

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE LINCOLN ELECTRIC COMPANY,
Plaintiff-Petitioner

v.

TRAVELERS CASUALTY AND SURETY COMPANY, ET AL.,
Defendant-Respondents

Supreme Court Case No. 2013-1088

On Certified Question from the United States District Court for the
Northern District of Ohio, Eastern Division
Case No. 1:11CV2253

**BRIEF OF AMICI CURIAE ONEBEACON AMERICA INSURANCE
COMPANY, GRANITE STATE INSURANCE COMPANY, LEXINGTON
INSURANCE COMPANY, AND NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA**

Associate Counsel:

Douglas Dennis (0065706)
ddennis@fbtlaw.com
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, OH 45202-4182
Telephone: (513) 651-6800
Facsimile: (513) 651-6981

Dated: January 15, 2014

Counsel of Record:

David W. Walulik (0076079)
dwalulik@fbtlaw.com
FROST BROWN TODD LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, OH 45202-4182
Telephone: (513) 651-6800
Facsimile: (513) 651-6981

*Counsel for Appellee
Amici Curiae*

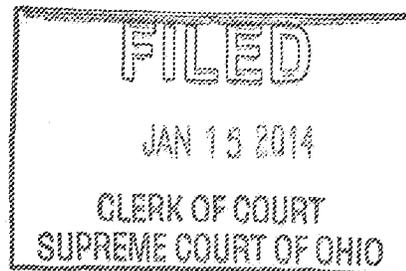


TABLE OF CONTENTS

I.	INTEREST OF AMICI CURIAE	1
II.	SUMMARY OF ARGUMENT	2
III.	STATEMENT OF FACTS	4
IV.	ARGUMENT	5
	A. Policyholder Makes Its “All Sums” Choice When It Chooses To Collect Insurance Proceeds Through Settlement	5
	1. “All sums” allocation under <i>Goodyear</i> allows a policyholder to choose among triggered policies	5
	2. When a policyholder chooses to collect insurance proceeds through settlement, the policyholder makes an “all sums” choice to allocate the loss to those policies	6
	B. A Policyholder Must Adhere To Its “All Sums” Choice By Exhausting The Policies It Has Chosen	6
	1. <i>Goodyear</i> states that a policyholder must collect “all sums” for an “entire claim” before moving to other insurance	7
	2. Those Ohio cases construing <i>Goodyear</i> have required a policyholder to exhaust settled coverage before moving to excess layers	8
	3. Ohio law generally requires a policyholder to exhaust primary coverage before reaching excess layers and credits the limits of primary coverage if settled	10
	C. To Preserve The Two Step Allocation Framework Established In <i>Goodyear</i> , A Policyholder Must Exhaust Settled Primary Policies Because Excess Insurers Have No Contribution Rights Against Settled Coverage	11
	1. “All sums” allocation depends upon a targeted insurer’s right to obtain “pro rata” redistribution from other insurers through contribution	12
	a. <i>Goodyear</i> creates a two step process in which a policyholder recovers “all sums” but the targeted insurer redistributes the loss through “pro rata” contribution	13

b. <i>Park-Ohio</i> clarifies that pro rata contribution among insurers is critical to all sums allocation by a policyholder	13
2. A policyholder destroys the ability of a targeted insurer to obtain contribution by settling with other insurers	15
a. Contribution is an equitable right to recover by a party who has paid more than its share of a common liability	14
b. Settlement precludes further contribution rights	16
3. A policyholder cannot recover “all sums” when the policyholder destroys a targeted insurer’s contribution rights	17
V. CONCLUSION	18

