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I. INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association (“CICLA”), the American Insurance Association (“AIA”) and the Property Casualty Insurers Association of America (“PCI”) (collectively, “*amici*”) are leading trade associations of major property and casualty insurance companies.¹

CICLA is a trade association of leading property-casualty insurers. It seeks to assist courts in understanding and resolving the core coverage issues that are of greatest consequence to insurers today. These are issues defining insurer obligations and coverage parameters in what are often complex, high-dollar claims. CICLA has participated as an *amicus curiae* in numerous insurance cases in state and federal courts across the United States, including important cases before this Court.² Especially in cases such as this one, where adverse *amici* briefs have been filed, CICLA plays a critical role in responding to sometimes sweeping contentions and purported public policy arguments concerning the insurance system.

AIA represents approximately 300 insurers that write more than \$117 billion in premiums each year. AIA member companies offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers’ compensation, homeowners’ insurance, medical malpractice coverage, and

¹ This brief is not submitted on behalf of member company Travelers Casualty and Surety Company, which is a party to this matter.

² See, e.g., *Pa. Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 836; *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109; *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 757 N.E.2d 329 (2001); *Ormet Primary Aluminum Corp. v. Emps. Ins. of Wausau*, 88 Ohio St.3d 292, 725 N.E.2d 646 (2000). See also *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 968 So.2d 705 (Ala. 2007) (quoting directly from CICLA’s brief and agreeing with its “well-reasoned approach”).

product liability insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums and files *amicus curiae* briefs in significant cases. AIA previously has participated in important cases before this Court.³

PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of more than 1,000 member companies, representing the broadest cross section of insurers of any national trade association. PCI members write more than \$195 billion in annual premiums, 39 percent of the nation's property casualty insurance. In Ohio, PCI members write 43.1 percent of the property casualty market, which includes 49.9 percent of the commercial property market and 42.8 percent of all commercial lines. PCI members are keenly interested in the decisions of this Court, especially those decisions pertaining to insurance coverage matters and other issues that impact property casualty insurers and their customers.

Collectively, the members of *amici* write a substantial amount of insurance both in Ohio and nationwide. *Amici* therefore have a national perspective and in-depth knowledge of the important insurance contract issues presented in this case, which will substantially impact insurers and policyholders throughout the State. *Amici* respectfully submit that their unique

³ See, e.g., *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215, *reconsideration denied*, 128 Ohio St.3d 1439, 2011-Ohio-1580, 944 N.E.2d 690; *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479; *In Re All Cases Against Sager Corp.*, 132 Ohio St.3d 5, 2012-Ohio-1444, 967 N.E.2d 1203; *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795; *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448; *Stetter v. R.J. Corman Derailment Servs. LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092; *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377; *DiCenzo v. A-Best Products Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E.2d 132; *Ackison v. Anchor Packing Co.*, 120 Ohio St.3d 228, 2008-Ohio-5243, 897 N.E.2d 1118.

perspective will assist the Court in deciding this case and the important insurance principles at stake.

II. SUMMARY OF THE ARGUMENT

A. Lincoln Electric seeks to ignore the consequences of its choice to target multiple primary policies and to allocate its liability horizontally.

The certified question presented can be readily answered by applying well-established precepts of Ohio insurance law to the facts at hand. Petitioner The Lincoln Electric Company (“Lincoln Electric”) faces actual and potential liability in connection with numerous underlying tort claims. Consistent with Ohio law governing allocation, Lincoln Electric elected to compromise its underlying primary insurance policies on a horizontal basis. In other words, the policyholder made an affirmative choice to distribute its tort liability broadly, across multiple policy years, to maximize coverage under its primary policies. Now, Lincoln Electric seeks to reverse course and re-allocate the same liability vertically, to a single policy year, in order to trigger coverage under its excess insurance policies—all without accounting for the limits of the compromised policies. Lincoln Electric’s position is directly contrary to Ohio law, which establishes that, once a policyholder targets a pool of primary policies for coverage, the policyholder can access excess coverage only by showing that the limits of all of the targeted policies are insufficient to cover its losses.

B. Lincoln Electric cannot shift the costs of its allocation decision to the excess insurers.

The equitable underpinnings of Ohio’s “all sums” approach to allocation require a policyholder to stand by its settlement decisions and the consequences that follow. In order to compromise its primary policies on a broad, horizontal basis, a policyholder must elect to allocate its liability across all years of the primary coverage. Having elected that approach, the policyholder cannot reallocate its liability to a single policy year in order to also trigger its excess

coverage. Allowing the policyholder to trigger excess coverage artificially, without showing that its losses exceed the limits of the policies it targeted first, would be wholly inconsistent with the policyholder's own allocation decisions and would shift the costs of the policyholder's freely negotiated compromise to the excess insurers, which are strangers to the bargain.

