

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.)	

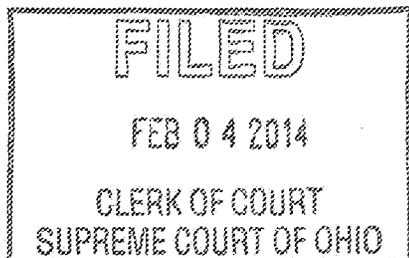
REPLY BRIEF OF AMICI CURIAE, THE OHIO MANUFACTURERS' ASSOCIATION; THE OHIO CHEMISTRY TECHNOLOGY COUNCIL; BRIDGESTONE AMERICAS TIRE OPERATIONS LLC; CHIQUITA BRANDS INTERNATIONAL, INC.; CLIFFS NATURAL RESOURCES INC.; DIEBOLD, INCORPORATED; DUKE ENERGY OHIO, INC.; EATON CORPORATION; FOREST CITY ENTERPRISES 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. INTRODUCTION

Notably, the Insurer Amici¹ do not directly challenge the four cornerstones of Ohio insurance coverage law addressed in the Brief of Amici Curiae, The Ohio Manufacturers' Association, et al. (the "OMA Amici") in Support of Plaintiff-Petitioner the Lincoln Electric Company ("Lincoln Electric") (the "OMA Br.," pp. 5-20).² The Insurer Amici do not dispute:

The First Cornerstone: Ohio follows 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.

The Second Cornerstone: Ohio has adopted "all sums" allocation, under which the policyholder is allowed to select from among triggered policies to receive payment on a claim.

The Third Cornerstone: If the full amount of an underlying policy is not available to pay a claim for any reason, such as settlement by, or insolvency of, the underlying insurer, the attachment point of the overlying policy is preserved, and the overlying policy is not required to "drop down" to pay claims below the bargained-for level; an overlying insurer, however, is responsible to pay a claim to the extent it reaches the attachment point of the overlying policy and penetrates into its coverage.

The Fourth Cornerstone: If an insurer is selected by the policyholder and pays a claim on an "all sums" basis, that insurer may have certain equitable rights of contribution against other triggered insurers.

¹ The Insurer Amici have filed three briefs: one by the Complex Insurance Claims Litigation Association ("CICLA"), the American Insurance Association ("AIA"), and the Property Casualty Insurers Association of America ("PCI") (collectively, the "CICLA Amici") (the "CICLA Br."); another by the Ohio Insurance Institute ("OII") (the "OII Br."); and another by OneBeacon America Insurance Company, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA (collectively, the "OneBeacon Amici") (the "OneBeacon Br.").

² Because Respondents Travelers Casualty and Surety Company ("Travelers") and St. Paul Fire and Marine Insurance Company ("St. Paul") have filed their merit brief under seal, rendering it unavailable to the OMA Amici, this brief focuses on the arguments made by the Insurer Amici.

While the Insurer Amici do not directly challenge these foundations of Ohio law, they nonetheless ask this Court to adopt, under the guise of equity, a rule that disregards the express terms of the subject insurance policies and defies these legal principles. Specifically, they assert, notwithstanding that the excess insurers promised to pay “all sums” the insured becomes legally obligated to pay as damages, and notwithstanding that this Court has repeatedly held as a matter of law that such language permits the policyholder to collect in full from any triggered policy up to that policy’s limits,³ that this Court should fashion a rule to effectively impose the rejected “pro rata” allocation scheme on a policyholder who *settles* with a primary insurer a claim that triggers multiple primary policies.

In the Insurer Amici’s view, excess insurers should be able to obtain unintended, windfall benefits from a settlement agreement to which they are not parties—an agreement which is a distinct contract entered into between different parties, at a different time, for a different purpose—and thereby avoid their obligations under policies they sold and for which they collected premiums. This offends contract law in general and insurance coverage law in particular. To assert this position, the Insurer Amici attempt to sidestep the analysis mandated by the certified question. Indeed, two of the Insurer Amici (the CICLA Amici and OII) do not even cite, much less discuss, *Goodrich Corp. v. Commercial Union Ins. Co.*, 9th Dist. Summit Nos. 23585, 23586, 2008-Ohio-3200 (“*Goodrich*”), which, according to the certifying court, “is directly on point” and represents one of the two conflicting lines of cases addressing the certified question. (Certification Order, p. 7). The other Insurer Amici (the OneBeacon Amici) do not

³ See *Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 271 N.E.2d 924 (1971); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 9 (“*Goodyear*”); *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, ¶ 1 (“*Park-Ohio*”).

challenge *Goodrich* as a correct statement of Ohio law, but, rather, they try to distinguish it on two inaccurate bases.