TABLE OF AUTHORITIES

<i>Bondex Int'l, Inc. v. Hartford Acc. and Indemn. Co.</i> , 2007 WL 405938 (N.D. Ohio Feb. 1, 2007)	9, 16
<i>Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.</i> , 147 Ohio St. 79, 67 N.E.2d 906 (1946).....	15
<i>Fulmer v. Insura Prop. & Cas. Co.</i> , 94 Ohio St. 3d 85, 2002-Ohio-64, 760 N.E.2d 392 (2002).....	10-11
<i>GenCorp, Inc. v. AIU Ins. Co.</i> , 138 Fed.Appx. 732 (6 th Cir. 2005).....	6, 8
<i>GenCorp, Inc. v. AIU Ins. Co.</i> , 297 F. Supp. 2d 995 (N.D. Ohio 2003).....	16-17
<i>Goodrich Corp. v. Commercial Union Ins. Co.</i> , 9 th Dist. Summit 2008-Ohio-3200 2008 WL 2581579 (June 30, 2008)	9
<i>Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.</i> , 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (2002)	<i>passim</i>
<i>Grange Mut. Cas. Co. v. Rosko</i> , 7 th Dist. Mahoning, 146 Ohio App. 3d 698, 2001-Ohio-3508, 767 N.E.2d 1225 (2001)	10
<i>Griewahn v. United States Fidelity & Guar. Co.</i> , 7 th Dist. Mahoning 160 Ohio App. 3d 311, 2005-Ohio-1660, 827 N.E.2d 341, 347 (2005)	10
<i>IMG Worldwide, Inc. v. Westchester Fire Ins. Co.</i> , 945 F. Supp. 2d 873 (N.D. Ohio 2013).....	8, 16-17
<i>Kelley v. Midwestern Indem. Co.</i> , 1 st Dist. Hamilton 108 Ohio App. 3d 207, 670 N.E.2d 510 (1995)	11
<i>Koppers Co., Inc. v. Aetna Cas. & Sur. Co.</i> , 98 F.3d 1440 (3d Cir. 1996).....	8
<i>McNeeley v. Pacific Employers Ins. Co.</i> , 10 th Dist. Franklin 2003-Ohio-2951, 2003 WL 21321469 (June 10, 2003)	10
<i>MW Custom Papers LLC v. Allstate Ins. Co.</i> , 2012 WL 6565832 (Montgomery CP, Ohio Sept. 21, 2012)	1, 6, 8
<i>OneBeacon America Ins. Co. v. American Motorist Ins. Co.</i> , 679 F.3d 456 (6 th Cir. 2012)	8, 16
<i>Pennsylvania General Ins. Co. v. Park-Ohio Industries</i> , 126 Ohio St. 3d 98, 2010-Ohio-2745, 930 N.E.2d 800 (2010).....	13-16

State Farm Mut. Ins. Co. v. Mahin, 1st Dist. Hamilton, 92 Ohio App. 3d 291,
634 N.E.2d 1058 (1st Dist. 1993)..... 11

I. INTEREST OF AMICI CURIAE

OneBeacon America Insurance Company, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“OneBeacon/Chartis Insurers”) are Appellees in a pending Ohio appeal, *MW Custom Papers LLC v. Allstate Ins. Co., et al.*, 2nd Dist. Montgomery No. CA 25430. In that case, the OneBeacon/Chartis Insurers are high level excess insurers who were dismissed for lack of a justiciable controversy. See *MW Custom Papers LLC v. Allstate Ins. Co.*, Montgomery C.P., 2012 CV 03228, 2012 WL 6565832 (Sept. 21, 2012). The OneBeacon/Chartis Insurers established that their excess policies could not be triggered because a policyholder had allocated its asbestos liabilities through coverage-in-place settlements across primary and umbrella policies that were not exhausted and that still continued to pay ongoing claims. *Id.*

In *MW Custom*, the trial court properly held that a policyholder cannot allocate asbestos claims horizontally through settlements while simultaneously allocating unreimbursed amounts on those same claims into select years of vertical excess coverage. *Id.* Although Ohio law provides a policyholder the right to allocate “all sums” to any triggered policy, a policyholder who chooses to allocate across horizontal layers of primary coverage must exhaust the full limits of the coverage it selects as its “all sums” choice before moving to excess layers. *Id.* A policyholder may choose to allocate horizontally or vertically, but cannot be allowed to allocate the same claims both horizontally and vertically as long as the horizontal coverage is not exhausted. This is the same issue certified by this Court’s September 25, 2013 Entry. Thus, the OneBeacon/Chartis Insurers have a direct interest in the issue presented for review to the extent this Court creates precedent applicable to the *MW Custom* appeal.

II. SUMMARY OF ARGUMENT

The Court should answer this certified question in the negative. A policyholder who settles claims with primary carriers on a “pro rata” basis may not employ an “all sums” method to aggregate unreimbursed losses to excess insurers. Instead, a policyholder who chooses to allocate a loss horizontally across primary coverage by accepting payment through settlements must exhaust those policies that the policyholder has chosen to settle. The Court should adopt three points of law to answer this question: (1) a policyholder makes its “all sums” choice when it chooses to collect insurance proceeds through settlement; (2) a policyholder must adhere to its “all sums” choice by exhausting the policies it has chosen; and, (3) in order to preserve the two step allocation framework established by *Goodyear*¹ a policyholder must exhaust settled primary policies because excess carriers have no contribution rights against the settled coverage.

With regard to the first proposition, when a loss triggers multiple years of insurance coverage, *Goodyear* allows a policyholder to choose among the triggered carriers from whom it wishes to recover “all sums” for the loss. Once a policyholder collects insurance proceeds by entering settlements with primary insurers, however, this is the policyholder’s allocation choice.

With regard to the second proposition, a policyholder who chooses to allocate a loss across multiple primary policies must adhere to its allocation choice and collect “all sums” until the settled policies are exhausted. The policyholder cannot collect “some sums” from the primary carriers, but reach excess layers on an “all sums” basis for unreimbursed amounts. A policyholder cannot allocate part of a claim to part of a primary policy and then move to excess layers as long as the primary policies remain unexhausted. Instead, once a policyholder chooses to allocate a loss to a policy it must seek “all sums” available until the policy exhausts.