C. The arguments presented by Lincoln Electric's amici do not withstand scrutiny.

Adopting a rule that permits policyholders to shift allocation tactics at any point is not—as argued by Lincoln Electric's amici⁴—(1) efficient, *e.g.*, Brief of *Amici Curiae* of Joseph B. Stulberg, JD, Ph.D, et al., in Support of Petitioner, at 12 (Nov. 25, 2013) (contending that a decision in favor of Lincoln Electric will reflect the “rule of law that will best support the parties ability to timely settle [insurance coverage] suits”); (2) equitable, *e.g.*, Brief of *Amicus Curiae* United Policyholders in Support of Plaintiff-Petitioner The Lincoln Electric Company, at 5 (Nov. 25, 2013) (asserting that it would “undermine[s] basic fairness and consistency crucial to proper working of the liability and insurance system” to require policyholders to stand by the allocation choices they make in settling with certain insurers); or (3) “intellectually consistent,” *e.g.*, Brief of *Amici* Insurance Law Professors Kenneth S. Abraham, et al., in Support of Petitioner, at 3 (Nov. 25, 2013) (arguing that “the only logically consistent choice based on fundamental principles of insurance law” is to allow policyholders to use different allocation approaches for different carriers).

For instance, the extent to which a non-settling insurer can enforce contribution rights vis-à-vis a settling insurer is far from clear. Thus, Lincoln Electric's proposed approach would

⁴ It is notable that many of Lincoln Electric's amici law professors appear as retained advocates for policyholders in high-stakes insurance disputes. *See, e.g.*, *Pacific Emps. Ins. Co. v. Clean Harbors Environmental Servs., Inc.*, No. 08-cv-2180 (N.D.Ill.), Docket Entry No. 263-2 (expert report of Professor Jeffrey Stempel on behalf of the policyholder); *SP Syntax LLC v. Natl. Union Fire Ins. Co. of Pittsburgh, P.A.*, No. 2011-19071 (Maricopa County, Ariz.) (expert report of Professor Kenneth S. Abraham on behalf of the policyholder).

waste judicial resources, as the targeted excess insurer would inevitably seek recovery from the other primary insurers under a theory of contribution, leading to increased litigation. It would be inequitable because it would allow the policyholder to target additional insurers without even satisfying the limits of policies it elected to tap in the first instance. And it would be intellectually inconsistent because it would abandon the key precept of Ohio’s “all sums” approach reflected in this Court’s directive that a policyholder can target another insurer only upon showing that the limits of the policies it targeted in the first instance were not sufficient to satisfy its losses. *Amici* therefore respectfully submit that, based upon firmly settled principles of Ohio insurance law and fundamental notions of fairness, the Court should answer the certified question in the negative and hold that, where a policyholder chooses to compromise multiple primary policies on a horizontal basis, excess coverage can be accessed only where the policyholder shows that its losses exceed the limits of all of the compromised policies.

III. STATEMENT OF FACTS⁵

Lincoln Electric is a welding company that faces actual and potential liability in connection with numerous underlying lawsuits alleging long-term bodily injury arising from alleged exposure to harmful substances in Lincoln Electric’s welding products. *Lincoln Elec. Co. v. Travelers Cas. & Sur. Co.*, No. 1:11-cv-02253, Certification Order at 2 (N.D. Ohio July 3, 2013) (the “Certification Order”).

Lincoln Electric has primary—and, in some cases, umbrella and excess—general liability insurance coverage for the period from 1947 to 1985, the years at issue in the underlying tort actions. Certification Order at 2-3. St. Paul Fire and Marine Insurance Company (“St. Paul”)

⁵ The facts and proceedings are drawn from the district court’s certification order. See *Lincoln Elec. Co. v. Travelers Cas. & Sur. Co.*, No. 1:11-cv-02253, Certification Order (N.D. Ohio July 3, 2013). Only those facts important to the issues addressed by *Amici* are restated here.

issued primary insurance policies to Lincoln Electric for the years from 1947 to 1985. *Id.* at 2. St. Paul also purportedly issued umbrella policies to Lincoln Electric for the years from 1969 to 1975 and from 1981 to 1985. *Id.* at 3.⁶ Lincoln Electric purchased umbrella policies from Aetna Casualty and Surety Company, n/k/a Travelers Casualty and Surety Company (“Travelers”), for the years from 1975 to 1981. *Id.*