As discussed below, the Insurer Amici rely upon many false premises, inaccurate and incomplete analyses of the law, and significantly flawed public policy assumptions. In short, they fail to provide this Court with justification for crafting a principle of Ohio law that would undermine many decades of Ohio jurisprudence.

II. LAW AND ARGUMENT

A. THE ARGUMENTS OF THE INSURER AMICI PROCEED FROM FALSE PREMISES.

An analysis that proceeds from a false premise is likely to lead to an erroneous conclusion. An analysis that proceeds from multiple false premises is certain to. The briefs of the Insurer Amici all suffer from this defect. The most significant of these false premises are addressed below.

1. False Premise regarding Purported Selection of an Allocation Method by Policyholder

The most pervasive false premise in the briefs of the Insurer Amici, and the one that is most central to their argument, is that Lincoln Electric has selected a “pro rata” allocation approach, rather than an “all sums” allocation approach. This false premise is expressed in various ways, such as the contention of the OneBeacon Amici that this case involves a “policyholder who settles with primary carriers on a ‘pro rata’ basis” (OneBeacon Br., p. 2), the contention of the CICLA Amici that this case “involves a decision by the policyholder regarding allocation” (CICLA Br., p. 9), and the contention by OII that “Lincoln Electric selected an allocation method” (OII Br., pp. 4-5).

These are alternative expressions of the same premise, namely that Lincoln Electric has selected an allocation method applicable to its excess insurance claims. That premise is false. Most fundamentally, it is factually inaccurate, as was made clear by the district court in its certification order. That order discussed Lincoln Electric’s settlement agreement with its primary insurer, which is the very agreement upon which the Insurer Amici base their assertion. As the district court stated, “The Primary Policy Agreement *does not specify any method for allocating* Lincoln Electric’s unreimbursed indemnity payments.” (Emphasis added.) (Certification Order, p. 4). Similarly, the district court noted that under the agreement, “Lincoln Electric purports to reserve its rights under the other umbrella policies.” (*Id.*, p. 3, fn. 1).

The lack of choice by Lincoln Electric of an allocation doctrine, which was specifically recognized by the district court, could not have been otherwise. As this Court has made clear, there are two generally recognized allocation doctrines, “pro rata” and “all sums,” and the governing doctrine in a particular jurisdiction is a question of law. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835. This Court has adopted the majority rule “all sums” approach and rejected the minority rule “pro rata” approach. *Id.* at ¶ 6, ¶ 10. Private parties have no ability to change the law of Ohio, and the parties before this Court could not have done so.

Rather, Lincoln Electric has settled with its primary insurer, St. Paul, which also happens to be one of the excess insurer respondents in this case,⁴ and it did so in an agreement that, as the

⁴ Given that the district court makes no reference to St. Paul asserting that it obtained a release of its excess policy obligations under this primary policy settlement agreement, it appears that St. Paul is attempting to accomplish here something that it failed to bargain for in that settlement agreement—release of its liabilities under its excess policies. St. Paul should not be permitted to accomplish through clever efforts in the federal district court and in this Court the release of excess liability obligations that it failed to bargain for in the very settlement agreement upon which it bases its arguments.

district court took care to note, “does not specify any method for allocating Lincoln Electric’s unreimbursed indemnity payments.” (Certification Order, p. 4). A settlement is just that—a settlement. It is not and cannot be an instrument that transforms the law of a jurisdiction. Nor can a contract, such as a settlement agreement, serve to transform the provisions of *other contracts*, such as the “all sums” excess policies at issue here. (See OMA Br., pp. 10-13). As the OneBeacon Amici have acknowledged, “[N]either insurer is a party to the other’s contract.” (OneBeacon Br., p. 15). Further, as the CICLA Amici have acknowledged, in regard to the primary policy settlement agreement, the excess insurers were “strangers to the bargain,” although they nonetheless attempt to take advantage of it. (CICLA Br., p. 4).

