harmful to policyholders, insurers, and the courts.

In regard to the Ohio’s continuous trigger law, the magistrate assumed its applicability for purposes of deciding the insurers’ motions for summary judgment. *Id.* at 1005, fn. 9. In regard to allocation, however, the magistrate began straying from applicable law. As noted above, in *Goodyear* this Court rejected pro rata allocation in favor of all sums allocation, determining that a policyholder can assign its loss to a single primary policy and, after obtaining

⁵ The Sixth Circuit affirmed the magistrate’s decision in *GenCorp Inc. v. AIU Ins. Co.*, 138 Fed.Appx. 732 (6th Cir. 2005). It did so, however, in an opinion it determined not to be suitable for publication. At that time, citation to unpublished decisions in the Sixth Circuit was permissible in limited instances but generally disfavored. *See* Sixth Circuit Rule 28(g) in effect on the date of the above decision. Under the current version of Sixth Circuit Rule 32.1, unpublished opinions may be cited, but they are not binding precedent in the Sixth Circuit. In addition, the Sixth Circuit provided no additional analysis in its brief *GenCorp* decision, instead merely referring to and adopting the analysis of the magistrate judge in the trial court. The amici curiae, therefore, address herein the trial court’s decision, which contains the analysis.

its recovery from that policy, proceed to recover its remaining loss from another primary policy or, alternatively, from an excess policy:

For each site, Goodyear should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim. In the event that this policy does not cover Goodyear's entire claim, then Goodyear may pursue coverage under other primary or excess policies.... At this juncture, we are unable to determine which policy Goodyear will invoke

Goodyear, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 12. Despite the clarity of this Court's language, the magistrate apparently misunderstood it, asserting that the *Goodyear* decision did not stand for its actual holding:

GenCorp believes that *Goodyear* allows it to allocate its liability during a particular policy period to a single primary policy, exceed the coverage provided by that policy without exhausting the coverage provided by other primary policies, and 'rise up' to the coverage provided by the excess insurers. . . . These positions are not supported by *Goodyear*.

GenCorp at 1006-1007. This observation by the magistrate, from which the rest of her analysis proceeded, was patently incorrect.

The magistrate then made a further mistaken observation in describing the effect of "all sums" allocation:

[I]f GenCorp is allowed to reach its excess insurance coverage by allocating all its liability accrued during some policy period to just one primary policy, and if the excess insurers are required to indemnify GenCorp for the entirety of its remaining liability, the excess insurers will necessarily pay GenCorp more than their contracted-for share of GenCorp's liability.

GenCorp, 297 F.Supp.2d at 1007. Paying a policyholder's unreimbursed liability that penetrates into excess policy limits, however, is *exactly* what an excess insurer *contracts to do*. When this Court observed that a policyholder may "seek coverage from any policy in effect during the time period of injury or damage . . . up to that policy's coverage limits" and, if its recovery under the chosen policy does not satisfy the entire claim, "pursue coverage under other primary or excess

insurance policies” until the full claim has been satisfied, *Goodyear* at ¶ 6, ¶ 12, it was not contemplating any insurers paying “more than their contracted-for share of . . . liability.” *GenCorp* at 1007. Rather, this Court was recognizing that excess insurers paying, if chosen, the amount of a loss penetrating into their limits, but only up to those limits, would be paying *precisely* their “contracted-for share.”

The magistrate’s analysis then continued to veer even further off course. She determined, for instance, without any citation to Ohio law, that by settling with its primary and umbrella insurers, “*GenCorp has already made its allocation of liability among its primary insurers.*” (Emphasis sic.) *Id.* at 1007. According to the magistrate, “*GenCorp made that allocation when it settled with its primary insurers.*” *Id.*

The first problem with these statements is that they reveal a misunderstanding of this Court’s allocation rulings in *Goodyear*, which later were confirmed by this Court in *Park-Ohio*. Policyholders are not entitled to choose whether “all sums” or “pro rata” allocation will apply to their claims. This Court has made clear that “all sums” is the law of Ohio. A policyholder merely can choose which triggered policies to recover under, and in what order. The policyholder and its insurers at all times retain the right to settle insurance claims for less than the limits of these policies. As long as those settlements do not create a double recovery, a policyholder then can proceed to recover its unreimbursed losses against any non-settled, triggered policy, as long as the policy’s attachment point and limits are respected. That is all Goodrich did, and it is all Lincoln Electric is trying to do. The *GenCorp* decision derailed the process through confusing a policyholder’s right to settle, which is to be preserved, with what that magistrate regarded as a policyholder’s “right” to choose applicable allocation law, a “right” that would invade the province of the courts and, accordingly, does not exist.