In June 2000, Lincoln Electric and St. Paul entered into an agreement regarding the primary policies issued by St. Paul (the “Primary Policy Agreement”), pursuant to which St. Paul agreed to pay a portion of Lincoln Electric’s defense and indemnity costs in connection with the underlying welding product claims. Certification Order at 3. The Primary Policy Agreement specifically provides that St. Paul’s indemnity payments will be spread equally across each of the primary policies it issued to Lincoln Electric for the years from 1947 to 1984. *Id.* at 4. In other words, in entering into the Primary Policy Agreement, Lincoln Electric made the decision to allocate its liability for the underlying welding product claims on a broad, horizontal basis.

The Primary Policy Agreement provides that St. Paul pays a decreasing percentage of Lincoln Electric’s defense and indemnity costs over time, and Lincoln Electric pays a correspondingly larger portion of its indemnity and defense costs. Certification Order at 4. Lincoln Electric now purports to have incurred more than \$91 million in defense and indemnity costs⁷ beyond the amounts it has received to date from St. Paul pursuant to the Primary Policy Agreement—amounts that Lincoln Electric agreed to pay pursuant to the Primary Policy

⁶ *Amici* understand that, although Lincoln Electric asserts that it purchased umbrella policies for the years from 1969 to 1975, the alleged policies have not been located by any party.

⁷ According to Lincoln Electric, it has paid more than \$12 million in settlements and adverse judgments in connection with the underlying welding product claims. Certification Order at 2. Lincoln Electric also asserts that, between the period from November 1, 1999 through December 31, 2012, it incurred over \$179 million in defense costs. *Id.*

Agreement. *Id.* St. Paul continues to pay for a portion of Lincoln Electric's defense and indemnity payments, as specified by the Primary Policy Agreement.

In 2011, Lincoln Electric filed a coverage action in the United States District Court for the Southern District of Ohio, seeking a declaration that it can re-allocate its liability from the horizontal basis it elected in the Primary Policy Agreement to a vertical basis, in order to recover a portion of the share it agreed to pay under the Primary Policy Agreement from either the 1980-81 umbrella policy issued by Travelers or the 1983-84 umbrella policy allegedly issued by St. Paul. *Id.* at 4. Travelers and St. Paul, in its capacity as the carrier that purportedly issued Lincoln Electric's 1983-84 umbrella policy, are referred to herein as the "Respondent Excess Insurers."⁸ More specifically, Lincoln Electric contends that—despite having already made a choice to compromise its liability on a broad, horizontal basis across all of its primary insurance policies—it is now entitled to switch course and to re-allocate its defense and indemnity costs on a vertical basis. If it is permitted to re-allocate its losses in this manner, Lincoln Electric argues that the asserted \$2 million attachment point of the respective policies issued by the Respondent Excess Insurers will be reached, thereby allowing it to access previously untapped excess coverage.

In the proceedings before the district court, the Respondent Excess Insurers moved for partial summary judgment on the allocation issue, arguing that Ohio law prohibits Lincoln Electric from re-allocating its liability on a vertical basis. Certification Order at 4-5. Lincoln Electric filed its own cross-motion for partial summary judgment on allocation, seeking judicial

⁸ Depending on the circumstances, an umbrella policy may afford primary coverage (when no primary coverage is available) or excess coverage (when primary coverage is available). Here, all parties agree that the umbrella policies at issue afford excess coverage. Therefore, it is appropriate to refer to the policies as providing "excess coverage" and to refer to respondents as the "Respondent Excess Carriers."

approval of its about-face. *Id.* Pursuant to Rule 9.01 of the Rules of Practice of this Court, the district court certified the following question:

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?

Id. at 1. On September 25, 2013, this Court accepted the certified question.

IV. ARGUMENT

A. **Where an insured chooses to allocate liability broadly across multiple primary policies, excess coverage can be accessed only when the insured’s losses exceed the policy limits of all the primary policies it elected to tap.**

1. **Ohio law allows a policyholder to choose how to allocate its liability.**

Ohio law governing allocation provides the foundation for answering the certified question. Subject to all of their terms, conditions and exclusions, general liability insurance policies typically provide coverage for “bodily injury” and “property damage.” Where the alleged bodily injury or property damage spans many years, Ohio law provides that multiple insurance policies can be implicated. *See Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 836, ¶ 11 (observing that the subject claim for environmental pollution “triggers claims under multiple policy periods”); *Pa. Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, ¶¶ 1-2 (addressing scenario where “loss or injury is caused over a period of time . . . and multiple insurance policies cover that time frame”). In such circumstances, Ohio law provides that a policyholder has discretion in choosing which policies (and, by extension, which insurers) to target for coverage. *Goodyear*, ¶ 12; *Park-Ohio*, ¶¶ 11-12.