2. False Premise regarding Purported Exhaustion

The Insurer Amici also make an “exhaustion” argument, which they express in various ways, such as the contention of the OneBeacon Amici that the policyholder cannot recover from its excess insurers because “primary policies remain unexhausted” (OneBeacon Br., p. 2) and the contention of OII that “Lincoln Electric asks to have the underlying limit mythically declared ‘exhausted’....” (OII Br., p. 6). The Insurer Amici base these contentions on the false premise that each subject excess policy contains an “exhaustion clause” that will bar excess coverage unless and until Lincoln Electric receives full payment from the primary policy underlying the subject excess policy.⁵

The defects in this premise are numerous, and they are revealed most clearly in OII’s extensive discussion of the subject. First, OII suggests that Lincoln Electric has language in its excess policies that mirrors the language construed by this Court in *Fulmer v. Insura Property &*

⁵ It bears noting that these arguments might warrant consideration, depending upon the facts, in a “pro rata” jurisdiction. As this Court repeatedly has emphasized, however, Ohio is an “all sums” jurisdiction, making these arguments immaterial to the outcome here.

Cas. Co., 94 Ohio St.3d 85, 760 N.E.2d 392 (2002), which read, “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” *Id.* at 87, fn. 1 (quoted at OII Br., pp. 2-3). The certification order does not quote the corresponding language that appears in the various Lincoln Electric excess policies, but many policy forms provide even more clearly than the *Fulmer* case policy language that an excess insurer is obligated to pay once a claim reaches the attachment point of the excess policy, *regardless* of whether the primary insurer has paid 100% of the limits of the underlying policy. The subject insurance policies, in short, may contain common variants of this language that even more strongly favor Lincoln Electric’s position than did the language construed in *Fulmer*.

Further, even in *Fulmer*, the case upon which the OII principally relies, this Court held that the insurer was liable for the amount of a claim that reached the effective attachment point of its policy and penetrated into its coverage, even when the effective underlying insurer, as a result of a settlement, did not pay its full limits. (*See* OMA Br., pp. 18-19 (discussing *Fulmer*)). Hence, even if the Lincoln Electric excess policies contain the language OII assumes, Lincoln Electric would nonetheless be entitled to the coverage it purchased, and its settlement with an underlying insurer would not deprive it of that coverage. Under this long-standing law of Ohio, Lincoln Electric would simply be self-insured for any gap between the attachment point of a chosen excess policy and the settlement amount received from the policy that underlies it.

3. False Premise regarding Purported “Shifting,” “Passing,” or “Re-allocating” of Liabilities

The Insurer Amici also argue that Lincoln Electric is attempting to “shift,” “pass,” or “reallocate” costs to the excess insurers, and in so doing somehow “trigger excess coverage artificially.” (*See, e.g.*, CICLA Br., pp. 3, 4, 7, 12, 14; OII Br., pp. 4, 7, 8). As made clear by the

district court, however, Lincoln Electric seeks to recover from these excess insurers only “unreimbursed” costs. (Certification Order, pp. 2, 4). Lincoln Electric, in fact, has obtained only a partial recovery from its primary insurer, and it seeks to recover only a portion of its *unreimbursed* costs from its excess insurers. Accordingly, Lincoln Electric is not “shifting,” “passing,” or “re-allocating” costs to these excess insurers; rather, it merely is asking them to pay what they contracted to pay, in precisely the manner Ohio law and their contracts require. As OII has acknowledged, “[U]nambiguous policy terms must be enforced as written....” (OII Br., p. 7). Here, the attachment point of each excess policy is unambiguous: “Each of these umbrella policies has a \$2 million attachment point and is required to respond when Lincoln Electric’s losses exceed \$2 million.” (Certification Order, p. 3). There is nothing “artificial” about holding an insurer to the provisions of the very policy it wrote.

4. False Premise regarding the Purported Two-Step Process

This Court in *Goodyear* recognized that an insurer chosen to pay a claim under Ohio’s “all sums” law can have rights of contribution against other insurers. *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 11. The Insurer Amici invert and distort this Court’s recognition of equitable contribution rights into an argument that “all sums,” in effect, ceases to be the law of Ohio when a chosen insurer lacks contribution rights.⁶ (*See, e.g.*, CICLA Br., pp. 14-15; OneBeacon Br., pp. 11-12, 16-17; OII Br., pp. 9-10). In reality, however, this Court