¹ *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (2002).

With regard to the third proposition, “all sums” allocation under *Goodyear* is a two step process which allows a policyholder to target a select insurer for “all sums” in the first instance, but then allows that targeted insurer to redistribute the loss through “pro rata” contribution from other insurers. This two step approach is fair to both sides because it allows a policyholder to determine how to allocate the loss and ensure recovery, but it also prevents any one insurer from paying more than its fair share the liability. Once a policyholder settles with primary insurers, however, that settlement destroys the targeted insurer’s contribution rights and eliminates *Goodyear’s* second step. This Court would remove the analytical foundation upon which it adopted “all sums” allocation if the Court allows a policyholder to collect “all sums” from excess carriers while simultaneously eliminating the “pro rata” right to redistribute the loss through contribution from settled primary carriers.

III. STATEMENT OF FACTS

The OneBeacon/Chartis Insurers adopt the Statement of the Case and Statement of Facts of Travelers Casualty and Surety Company and St. Paul Fire and Marine Insurance Company.

IV. ARGUMENT

A. A Policyholder Makes Its “All Sums” Choice When It Chooses To Collect Insurance Proceeds Through Settlement

When a loss triggers multiple years of insurance coverage, *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835 (2002) allows a policyholder to choose among the triggered carriers it wishes to recover “all sums” for the loss. Once a policyholder collects insurance proceeds by entering settlements with primary insurers, however, this is the policyholder’s allocation choice. The fact that a policyholder may choose to collect only “some sums” from selected primary carriers instead of “all sums” does not change the fact that the policyholder has chosen to allocate the loss to the settled policies.

1. “All sums” allocation under *Goodyear* allows a policyholder to choose among triggered policies

This Court has defined “all sums” allocation as a policyholder’s right “to seek full coverage for its claims from any single policy, up to that policy’s coverage limits, out of the group of policies that has been triggered.” *See Goodyear*, 95 Ohio St. 3d at 515, 2002-Ohio-2842 ¶6, 769 N.E.2d at 840. Under this approach, when a loss “triggers claims under multiple primary insurance policies, the insured is entitled to secure coverage from a single policy of its choice that covers ‘all sums’ incurred as damages ‘during the policy period,’ subject to that policy’s limit of coverage.” *Id.*, 95 Ohio St. 3d at 516, 769 N.E.2d 835, 840, 2002-Ohio-2842 ¶6 (2002). A policyholder is “permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim.” *See Goodyear*, 95 Ohio St. 3d at 517, 769 N.E.2d 841, 2002-Ohio-2745 ¶12. In the event that a selected policy “does not cover an entire claim,” then the policyholder “may pursue coverage under other primary or excess insurance policies.” *Id.*

2. When a policyholder chooses to collect insurance proceeds through settlement, the policyholder makes an “all sums” choice to allocate the loss to those settled policies

There is no question that a policyholder who collects insurance proceeds for a loss has made its “all sums” choice to allocate the loss to the policies it has selected. If a policyholder enters cost sharing settlement agreements which obligate primary insurers to pay “pro rata” portions of a loss, as in this case, it remains the policyholder’s choice to allocate the loss across those policies. See *MW Custom Papers, LLC v. Allstate Ins. Co.*, Montgomery C.P. 2012 CV 03228 at 1, 2012 WL 6565832 *1 (Sept. 21, 2012) (“MW Custom already has allocated its asbestos claims ‘horizontally’ and across all triggered underlying coverage by entering cost share agreements with the underlying carriers”); *GenCorp, Inc. v. AIU Ins. Co.*, 138 Fed. Appx. 732, 734 (6th Cir. 2005) (Ohio law) (“by settling with its primary and umbrella insurers, GenCorp has made the choice to allocate its liability as broadly as possible”). The fact that a policyholder may choose to collect only some portions of a loss from primary insurers does not change the fact that the policyholder has decided to allocate the loss to those policies by collecting insurance proceeds. Any choice to collect insurance is a choice to allocate a loss to that insurance.

B. A Policyholder Must Adhere To Its “All Sums” Choice By Exhausting The Policies It Has Chosen

The OneBeacon/Chartis Insurers simply ask this Court to adopt a rule that is consistent with existing Ohio law and which requires a policyholder to adhere to its allocation choice by exhausting the policies it selects. *Goodyear* itself states that a policyholder must collect “all sums” for an “entire claim” before moving to other insurance. Likewise, those Ohio cases construing *Goodyear* have required a policyholder to exhaust settled coverage before moving to excess layers. Finally, this rule is consistent with general principles applicable to excess insurance in Ohio, which require a policyholder to exhaust primary coverage before reaching

excess layers and which credit the limits of primary coverage if settled. With regard to the certified question, Ohio law does not allow a policyholder to aggregate unreimbursed losses to excess layers without exhausting settled primary coverage. When a policyholder chooses to allocate a loss by settlement with primary insurers, Ohio law requires the policyholder to exhaust the policies that the policyholder has selected to cover its claims.