A policyholder must first decide which policy among the group of triggered primary policies should be targeted to respond to the loss. *Goodyear*, ¶ 12 (“For each [polluted] site, [the

policyholder] should be permitted to choose, from the pool of triggered primary policies, a single primary policy under against which it desires to make a claim.”). If the limits of the targeted primary policy are insufficient to cover the entire claim, the policyholder can then choose to target other primary policies or to access an excess policy that affords coverage for the same policy year. *See id.*, ¶ 12 (“In the event that this [targeted] policy does not cover [the policyholder’s] entire claim, then [the policyholder] may pursue coverage under other primary or excess insurance policies.”).

2. **A policyholder’s decision to allocate liability horizontally represents a choice to spread its losses broadly.**

Pursuant to the “pick-and-choose” approach adopted in *Goodyear* and its progeny, any settlement or compromise that involves multiple insurance policies necessarily involves a decision by the policyholder regarding allocation. Put differently, a policyholder’s decision to compromise multiple insurance policies necessarily entails a choice of which pool of policies to target for coverage—an affirmative exercise of the discretion granted by *Goodyear*. For example, by agreeing to a compromise that involves concurrent payments across multiple primary insurance policies, a policyholder elects to allocate its liability broadly, on a horizontal basis. *See, e.g., GenCorp, Inc. v. AIU Ins. Co.*, 297 F.Supp.2d 995, 1007 (N.D. Ohio 2003) (the policyholder “made its allocation of liability” under *Goodyear* “when it settled with its primary insurers”), *aff’d*, 138 Fed.Appx. 732 (6th Cir.2005) (“[B]y settling with its primary and umbrella insurers, [the policyholder] . . . made the choice to allocate its liability as broadly as possible[.]”); *MW Custom Papers LLC v. Allstate Ins. Co.*, Montgomery C.P. No. 2012-CV-3228, 2012 WL 6565832 (Sept. 21, 2012) (in entering into cost-sharing agreements with the “low level primary and umbrella carriers,” the insurer “already has allocated its asbestos claims”); *Goodyear Tire & Rubber Co. v. Hartford Acc. & Indemn. Co.*, W.D.Pa. No. 97-933,

2005 WL 6244202, *6 (Mar. 11, 2005) (“*Goodyear II*”) (Ohio law) (an insured’s settlement with multiple primary carriers constitutes a decision to allocate liability “as broadly as possible”).

Under *Goodyear*, a policyholder might instead opt to allocate its liability vertically, by targeting a tower of insurance policies that provide different layers of coverage for a single period of insurance.

3. **Lincoln Electric exercised its discretion under *Goodyear* by choosing to allocate its liability horizontally.**

Here, Lincoln Electric voluntarily elected to enter into the Primary Policy Agreement with St. Paul, pursuant to which it received concurrent defense and indemnity payments under a series of primary insurance policies. Thus, Lincoln Electric chose to allocate its liability for the underlying welding product claims broadly, on a horizontal basis and across a number of periods of insurance. This decision represents an affirmative exercise of the discretion granted to policyholders by *Goodyear* to choose which pool of policies to target for coverage.

4. **As a result of its decision, Lincoln Electric must account fully for the limits of the tapped policies before it can access excess coverage.**

Under the second portion of the *Goodyear* holding, Lincoln Electric can move on to target other primary policies or to access an excess policy that provides coverage in one of the compromised primary policy years only if the limits of the targeted primary policies “do not cover [its] entire claim.” *Goodyear*, ¶ 12; see also *GenCorp*, 138 F. App’x at 733-34 (explaining that, pursuant to *Goodyear*, the consequence of an insured’s decision to “allocate its liability as broadly as possible” meant that the policyholder “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”); *MW Custom Papers*, Montgomery C.P. No. 2012-CV-3228 (because the policyholder elected to compromise its losses on a horizontal basis, “it has to demonstrate that its liabilities would exceed the cumulative limits of all the primary and umbrella

policies before it could trigger the excess policies”).