⁶ The Insurer Amici cite federal cases that do not support their argument that “all sums,” in effect, ceases to be the law of Ohio when a chosen insurer lacks contribution rights. Instead, those cases recognize the importance of promoting the finality of settlements and hold 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.” *OneBeacon Am. Ins. Co. v. Am. Motorists Ins. Co.*, 679 F.3d 456, 463 (6th Cir.2012); *see also IMG Worldwide, Inc. v. Westchester Fire Ins. Co.*, 945 F.Supp.2d 873, 889 (N.D. Ohio 2013); *Bondex Int’l, Inc. v. Hartford Acc. & Indemn. Co.*, N.D. Ohio No. 1:03-CV-01322, 2007 WL 405938 (Feb. 1, 2007); *GenCorp Inc. v. AIU Ins. Co.*, 297 F.Supp.2d 995, 1007 (N.D. Ohio 2003), *aff’d*, 138 Fed. Appx. 732 (6th Cir.2005) (unpublished).

acknowledged in *Goodyear* that selected insurers could assert equitable contribution claims against other insurers only “when possible,” necessarily recognizing that at times contribution actions would not be possible. *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 11. This Court further acknowledged in *Goodyear* that contribution rights could exist only against other “applicable” insurance, necessarily recognizing that at times no other insurance might be applicable. *Id.*

Notwithstanding the potential unavailability of equitable contribution to a selected insurer under certain circumstances,⁷ this Court nonetheless adopted “all sums” allocation as the law of Ohio without exception. Moreover, in *Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 1, this Court reaffirmed “all sums” as the law of Ohio, even as it recognized that there could be circumstances when a chosen insurer would have no contribution rights against other insurers.⁸ This Court’s decision in this regard makes sense because insurance policies are contracts that establish legal rights. Equitable rights against third parties, such as the targeted insurer’s potential right to equitable contribution against non-targeted insurers, cannot affect the

⁷ To shield a settling insurer from a contribution action, it is likely that Ohio law would require the settlement to be reasonable and made in good faith; not every settlement would provide such a shield. *See Krischbaum v. Dillon*, 58 Ohio St.3d 58, 69-70, 567 N.E.2d 1291 (1991); *see also Foremost Ins. Co. v. Motorists Mut. Ins. Co.*, 167 Ohio App.3d 198, 2006-Ohio-3022, 854 N.E.2d 552, ¶ 23 (8th Dist.) (permitting a contribution action against a settled insurer); *Rumpke Sanitary Landfill, Inc. v. Motorists Mut. Ins. Co.*, Hamilton C.P. No. A9101617, slip op. at 1-2 (Jan. 2, 1993) (recognizing that a good faith settlement would insulate a settling insurer from contribution actions). Shielding an insurer that settles reasonably promotes good faith settlements, accomplishing contractually, efficiently, and without court intervention the contribution outcome authorized by this Court in *Goodyear* and *Park-Ohio*.

⁸ Although not material to the outcome here, it is unclear from the publicly available record that an excess insurer chosen by Lincoln Electric would have no contribution rights against other insurers. As noted in the OMA Amici’s initial brief, there are times when even a settled insurer can be liable in contribution. (OMA Br., p. 20). Although St. Paul as an excess insurer presumably would not bring a contribution action against itself as a primary insurer, it is not clear from the record that St. Paul would be unable to pursue contribution claims against others, or that Travelers would be unable to pursue contribution claims against anyone.

legal rights between the targeted insurer and the policyholder under the insurance contracts. As the Sixth Circuit recently stated, a non-settling insurer that lacks the ability to obtain contribution is not being asked “to pay more than its contracted-for share of liability,” because any amount it would pay to the policyholder “would be less than or equal to its policy limit.” *See OneBeacon*, 679 F.3d at 461.

In addition, nowhere in *Goodyear* did this Court suggest either that policyholders should be limited in their ability to settle or that they would forfeit coverage under certain policies if they settled claims under other policies for less than limits. In addition, nowhere in *Goodyear* did this Court regard the policies at issue as anything other than assets of the policyholder it could use for the protection it required. Further, nowhere did this Court make the extraordinary suggestion, which the Insurer Amici would read into the opinion, that the policyholder had some obligation to refrain from settling with any of its insurers and, instead, was required to preserve its own insurance for potential pursuit by its insurers in contribution actions. In effect, the Insurer Amici regard the policyholder’s direct insurance policies, which it purchased for its own protection, as if they were de facto reinsurance policies purchased for the benefit of the policyholder’s direct insurers.