1. Goodyear states that a policyholder must collect “all sums” for an “entire claim” before moving to other insurance

When this Court adopted “all sums” allocation in *Goodyear*, this Court was clear that a policyholder must exhaust “all sums” available from policies that the policyholder selects. Specifically, this Court held that a policyholder must seek payment for an “entire claim” from the insurer it selects before seeking payment from other insurers:

Goodyear should be permitted to choose, from the pool of triggered primary policies, a single primary policy against which it desires to make a claim. In the event that this policy does not cover Goodyear’s entire claim, then Goodyear may pursue coverage under other primary or excess insurance policies.

Id., 95 Ohio St. 3d at 517, 2002-Ohio-2842 ¶12, 769 N.E.2d at 841. *Goodyear* allows a policyholder the right to select “a single primary policy against which it desires to make a claim,” but the policyholder “may pursue coverage under other primary and excess policies” only “[i]n the event that this policy does not cover (the policyholder’s) entire claim.” *Id.* In the present context, settled policies remain available to cover an “entire claim” but the policyholder has chosen not to pursue full coverage. That was the policyholder’s choice.

With regard to excess coverage, *Goodyear* also was clear that excess coverage cannot be determined until the policyholder selects primary coverage and then exhausts those policies:

At this juncture, we are unable to determine which policy Goodyear will invoke, and thus we are also unable to determine whether the primary policy limits will be exhausted. Since Goodyear may find it necessary to seek excess coverage, we

find the lower court erred in granting directed verdicts in favor of the excess insurers.

Id., 95 Ohio St. 3d at 517, 2002-Ohio-2842 ¶12, 769 N.E.2d at 842. In *Goodyear*, the policyholder had not made its allocation choice, but in the present case the policyholder has chosen to allocate across multiple primary policies. Consistent with *Goodyear*, the present case requires the Court to “determine whether the primary policy limits will be exhausted.” *Id.* Since there is no dispute that the policyholder in this case has allocated its claims to primary policies that are not exhausted, there is no dispute that the policyholder may not aggregate unreimbursed losses arising from those claims into excess layers.

2. Those Ohio cases construing *Goodyear* have required a policyholder to exhaust settled primary coverage before moving to excess layers

There have been five post-*Goodyear* cases by state and federal courts applying Ohio law which have required a policyholder to exhaust primary coverage that was settled horizontally before seeking to recover from excess insurers:

MW Custom Papers, LLC v. Allstate Ins. Co., 2012 WL 6565832 *1 (Montgomery CP, Ohio Sept. 21, 2012) (dismissing excess insurers for lack of justiciability where policyholder “has allocated its asbestos claims ‘horizontally’ and across all triggered underlying coverage by entering cost share agreements with underlying carriers”);

GenCorp, Inc. v. AIU Ins. Co., 138 Fed.Appx. 732, 734 (6th Cir. 2005) (“GenCorp had made the choice to allocate its liability as broadly as possible, which meant that it had to demonstrate that its liabilities would exceed cumulative limits of all the primary and umbrella policies before it could trigger the excess policies”);

OneBeacon America Ins. Co. v. American Motorist Ins. Co., 679 F.3d 456, 463 (6th Cir. 2012) (“Normally, as in *Koppers*,² the reviewing court may reduce the amount of the underlying verdict to reflect settlement credits”);

IMG Worldwide, Inc. v. Westchester Fire Ins. Co., 945 F. Supp. 2d 873, 889 (N.D. Ohio 2013) (“[T]he insured may not shift the risk of settling for a reduced

² *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440 (3d Cir. 1996) (Pa. law). We note that the *OneBeacon* court did not apply a settlement credit because a separate state court already found that there was not a mutuality of claims for contribution because the settling insurer settled different environmental sites. *Id.*, 679 F.3d at 463.

amount with the primary carrier to the excess carrier. It was IMG who accepted the risk of obtaining a reduced recovery for defense costs from Great Divide through settlement, rather than choosing to go to trial to obtain the full amount of defense costs”) (internal citation omitted);

Bondex Int'l v. Hartford Acc. and Indem. Co., 2007 WL 405938 *4 (N.D. Ohio Feb. 1, 2007) (refusing contribution against settled insurer and noting that if limits remain under primary coverage “then the plaintiffs would have settled their claims against Cardinal/Colony for far less than they were worth and would accordingly bear that risk and could conceivably owe defendants for the amounts they paid, that Cardinal/Colony should have paid, but which the plaintiffs negotiated away”).