The certified question can therefore be answered by a straightforward application of the Court’s prior holding in *Goodyear*: by virtue of its own allocation decisions, Lincoln Electric can access the policies issued by the Respondent Excess Insurers only if and when it shows that its liability for the underlying welding product claims exceeds the total combined limits of each of the policies Lincoln Electric chose to compromise by entering into the Primary Policy Agreement.

B. The equitable nature of Ohio allocation law requires that a policyholder be held accountable for the consequences of its settlement decisions.

1. Notwithstanding its prior horizontal allocation choice, Lincoln Electric seeks to re-allocate the same losses vertically.

Despite recognizing the allocation principles announced in *Goodyear* as “cornerstones” of Ohio law, *e.g.*, Brief of *Amici Curiae* The Ohio Manufacturers’ Association, et al., in Support of Plaintiff-Petitioner The Lincoln Electric Company, at 6 (Nov. 25, 2013) (recognizing that *Goodyear* gave policyholders a “right to choose from among triggered insurers” and that “[e]ach selected policy is responsible to pay, *up to its stated limits*”) (emphasis added), Lincoln Electric and its *amici* nonetheless seek to overturn a key portion of this Court’s holding in *Goodyear*. Specifically, Lincoln Electric and its *amici* argue that, when a policyholder elects to allocate its losses broadly across multiple periods of insurance, the policyholder can also access excess coverage without accounting for the limits of the policies it settled. To accomplish this feat, Lincoln Electric seeks to account only for the “gap” purportedly created in a *single* period of insurance (*i.e.*, by accounting for the difference between what it has received to date from St. Paul pursuant to a single primary policy and the limits of that same primary policy). Lincoln Electric and its *amici* urge the Court to ignore the consequences of its previous allocation choices and create a rule that allows a policyholder to transfer losses to its insurers whenever and

however the policyholder sees fit, even without “intellectual” or actual consistency in its accounting for the limits of the policies it targets. *E.g.*, Brief of *Amici Curiae* The Ohio Manufacturers’ Association, et al., in Support of Plaintiff-Petitioner The Lincoln Electric Company, at 31 (Nov. 25, 2013) (“Insurance policies . . . are assets of the policyholder, to be used as and when the policyholder sees fit.”).

2. **Lincoln Electric’s position would unfairly pass on the costs of its business decision to the Respondent Excess Insurers.**

Lincoln Electric’s position flies in the face of Ohio law and public policy. Although *Goodyear* bestows policyholders with certain discretion in choosing which insurance policies to target for coverage, that discretion is not unfettered. Nothing in *Goodyear* suggests that a policyholder can make one allocation choice for purposes of collecting against a pool of primary insurance policies and then reapply the same losses in a different fashion to also recover from its excess policies. This Court stated that *Goodyear* is premised on principles of equity and fairness. It is hardly equitable to allow an insured to allocate its liability across primary policies horizontally to settle their liability and simultaneously use the same loss dollars to trigger excess coverage, as well. It is unfair to allow the policyholder to collect, and to require an excess policy to pay, before the excess policy would normally respond in the horizontal allocation regime that the policyholder chose to follow in tapping other coverage on the loss. Rather, the equitable nature of the *Goodyear* decision compels the conclusion that a policyholder must live with the consequences of its allocation decisions.

In entering into the Primary Policy Agreement, Lincoln Electric deliberately apportioned its liability across a number of periods of insurance to maximize recovery under its primary policies. Indeed, Lincoln Electric continues to receive payments from St. Paul that are allocated across its primary policies. Pursuant to the terms of the Primary Policy Agreement, Lincoln

Electric will continue to do so until the limits of the primary policies are exhausted through a combination of St. Paul's payments and the amounts for which Lincoln Electric voluntarily agreed to be responsible. It cannot now use the losses it apportioned elsewhere to access the excess policies issued by the Respondent Excess Insurers. Indeed, doing so would be wholly inconsistent with the obligations Lincoln Electric itself decided to assume when it agreed to the Primary Policy Agreement.

3. **Lincoln Electric still seeks to access coverage under the primary policies it elected to tap first.**

As discussed in detail above, a straightforward application of *Goodyear* and its progeny leads to the conclusion that Lincoln Electric can access its excess policies only if and when it can show that the compromised policies it targeted first will not cover its losses. In other words, the only possible way that Lincoln Electric could “fill the gap” that it created by entering into the Primary Policy Agreement is by showing that its losses exceed the aggregated limits of liability of *all* of the settled primary policies (the policies that it elected to target first). Holding otherwise would improperly insulate Lincoln Electric from the consequences of the Primary Policy Agreement it voluntarily entered into with St. Paul—a result that would violate the express holding of *Goodyear* and that would be contrary to the equitable nature of Ohio allocation law.