This Court has made Ohio's allocation law clear: "[W]e agree with Goodyear's position and adopt the 'all sums' method of allocation." *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 6. A policyholder is not free to choose between the legal doctrines of "all sums" and "pro rata" allocation. "All sums" is the law of Ohio. Under that law, a policyholder is free to choose among triggered policies. If it is able to settle along the way with insurers issuing those triggered policies, respecting policy attachment points and limits and thereby contractually effectuating the contribution outcome authorized by this Court in *Goodyear* and *Park Ohio*, all four cornerstones of Ohio coverage law discussed above are satisfied.

Further, rather than crediting the excess insurers in *GenCorp* with the stated coverage limits of the policy or policies *directly* underlying their policies in their particular policy periods, the magistrate credited them with the full policy limits of *all* of GenCorp's primary and umbrella policies in *all* policy periods. In so doing, the magistrate effectively raised the attachment points of the excess policies from those stated in the policies to extremely high levels equaling the combined policy limits of all of GenCorp's primary and umbrella policies, regardless of whether such policies underlay a chosen excess policy. Some of GenCorp's excess insurers in the case had issued policies with attachment points as low as \$11 million, which were easily reached by a site that exceeded \$28 million. *GenCorp*, 297 F.Supp.2d at 998. The magistrate, however, effectively re-wrote those policies to provide attachment points of \$64 million. *See id.*

The magistrate's decision also misconstrued Ohio's law of contribution by determining that the unavailability of contribution from other triggered policies in that particular case would preclude coverage from being available under non-settled policies. In *Goodyear*, this Court recognized that when a policyholder chooses a particular insurer's policy to provide coverage for a long-tail claim, that insurer is permitted "to seek contribution from other responsible parties

when possible.” (Emphasis added.) *Goodyear* at ¶ 11. This Court, accordingly, made clear that “all sums” was the law of Ohio and that under the operation of that law contribution recoveries by a chosen insurer may or *may not* be possible. The magistrate, however, inverted this Court’s analysis and held that if contribution from “other responsible parties” is not possible because of underlying insurers’ settlements with the policyholder, “all sums” liability of excess insurers would not be recognized and a chosen excess insurer need not honor the coverage obligations it undertook when it sold its policies.

Insurance policies, however, are assets of the policyholder, to be used as and when the policyholder sees fit. None of its insurance policies are de facto reinsurance policies, to be preserved by the policyholder for the benefit of non-settling insurers that may refuse to settle, suffer judgment, and wish to pursue contribution claims. A policyholder’s settlements with its other insurers may prove, in fact, an impediment to non-settling insurers in seeking contribution. That is a risk non-settling insurers take. By settling, however, a policyholder should not forfeit its rights against non-settling insurers. Correspondingly, the risk that recalcitrant insurers may face reduced contribution prospects may well encourage settlement by all, an outcome strongly favored in Ohio.

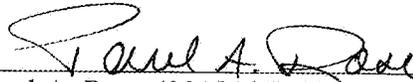
If *GenCorp* were to become the law of Ohio, policyholders would be forced to forego settling with their primary or other lower level insurers. Instead, they would be compelled to proceed in litigation to judgment against as many insurers as possible to avoid forfeiting coverage rights. Any principle that so discourages settlement and so readily causes forfeiture cannot be permitted to become the law of Ohio. The amici curia, therefore, respectfully request that this Court take this opportunity to make clear that *Goodrich*, not *GenCorp*, accurately reflects Ohio law.

V. CONCLUSION

The carefully integrated principles of Ohio insurance coverage law implicated by the certified question have for decades served well Ohio policyholders, insurers, and courts. They assure that all policies triggered by long tail claims are eligible to fully compensate the policyholder who purchased the policies. They also assure that no insurer has to pay a dollar more or a moment sooner than its policy limits and attachment points require and, further, that if and when an insurer is chosen to pay a claim, it has the potential to receive contribution from other insurers. These principles, therefore, have been very effective in providing appropriate compensation for policyholders and claimants alike, while protecting insurers, promoting settlements, and avoiding forfeitures. Accordingly, this Court should answer the certified question in the affirmative, preserving Ohio's carefully crafted insurance coverage law that provides the answer.

Respectfully submitted,

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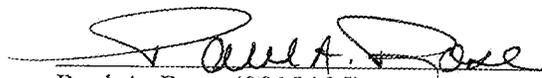
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