Each of these cases allows the policyholder to exercise complete control over its allocation choice and settle with whomever it pleases, but each also requires the policyholder to adhere to that choice and exhaust the coverage it chooses. *Goodyear* provides the right to collect “all sums” but if the policyholder chooses only to collect “some sums” from some insurers, the policyholder made that allocation choice and cannot seek unreimbursed amounts from excess layers on an “all sums” basis. As long as primary policies are not exhausted, a policyholder cannot move to excess layers.

The OneBeacon/Chartis Insurers note that several of the policyholder parties in this case suggest that *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200, 2008 WL 2581579 (June 30, 2008) allows a policyholder to proceed to excess layers without crediting settled coverage. *Goodrich* is distinguished from the present case in two ways. First, *Goodrich* required the policyholder to exhaust vertical primary coverage and provided excess insurers a full credit for the value of policies that sat directly below. *Id.*, 2008-Ohio-3200 ¶40, 2008 WL 2581579 *8 (providing \$20 million credit for primary coverage). Second, there was no horizontal credit for other settled coverage because the policyholder settled underlying environmental sites that were different than the single site at issue in that case. *Id.*, 2008-Ohio-3200 ¶42, 2008 WL 2581579 *8 (“the insurers paid for a release from liability to

Goodrich for a much wider array of claims than simply EDC groundwater remediation at Calvert City”). In contrast, in the present case, the policyholder seeks to allocate unreimbursed amounts from the same settled underlying claims to excess layers and which continue to be paid in part at primary layers. There is a complete mutuality of claims involved, unlike the environmental sites at issue in *Goodrich*.

3. Ohio law generally requires a policyholder to exhaust primary coverage before reaching excess layers and credits the limits of primary coverage if settled

By requiring a policyholder to exhaust settled primary coverage before seeking excess coverage, this Court will remain consistent with basic Ohio law which requires a policyholder to exhaust primary coverage before seeking excess insurance. *See Griewahn v. United States Fidelity & Guar. Co.*, 7th Dist. Mahoning 160 Ohio App. 3d 311, 2005-Ohio-1660 ¶44, 827 N.E.2d 341, 347, (2005) (“excess coverage generally is not triggered until underlying primary limits are exhausted by way of judgments or settlements”); *Grange Mut. Cas. Co. v. Rosko*, 7th Dist. Mahoning 146 Ohio App. 3d 698, 710, 2001-Ohio-3508 ¶51, 767 N.E.2d 1225, 1235 (2001) (“An excess insurer is not generally liable for any part of the loss or damage which is covered by other insurance”); *McNeeley v. Pacific Employers Ins. Co.*, 10th Dist. Franklin 2003-Ohio-2951 ¶28; 2003 WL 21321469 *5 (June 10, 2003) (“excess liability insurance policies serve to augment primary liability coverage by providing excess coverage when primary coverage limits are exhausted”).³

This rule also is consistent with basic Ohio law which allows an excess insurer to receive a credit for the limits of primary coverage if the policyholder settles that coverage. *See Fulmer*

³ This rule is consistent with the premiums paid for excess coverage, which reflect lower cost based upon the fact that primary insurance carries the primary risk. *See Griewahn*, 2005-Ohio-1660 ¶44, 827 N.E.2d at 347 (“Excess insurance is priced on the assumption that primary coverage exists”).

v. Insura Prop. & Cas. Co., 94 Ohio St. 3d 85, 95, 2002-Ohio-64, 760 N.E.2d 392, 401 (2002) (permitting policyholder to exhaust primary underinsured motorist coverage with settlement, but providing excess carrier “credit for the full amount of the tortfeasor’s available policy limit”); *Kelley v. Midwestern Indem. Co.*, 1st Dist. Hamilton 108 Ohio App. 3d 207, 670 N.E.2d 510 (1995) (reversing when excess carrier did not receive a credit for the difference between primary limits and the attachment point of excess coverage); *State Farm Mut. Ins. Co. v. Mahin*, 1st Dist. Hamilton 92 Ohio App. 3d 291, 296, 634 N.E.2d 1058, 1061 (1993) (“State Farm is to be credited with the \$50,000 not exhausted by any injured party from the total available payment from the tortfeasor’s liability coverage”).

These cases uniformly hold that a policyholder cannot trigger excess coverage without exhausting primary coverage. In the context of this case, a policyholder who allocates its losses across multiple primary years of coverage must exhaust those policies before reaching excess layers. A policyholder cannot obtain partial payment and then proceed to excess layers for unreimbursed amounts. The policyholder must exhaust the coverage it selects to allocate a loss.