C. **None of the reasons offered by Lincoln Electric and its amici justify departing from the requirement that a policyholder who allocates its liability broadly can access its excess coverage only upon showing that its losses exceed the limits of the targeted primary policies.**

Lincoln Electric and its amici urge that a policyholder who broadly allocates liability across multiple primary policies can re-allocate the same losses vertically to access excess coverage without accounting for the limits of the compromised policies. This result, they claim, is justified based on the availability of contribution; the public policy disfavoring forfeitures of

coverage; and Ohio's preference for resolving insurance coverage disputes outside of the courtroom. As set forth below, none of Lincoln Electric's proffered justifications warrant a departure from *Goodyear's* requirement that a policyholder can access additional policies for coverage only if and after showing that the limits of the policies it elected to target first are insufficient to satisfy its losses.

1. **Contribution does not remedy the inequities that would result if Lincoln Electric is permitted to access its excess coverage without making the showing required by *Goodyear*.**

One of the main arguments that Lincoln Electric and its *amici* advance is that, if Lincoln Electric is permitted to re-allocate its losses vertically to access excess coverage, the Respondent Excess Insurers will be able to seek contribution from the settled insurers. *E.g.*, Brief of *Amici Curiae* The Ohio Manufacturers' Association, et al., in Support of Plaintiff-Petitioner The Lincoln Electric Company, at 20 (Nov. 25, 2013) (asserting that one "cornerstone" of Ohio law is that where an "insurer pays the claim on an 'all sums' basis, that insurer has certain equitable rights of contribution against other insurers"); Brief of *Amici Curiae* The National Electrical Manufacturers' Association, et al., in Support of Petitioner The Lincoln Electric Company, at 8 (Nov. 25, 2013) (highlighting that, under the 'all sums' approach, "the insurer whose policy is selected" has a right "to spread its burden by obtaining contribution from other insurers whose policies are also implicated by the same claim").

Contrary to Lincoln Electric's suggestion, it is unclear whether contribution rights are viable against the settled insurers at all. *See, e.g., GenCorp*, 297 F.Supp.2d at 1007 ("The settlements [between the policyholder and the primary insurers] extinguished all claims . . . against the primary insurers. The excess insurers, therefore, cannot seek contribution from [the policyholder's] primary insurers because those insurers have no remaining liability to [the policyholder]."); *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, 679 F.3d 456, 463 (6th

Cir.2012) (holding that, pursuant to the terms of a release signed by the policyholder, the non-settling insurers could not seek contribution from released insurers). Thus, here again, Lincoln Electric's arguments are inconsistent with the "all sums" approach adopted in *Goodyear*, which is explicitly premised on the equitable notion that a targeted or chosen insurer can seek contribution from non-targeted insurers. *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 11 (observing that a chosen insurer is permitted to "seek contribution from other responsible parties when possible," including contribution from other "applicable" insurance policies); *see also Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, ¶ 11 ("The targeted insurer is then able to file a later action against any other insurers . . . to obtain contribution.").

Contribution is not a panacea even in circumstances where such recovery rights clearly exist. Another insurer might be able to avoid liability by asserting policy exclusions and coverage defenses, leaving the targeted carrier with more than its fair share of losses. *Cf. Bondex Internatl., Inc. v. Hartford Acc. & Indemn. Co.*, N.D. Ohio No. 1:03-cv-01322, 2007 WL 405938, *4 (Feb. 1, 2007) (observing that a contribution action against settled insurers "undermines the finality of the settlement" between the policyholder and its primary carriers). Thus, even if such rights were available in this setting, contribution does not warrant a departure from previously settled Ohio law.