5. False Premise regarding Purported “Premature” Payment

The OII expressly argues that Lincoln Electric seeks to “prematurely require the excess insurers to pay defense costs...,” and the other Insurer Amici implicitly make the same argument. (OII Br., p. 5). Given the numbers provided by the district court in its certification order, the Insurer Amici’s contention is without basis. According to the district court, “Each of these umbrella policies has a \$2 million attachment point and is required to respond when Lincoln Electric’s losses exceed \$2 million.” (Certification Order, p. 3). None of the Insurer Amici contests this \$2 million attachment point. The district court further stated, “Lincoln

Electric ... asserts that \$4.5 million of the indemnity costs have not been reimbursed by insurance” and “more than \$86.7 million [in defense costs] has been unreimbursed by insurance.” *Id.* at 2. Emphasizing the point, the district court stated, “St. Paul has paid substantially less than 100% of Lincoln Electric’s defense and indemnity costs” and “Lincoln Electric claims it has paid more than \$91 million to date.” *Id.* at 4. The Insurer Amici do not contest these figures.

These unchallenged figures refute the OII’s contention that Lincoln Electric prematurely seeks payment from its excess insurers. If this Court had adopted pro rata allocation as the law of Ohio, the math OII suggests might be possible in this case. This Court, however, has rejected pro rata allocation. Under Ohio’s “all sums” law, which this Court has adopted and affirmed in multiple decisions, the \$4.5 million in uncompensated indemnity costs alone are more than sufficient to reach a \$2 million attachment point. Lincoln Electric is not, as the OII suggests, making a “mythically” based exhaustion argument. (OII Br., p. 6). It is making a mathematically based one.⁹ Further, as is evident from these numbers, and contrary to the Insurer Amici’s assertions, if the law of Ohio is modified to permit the excess insurers to avoid their obligations for these insured costs, Lincoln Electric will suffer a very real and substantial “forfeiture.” (CICLA Br., p. 15).

B. THE INSURER AMICI PREDICATE THEIR ARGUMENTS ON INCOMPLETE OR INACCURATE ANALYSES OF THE LAW.

⁹ Space does not permit addressing all of the false premises in the Insurer Amici’s briefs. The others, however, refute themselves, such as the assertion by the CICLA Amici that the excess insurers have been deprived of their right to participate in the defense of the subject claims. (CICLA, et al. Br., p. 17). This argument falsely presumes that an insurer refusing to honor a claim has any right to participate in it and irrationally presumes that policyholders would reject offers of assistance from their insurers.

In addition to being analytically flawed, the Insurer Amici's premises are based upon incomplete or inaccurate considerations of the law. The most notable such deficiencies are addressed below.

1. In Arguing the False Premise regarding the Selection of an Allocation Method, the Insurer Amici Fail to Meaningfully Challenge *Goodrich*.

a. None of the Insurer Amici Directly Contest the Holding in *Goodrich*, which Accurately Reflects Ohio Law.

In its certification order, the federal district court discussed at length three cases that reached conflicting holdings on the issue presented by the certified question: *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 (“*Goodrich*”); *GenCorp Inc. v. AIU Ins. Co.*, 297 F.Supp.2d 995 (N.D. Ohio 2003), *aff’d*, 138 Fed. Appx. 732 (6th Cir.2005) (unpublished) (“*GenCorp*”); and *MW Custom Papers LLC v. Allstate Ins. Co.*, Montgomery C.P. No. 2012 CV 03228 (Sept. 21, 2012) (“*MW Custom Papers*”). (Certification Order, pp. 5-10). However, even though the district court described *Goodrich* as “directly on point,” neither the CICLA Amici nor OII cite *Goodrich*, let alone discuss it. This failure is particularly notable, given that *Goodrich* reflects the only consideration to date by an Ohio appellate court of the issue certified for review.

The remaining Insurer Amici (the OneBeacon Amici) address *Goodrich*, and they do not suggest that it incorrectly states Ohio law on the certified question; instead, they make a cursory attempt to distinguish it on two grounds that are factually incorrect. First, the OneBeacon Amici assert that *Goodrich* is distinguishable because it “required the policyholder to exhaust vertical primary coverage and provided excess insurers a full credit for the value of *policies* that sat directly below.” (Emphasis added.) (OneBeacon Br., p. 9). This is incorrect. In *Goodrich*, the

targeted insurer received credit *only* for the \$20 million limit of a *single policy* that underlay a targeted excess policy; it *did not* receive a credit for the limits of *all* triggered and settled underlying policies, which had combined limits totaling far in excess of \$20 million. *Goodrich* at ¶ 5, ¶ 7, ¶ 40. Lincoln Electric here proposes to follow the exact approach taken in *Goodrich* and allow a chosen excess insurer credit for the \$2 million indemnity limit of the immediately underlying primary policy.