C. To Preserve The Two Step Allocation Framework Established In *Goodyear*, A Policyholder Must Exhaust Settled Primary Policies Because Excess Insurers Have No Contribution Rights Against Settled Coverage

As a final matter, the Court cannot allow a policyholder to aggregate unreimbursed amounts left over after primary settlements into excess layers without undermining the basic two step framework by which this Court adopted “all sums” allocation. *Goodyear* reconciled competing “all sums” and “pro rata” approaches by allowing both approaches to co-exist in a two step recovery process. In the first step, a policyholder may select a single insurer to pay “all sums” arising from a loss that triggers multiple years of coverage. In the second step, the targeted insurer may effect a “pro rata” redistribution of the loss through contribution actions

against the other triggered insurers. This two step approach is fair to both sides because it allows a policyholder to determine how to allocate the loss and ensure recovery, but it also prevents any one insurer from paying more than its fair share the liability. Once a policyholder settles with primary insurers, however, that settlement destroys the targeted insurer's contribution rights and eliminates *Goodyear's* second step. This Court would remove the analytical foundation upon which it adopted "all sums" allocation if the Court allows a policyholder to collect "all sums" from excess carriers while simultaneously eliminating any "pro rata" right to redistribute the loss through contribution from settled primary carriers.

1. "All sums" allocation depends upon a targeted insurer's right to obtain "pro rata" allocation from other insurers through contribution

A policyholder's ability to recover "all sums" from a single insurer depends upon the targeted insurer's subsequent ability to effect a "pro rata" redistribution through contribution against other insurers. In this instance, *Goodyear* considered contract language stating that the policies cover "all sums," but the policies also apply only to damage "which occurs during the policy period." *Id.*, 95 Ohio St. 3d at 515, 769 N.E.2d at 840, 2002-Ohio-2842 ¶7. The *Goodyear* insurers argued that the phrase "during the policy period" rendered them liable only for the pro rata portion of damage that their policy periods bore to the entire time span of the loss. *Id.*, 95 Ohio St. 3d at 515, 769 N.E.2d at 840, 2002-Ohio-2842 ¶6. This Court rejected that type of "pro rata" allocation as applied to the policyholder's recovery, but reconciled the "all sums" and "during the policy period" terms by allowing "pro rata" allocation in a second round of contribution actions between insurers.

a. Goodyear creates a two step process in which a policyholder recovers “all sums” but the targeted insurer redistributes the loss through “pro rata” contribution

Goodyear creates a two step process whereby a policyholder is allowed to recover “all sums” from a single insurer in the first instance and then a targeted insurer may redistribute the “all sums” loss through “pro rata” contribution from other insurers. As noted by *Goodyear*, this two step process provides the policyholder with “complete security” in the first instance, and “[t]his approach promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties when possible.” *Id.*, 95 Ohio St. 3d at 516, 769 N.E.2d at 841, 2002-Ohio-2842 ¶11. The policyholder is paid through an “all sums” allocation and the insurers still receive a “pro rata” redistribution through contribution from each other. These two steps are interdependent.

b. Park-Ohio clarifies that pro rata contribution among insurers is critical to all sums allocation by a policyholder

Eight years after *Goodyear*, this Court clarified that the legal foundation supporting “all sums” allocation by a policyholder is the ability of the targeted insurer to seek “pro rata” contribution from the other triggered insurers. *See Pennsylvania General Ins. Co. v. Park-Ohio Industries*, 126 Ohio St. 3d 98, 930 N.E.2d 800, 2010-Ohio-2745 (2010). In *Park-Ohio*, a targeted insurer paid asbestos losses and brought contribution claims against other insurers. *Id.*, 126 Ohio St. 3d at 100, 930 N.E.2d at 804, 2010-Ohio-2745 ¶¶5-7. The non-targeted insurers claimed that contribution did not lie because the policyholder had provided late notice to them, which meant that they were not jointly liable for the losses because they had a coverage defense. *Id.*, 126 Ohio St. 3d at 105, 930 N.E.2d at 807-08, 2010-Ohio-2745 ¶21.

This Court held that the targeted insurer's equitable right to "pro rata" contribution, as the critical foundation for *Goodyear* "all sums" allocation, should not be affected by a policyholder's contractual failure to provide timely notice to non-targeted insurers, specifically holding:

It would be inequitable to hold that Park-Ohio's failure to abide by the notice provisions in the Nationwide and Continental policies eliminates Penn General's right to contribution, given the equitable nature of the all-sums approach to allocation and the fact that Penn General followed the procedure established in *Goodyear* during the litigation.

Id., 126 Ohio St. 3d at 104, 930 N.E.2d at 807, 2010-Ohio-2745 ¶18. This Court was not required to determine whether a policyholder loses its ability to seek "all sums" allocation if the policyholder destroys a targeted insurer's "pro rata" contribution rights, however, because the Court found that the nontargeted insurers did not have a late notice defense and remained subject to contribution. *Id.*, 126 Ohio St. 3d at 105, 930 N.E.2d at 808, 2010-Ohio-2745 ¶23 (we do not address the issue of what consequences might result if a nontargeted insurer is prejudiced by an insured's failure to notify").