2. **Requiring Lincoln Electric to account for the limits of the policies it chose to tap does not result in any "forfeiture" of excess coverage.**

Lincoln Electric and its *amici* also suggest that requiring it to stand by its election to allocate liability horizontally to multiple primary policies would result in a "forfeiture" of excess coverage that is disfavored under Ohio law. *E.g.*, Brief of *Amici Curiae* The Ohio Manufacturers' Association, et al., in Support of Plaintiff-Petitioner The Lincoln Electric

Company, at 31 (Nov. 25, 2013) (arguing that answering the certified question in the negative would “readily cause[] forfeiture” of coverage for policyholders); Brief of *Amici* Insurance Law Professors Kenneth S. Abraham, et al., in Support of Petitioner, at 20 (Nov. 25, 2013) (asserting that, unless the Court adopts a rule that allows Lincoln Electric to re-allocate its losses vertically, the insured would be “essentially penalized for settling with its primary [insurer]” and “would essentially lose its excess coverage”); Brief of *Amici Curiae* National Electrical Manufacturers Association, at 3 (Nov. 25, 2013) (incorrectly characterizing the Respondent Excess Insurers’ position as arguing that “their policyholder is no longer entitled to the full scope of coverage that the plain meaning of their policies provide”).

This is simply untrue. Lincoln Electric made its own choice to tap multiple primary policies first; and must be held to that decision before it can tap excess coverage as well. Requiring Lincoln Electric to stand by its horizontal allocation of liability would not make this a circumstance in which a policyholder’s settlement with an underlying insurer results in a forfeiture of coverage. Rather, Lincoln Electric can attempt to access its excess policies once it fully accounts for the underlying policies it chose to target—it simply has not done so yet. Instead, Lincoln Electric continues to receive payments from primary insurer St. Paul and, pursuant to the terms of the Primary Policy Agreement, will continue to do so until the primary policies are exhausted. Precluding Lincoln Electric from taking an allocation position that is inconsistent with the Primary Policy Agreement is altogether different than concluding that the Primary Policy Agreement resulted in a forfeiture of coverage.⁹

⁹ There are circumstances where a policyholder’s decision to settle with a primary insurer for less than the policy limits will result in a forfeiture of excess coverage. For instance, under certain policy language, a policyholder who settles with an underlying insurer for less than the full policy limits forfeits the ability to obtain excess coverage because the full underlying limits have not been applied to the loss. *See, e.g., Qualcomm, Inc. v. Certain Underwriters At*

3. **Respondent Excess Insurers should not be denied their bargained-for right to participate in the defense.**

The proposal offered by Lincoln Electric and its *amici* would unfairly deprive not Lincoln Electric, but rather its excess carriers, of their bargained-for rights. Specifically, the excess insurers would be denied their bargained-for rights to participate in the defense of their policyholder. Lincoln Electric is asking the Respondent Excess Carriers to pay for defense costs that have already been incurred, even though the Respondent Excess Carriers had no opportunity to be involved in the defense of the underlying welding product cases. Moreover, because Lincoln Electric seeks payment from the Respondent Excess Carriers while it is still receiving defense payments from primary insurer St. Paul, its proposal would have the perverse result of having a primary and an excess carrier provide a defense at the same time. This result would almost surely lead to confusion about which insurer controls the defense of the policyholder—further highlighting the unfairness that the Respondent Excess Insurers would suffer if the Court disregarded existing Ohio law to adopt the approach advocated by Lincoln Electric and its *amici*.

By entering into policies with defense rights, excess insurers agree to insure a certain type of risk. Permitting policyholders to access excess coverage even while the excess insurer is precluded from exercising its defense rights would necessarily change the nature of the risk insured, as the insurer would no longer be receiving the benefit of its bargain. This Court should

Lloyd's, London, 161 Cal.App.4th 184, 204, 73 Cal.Rptr.3d 770 (2008); *Danbeck v. Am. Family Mut. Ins. Co.*, 629 N.W.2d 150, 156 (Wis.2001); *Comerica Inc. v. Zurich Am. Ins. Co.*, 498 F.Supp.2d 1019, 1032 (E.D.Mich.2007). In other circumstances, the language of an excess policy or considerations of public policy do not permit an insured to “fill in the gap” between the amount of the settlement and the underlying policy’s limit of liability. *Goodyear Tire & Rubber Co. v. Natl. Union Ins. Co. of Pittsburgh*, N.D. Ohio No. 5:08-cv-1789, 2011 WL 5024823, *4 (Sept. 19, 2011) (Ohio law) (recognizing that, in some cases, the clear language of an excess policy’s exhaustion provision does not “contemplate the insured ‘filling the gap’ or ‘crediting the difference’”), *aff’d sub nom.*, *Goodyear Tire & Rubber Co. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 694 F.3d 781 (6th Cir.2012) (“*Goodyear III*”).

not permit policyholders to negate the excess insurers' bargained-for defense rights through unilateral settlement decisions.