Second, the OneBeacon Amici attempt to distinguish *Goodrich* based on their contention that in *Goodrich*, “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.” (OneBeacon Br. 9). This also is incorrect. The settlements in *Goodrich* all pertained only to the Calvert City site, which was the lone environmental site at issue in the litigation. *Goodrich* at ¶ 41. Based on the fact that all of the settlements and the judgment in the litigation involved the same, single site, the insurers, including OneBeacon America Insurance Company (f/k/a Commercial Union Insurance Company), sought a setoff of the settlement amounts from the damages award, purportedly to avoid a double recovery by Goodrich. *Id.* at ¶¶ 41-42. The Ninth District, however, denied this request because the insurers failed to show that the settlements involved the “same damages” as the jury award. *Id.* at ¶ 46. The court reasoned that no setoff was required because the settling insurers paid for a release of “a much wider array of claims” arising from the Calvert City site than the narrow EDC groundwater remediation claim presented to the jury. *Id.* at ¶ 42. In Lincoln Electric’s case, as in *Goodrich*, there is no potential for a double recovery, because Lincoln Electric seeks to recover from its excess insurers only *unreimbursed* losses.

b. GenCorp and MW Custom Papers are Fundamentally Inconsistent with “All Sums” Allocation.

While virtually ignoring *Goodrich*, the Insurer Amici rely heavily on *GenCorp* and *MW Custom Papers*—the other two cases cited in the district court’s certification order. Their reliance on those cases is misplaced. The OMA Amici already have addressed extensively the miscomprehension of Ohio law and erroneous reasoning employed by the federal magistrate judge in *GenCorp* to conclude that the insurers there were entitled to a credit for the limits of all settled underlying policies. (See OMA Br., pp. 26-31). While the Sixth Circuit affirmed the magistrate judge’s decision (see *GenCorp Inc. v. AIU Ins. Co.*, 138 Fed. Appx. 732 (6th Cir.2005) (unpublished)), it merely adopted the reasoning of the magistrate judge and did so in an unpublished opinion that is not binding precedent on subsequent panels. See *Crump v. Lafler*, 657 F.3d 393, 405 (6th Cir.2011), citing *Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir.1996). Thus, *GenCorp* is not controlling law even within the Sixth Circuit.

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

Ohio law and is of no persuasive value as to the law in Indiana.”); *Massachusetts Elec. Co. v. Commercial Union Ins. Co.*, Mass.Super. No. 99-00467B, 2005 WL 3489874, *2 (Oct. 25, 2005) (recognizing *GenCorp* as being inconsistent with “all sums” allocation). As recognized by these courts, *GenCorp* does not accurately reflect Ohio law.

Nonetheless, in *MW Custom Papers*, the trial court applied *GenCorp* and dismissed several excess insurers (the OneBeacon Amici) on justiciability grounds. *MW Custom Papers*, Montgomery C.P. No. 2012 CV 03228 (Sept. 21, 2012). As noted by the federal district court, however, “[t]here is no evidence that the Montgomery County Court of Common Pleas was presented with the *Goodrich* decision.” (Certification Order, p. 10). Moreover, the trial court’s decision in *MW Custom Papers* is currently on appeal. (See OneBeacon Br., p. 1). *MW Custom Papers*, 2d Dist. No. CA 25430. Because that decision could be reversed on appeal, it is not yet even the law of that case and provides little support for the Insurer Amici’s position here. For the reasons discussed on pages 24-31 of the OMA Amici’s initial brief, the application of the four cornerstones of Ohio law to the certified question compels the conclusion that *Goodrich*, not *GenCorp*, accurately reflects Ohio law.

2. In Arguing their False Premise regarding Purported Exhaustion, the Insurer Amici Incompletely Analyze Ohio Law.

In making their arguments about exhaustion, the Insurer Amici have incorrectly and incompletely analyzed Ohio law. OII, for example, relies principally on this Court’s decision in *Fulmer v. Insura Property & Cas. Co.*, 94 Ohio St.3d 85, 760 N.E.2d 392 (2002), to argue that each subject excess policy contains an “exhaustion clause” that will bar excess coverage unless and until Lincoln Electric receives full payment from the primary policy underlying the subject excess policy. (OII Br., pp. 2-3, 5-6). *Fulmer* does not stand for this proposition. Under *Fulmer*, this Court held that an insurer is liable for the amount of a claim that reaches its

effective attachment point and penetrates into its coverage, even when the effective underlying insurer, as a result of a settlement, does not pay its full limits. *See Fulmer* at paragraph two of the syllabus; *see also 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). *Fulmer*, therefore, supports the position advocated by the OMA Amici that Ohio law allows a policyholder to absorb any gaps in coverage occasioned by a less-than-limits settlement.