In *Park-Ohio*, this Court was clear that "[w]hile *Goodyear* allows the insured to choose a targeted insurer from which it may recover a full amount of indemnification, this does not mean that the insured may engage in tactics to delay or obstruct the targeted insurer in the process of obtaining contribution from nontargeted insurers." *Id.*, 126 Ohio St. 3d at 104, 930 N.E.2d at 807, 2010-Ohio-2745 ¶19. In the context of the present case, that issue is ripe for decision because a policyholder's settlement destroys a targeted insurer's contribution rights against settled insurers. Unlike the late notice in *Park-Ohio*, settlement prejudices a targeted insurer's ability to effect pro rata contribution by eliminating that contribution right. As set forth in Section IV.C.3 at p. 17 below, this Court should adopt the well-reasoned opinions of those federal courts which have construed Ohio law on this issue and hold that the policyholder bears

the burden that it has not collected in full when the policyholder destroys an insurer's right of contribution by settling insured claims.

2. A policyholder destroys the ability of a targeted insurer to obtain contribution by settling with other insurers

Contribution among insurers arises when one insurer pays more than its share of a common liability. When a policyholder settles with one insurer, however, that settlement extinguishes any further obligation by the settled insurer to cover the loss. After settlement, there is no further common liability for the same loss. As a result, after settlement, there is no ability to pursue contribution against the settled party. Thus, when a policyholder settles with one insurer, that policyholder destroys the ability of the non-settling insurer to seek contribution from the settled insurer.

a. Contribution is an equitable right to recover by a party who has paid more than its share of a common liability

When two insurers issue separate policies to the same policyholder, the insurers have contractual privity with the policyholder, but do not have contractual privity with each other because neither insurer is a party to the other's contract. Thus, contribution between insurers who cover the same loss under separate contracts is a right that arises in equity. *See Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Ins. Co.*, 147 Ohio St. 79, 88, 67 N.E.2d 906, 911 (1946) (noting that contribution between insurers "rests upon principles of equity and natural justice"); *Pennsylvania General Ins. Co. v. Park-Ohio Industries*, 126 Ohio St. 3d 98, 104, 930 N.E.2d 800, 807, 2010-Ohio-2745 ¶18 (2010) (noting the lack of privity and discussing the equities of contribution in the all sums context).

b. Settlement precludes further contribution rights

Since contribution is an equitable right that depends upon a common obligation to insure the same loss, once an insurer settles with the policyholder, that common obligation no longer exists. Although no Ohio state court appears to have considered the issue, the federal courts applying Ohio law uniformly hold that a policyholder's settlement with an insurer precludes any further right of contribution against that insurer. See *OneBeacon America Ins. Co. v. American Motorist Ins. Co.*, 679 F.3d 456 (6th Cir. 2012) (“[W]e agree that settlement can exhaust a settling insurer’s policy, and that such exhaustion precludes a non-settling insurer from seeking equitable contribution from the settling insurers”); *IMG Worldwide, Inc. v. Westchester Fire Ins. Co.*, 945 F. Supp. 2d 873, 889 (N.D. Ohio 2013) (“IMG has destroyed Westchester’s ability to seek reimbursement or contribution from Great Divide”); *Bondex Int’l, Inc. v. Hartford Acc. and Indemn. Co.*, 2007 WL 405938 *5 (N.D. Ohio Feb. 1, 2007) (“The court finds that there is no reason to create an exception for equitable contribution to a policy that bars contribution actions, not because of their character, but because of their effect on the finality of settlement”); *GenCorp, Inc. v. AIU Ins. Co.*, 297 F. Supp. 2d 995, 1007 (N.D. Ohio 2003) (“The settlements extinguished all claims related to the issues in dispute in GenCorp I against the primary insurers. The excess insurers, therefore, cannot seek contribution from GenCorp’s primary insurers because those insurers have no remaining liability to GenCorp.”).

The rationale supporting these federal decisions denying contribution is that equity favors settlement over serial litigation. Allowing a non-settling excess carrier to assert claims against a settled primary carrier would drastically discourage settlement. As the Sixth Circuit succinctly held in *OneBeacon*, “A decision allowing OneBeacon to pursue equitable contribution from AMICO would not only fail to encourage settlements, it would actively discourage such

settlements. An insurer would have no incentive to settle with a policyholder if it knew that it would be liable to another insurer down the road.” *Id.*, 679 F.3d at 463.