4. **Lincoln Electric's proposed approach would hinder—not facilitate—the good faith resolution of insurance disputes.**
 - a. Creating a one-sided playing field for policyholders is not an equitable means of promoting settlement.

Lincoln Electric and its *amici* insist that public policy favoring settlement supports their effort to insulate Lincoln Electric from the consequences of its own allocation decisions. Indeed, Lincoln Electric's *amici* go so far as to assert that the *only* way to facilitate out-of-court settlements between a policyholder and its insurers is to give policyholders unfettered discretion to target insurers without requiring any consistency in allocating actual loss. *E.g.*, Brief of *Amicus Curiae* United Policyholders in Support of Plaintiff-Petitioner The Lincoln Electric Company, at 4 (arguing that a rule that holds policyholders accountable for their allocation choices “will likely negatively the impact the ability to settle multi-party insurance cases”); Brief of *Amici* Insurance Law Professors Kenneth S. Abraham, et al., in Support of Petitioner, at 20 (Nov. 25, 2013) (asserting that, if the certified question is answered in the negative, primary insurers will “have no incentive to settle” and “both parties would be forced to move forward with time-consuming and expensive litigation”).

This suggestion is patently absurd. What *amici* actually advocate for is the creation of an uneven playing field that favors the policyholder's interests in avoiding the consequences of its own allocation decisions. Such a result does not facilitate the good faith compromise of insurance disputes or otherwise promote equity. Rather, Ohio's equitable approach to allocation, as set forth in *Goodyear*, requires that Lincoln Electric be held accountable for its decisions to target certain policies first.

- b. Policyholders should not be incentivized to shirk their settlement obligations.
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Here, Lincoln Electric seeks to avoid even the obligation it voluntarily assumed under the Primary Policy Agreement to pay a share of the targeted primary policies' limits. If Lincoln Electric's approach were approved, it would create a perverse incentive for a policyholder to negotiate low settlements with as many primary insurers as possible—all the while shirking the responsibility under Ohio law to apply losses to meet the limits of the primary policies it elected to target. *See GenCorp*, 138 Fed.Appx. at 733-34 (under the teaching of *Goodyear*, an insured's decision to "allocate its liability as broadly as possible" meant that the policyholder "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").

The correct result under existing Ohio law is that, where a policyholder compromises its losses on a horizontal basis across multiple primary policies, the policyholder can access excess coverage only if the limits of the policies it chose to target are insufficient to satisfy its losses. This rule places the risk of settlement on the insured, who participated in the negotiations, rather than on the excess carrier, which is a stranger to the agreement. *Cf. IMG Worldwide, Inc. v. Westchester Fire Ins. Co.*, 945 F.Supp. 2d 873, 889 (N.D. Ohio 2013) (observing that, where the insured "accepted the risk of obtaining a reduced recovery for defense costs" by settling with a primary insurer, it "may not shift the risk of settling for a reduced amount with the primary carrier to the excess carrier"). It also reflects the reality that the premiums charged for an excess policy reflect the excess insurer's reduced risk. *See, e.g., Revco D.S., Inc. v. Govt. Emps. Ins. Co.*, 791 F.Supp. 1254, 1264 (N.D. Ohio 1991) ("The premiums of the excess insurer are considerably lower than those of the primary insurer, in view of the reduced risk that there will be liability or loss in the amount covered by such excess insurance[.]" (internal marks omitted)).

V. **CONCLUSION**

Existing Ohio insurance law provides an answer to the certified question: where a policyholder chooses to compromise multiple primary policies on a horizontal basis, the policyholder can access coverage afforded by an excess policy only by showing that the limits of all of the compromised policies are insufficient to satisfy its losses. Allowing the policyholder to trigger excess coverage artificially, without accounting for each compromised policy, would be a significant departure from established Ohio law governing allocation. It would also unfairly shield the policyholder from the ramifications of its own allocation decisions and contradict the principles of equity and fairness upon which Ohio allocation law is premised. *Amici* respectfully urge the Court to adhere to these principles by deciding the certified question in the negative.

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CERTIFICATE OF SERVICE

I hereby certify that I directed that a copy of Brief of *Amici Curiae* The Complex Insurance Claims Litigation Association, The American Insurance Association and the Property Casualty Insurers Association of America in Support of Respondents Travelers Casualty and Surety, et al., be served by email and first class mail on January 14, 2014 on the following:

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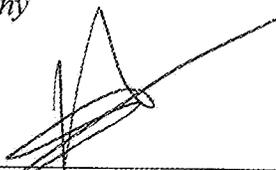
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