3. A policyholder cannot recover “all sums” when the policyholder destroys a targeted insurer’s contribution rights

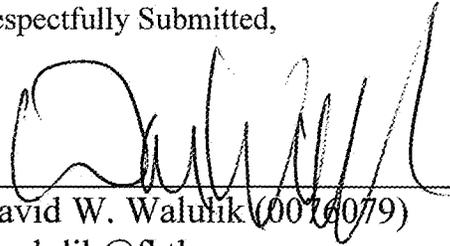
The OneBeacon/Chartis Insurers ask this Court to preserve the two step *Goodyear/Park-Ohio* framework by adopting a rule that preserves both the policyholder’s “all sums” right to select among triggered insurance policies and a targeted insurer’s “pro rata” right of contribution. Two federal courts have construed Ohio law to hold that a policyholder who destroys an excess insurer’s right to obtain contribution from a primary insurer by settlement may not allocate unreimbursed losses to excess layers that should have been paid at the primary level. *See IMG Worldwide, Inc. v. Westchester Fire Ins. Co.*, 945 F. Supp. 2d 873, 889 (N.D. Ohio 2013) (“It was IMG who accepted the risk of obtaining a reduced recovery for defense costs from Great Divide through settlement”); *GenCorp, Inc. v. AIU Ins. Co.*, 297 F. Supp. 2d 995, 1007-08 (N.D. Ohio 2003) *aff’d* 138 Fed. Appx. 732 (6th Cir. 2005) (requiring policyholder to exhaust settled primary coverage after destroying contribution rights). In each of these cases, the policyholder is required to exhaust the limits of primary coverage before seeking excess insurance and cannot aggregate unreimbursed amounts left over from settlement to excess layers.

This Court likewise should require a policyholder to exhaust settled primary coverage before moving to excess layers. In the event that the policyholder does not choose to seek a full recovery from the settled coverage, it remains the policyholder who makes that choice. Any settlement destroys the contribution rights that underlie the rationale of *Goodyear*. In order to protect the two step framework established by *Goodyear*, a policyholder cannot proceed to excess layers until the limits of primary coverage are exhausted, regardless of whether a policyholder has settled for less than those amounts.

V. CONCLUSION

For the foregoing reasons, the OneBeacon/Chartis Insurers ask this Court to answer the certified question in the negative. A policyholder who has allocated a loss across multiple primary policies through settlements may not employ “all sums” allocation to aggregate unreimbursed amounts and reach excess layers of coverage. This Court adopted “all sums” allocation upon the foundation that a targeted insurer may redistribute a loss by asserting “pro rata” contribution against other triggered insurers. When a policyholder settles, it destroys that right of contribution against the settled insurers. The solution is to preserve the two step procedure outlined in *Goodyear/Park-Ohio* to require a policyholder to exhaust any policies it has settled before seeking excess coverage.

Respectfully Submitted,



David W. Walulik (0076079)

dwalulik@fbtlaw.com

FROST BROWN TODD LLC

3300 Great American Tower

301 East Fourth Street

Cincinnati, OH 45202-4182

Telephone: (513) 651-6800

Facsimile: (513) 651-6981

Counsel for Appellee Amici Curi:

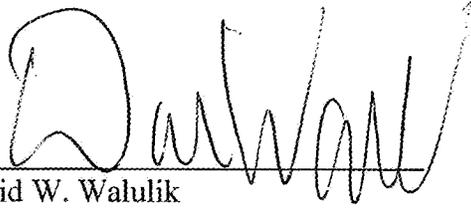
OneBeacon America Ins. Co., Granite State Ins. Co., Lexington Ins. Co., and National Union Fire Ins. Co. of Pittsburgh, PA

Dated: January 15, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Brief of Amici Curiae OneBeacon America Insurance Company, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA was served via United States First Class Mail on this January 15, 2014 upon the following counsel of record:

Service List Attached Hereto



David W. Walulik

SERVICE LIST

Amy Bach
Executive Director
United Policyholders
381 Bush St., 8th Fl.
San Francisco, CA 94104

William G. Passannante
(*pro hac vice* – PHV – 4141-2013)
Anderson Kill PC
1251 Avenue of the Americas
New York, NY 10020

Jodi Spencer Johnson
Thacker Martinsek LPA
2330 One Cleveland Center
1375 East 9th Street
Cleveland, OH 44114

Attorneys for Amicus Curiae, United Policyholders

Alexander B. Simkin
Mary Beth Forhsaw
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017

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

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

Paul A. Rose
Clair E. Dickinson
Brouse McDowell
388 S. Main Street, Suite 500
Akron, OH 44311

Anna P. Engh
William P. Skinner
Elliott Schulder
Timothy D. Greszler
Covington & Burling
1201 Pennsylvania Ave., NW
Washington, DC 20004

Yvette McGee Brown
Chad A. Readler
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215

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

Attorneys for Plaintiff-Petitioner The Lincoln Electric Company

Robert Lee Kinder, Jr.
John E. Heintz
Dickstein Shapiro LLP
1825 Eye St., NW
Washington, DC 2006

Attorneys for Amici Curiae The National Electric Manufacturers Association and Dana Companies, LLC

Caroline L. Marks
Brouse McDowell
600 Superior Avenue East, Suite 1600
Cleveland, OH 44114

*Attorneys for 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; Pilkington
North America, Inc.; Polyone Corporation;
RPM International, Inc. The Sherwin-
Williams Company and Waste Management,
Inc.*