OII also attempts to distinguish *Fulmer* on the grounds that it involves UM/UIM coverage, not general liability coverage. (OII Br., pp. 5-6). This attempt again is misguided, as courts applying Ohio law have applied the holdings in *Bogan* and *Fulmer* outside the UM/UIM context. *See, e.g., Triplett*, 10th Dist. Nos. 92AP-816, 92AP-817, 1992 WL 394867, *7 (applying *Bogan* in a case involving liability insurance coverage for deaths caused by an apartment fire); *see also Elliott Co. v. Liberty Mut. Ins. Co.*, 434 F.Supp.2d 483, 500 (N.D. Ohio 2006) (stating, in a case involving coverage for asbestos-related lawsuits, that “an insured should be allowed to exhaust a policy by good faith agreement, even if payments do not actually exceed the policy limits”). Notwithstanding that the OMA Amici cited *Triplett* in their initial brief, OII has failed to address it.

The other Insurer Amici also use the term “exhaustion” and contend that Lincoln Electric cannot recover from its excess insurers because “primary policies remain unexhausted” (*see, e.g., OneBeacon Br.*, p. 2), but they actually are addressing in large measure the allocation cornerstone of Ohio law implicated by the certified question. The issue is whether Lincoln Electric must exhaust all settled primary policies on a “pro rata” basis before reaching any excess

policy, or whether it can exhaust a single primary policy, perhaps in part through absorbing as permitted by *Fulmer* a self-insured gap caused by a less-than-limits settlement of that primary policy, and then recover under an excess policy under Ohio's "all sums" allocation. This Court has decided that allocation issue. Further, as reflected in the cases these Insurer Amici cite, they have no precedential basis to challenge either the manner in which an underlying policy may be exhausted¹⁰ or the ability of Lincoln Electric to absorb any gaps in coverage created by a less-than-limits settlement.

In fact, the cases cited by the OneBeacon Amici on pages 10-11 of their brief stand for the unremarkable principle that the obligations of an excess policy do not arise until the claim is sufficient to reach the excess coverage. *See Griewahn v. United States Fid. & Guar. Co.*, 160 Ohio App.3d 311, 318-319, 2005-Ohio-1660, 827 N.E.2d 341, ¶ 44 (7th Dist.) (describing the differences between excess and umbrella coverage); *McNeeley v. Pacific Emps. Ins. Co.*, 10th Dist. Franklin No. 02AP-1217, 2003-Ohio-2951, ¶ 28 (same); *Grange Mut. Cas. Co. v. Rosko*, 146 Ohio App.3d 698, 710, 767 N.E.2d 1225 (7th Dist.2001) (noting that an excess insurer is not

¹⁰ The CICLA Amici cite to *Qualcomm* and *Comerica* for the proposition that "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..." (Emphasis added.) (CICLA, Br., pp. 16-17, fn. 9). These cases, however, do not involve Ohio law and have been rejected in other jurisdictions. *See, e.g., Mills, Ltd. P'ship v. Liberty Mut. Ins. Co.*, Del. Sup. Ct. No. 09C-11-174 FSS, 2010 WL 8250837, *28 (Nov. 5, 2011) (Delaware law); *HLTH Corp. v. Agric. Excess & Surplus Ins. Co.*, Del. Sup. Ct. No. 07C-09-102 RRC, 2008 WL 3413327, *15 (July 31, 2008) (Delaware and New Jersey law), *overruled on other grounds in Axis Reinsur. v. HLTH Corp.*, 993 A.2d 1057 (Del. 2010); *see also Elliott*, 434 F.Supp.2d at 500; *Triplett*, 1992 WL 394867, at *7; *Bogan*, 36 Ohio St.3d at 28; *Fulmer*, 94 Ohio St.3d at 95. Further, in *Goodyear Tire & Rubber Co. v. Natl. Union Fire Ins. Co.*, 694 F.3d 781 (6th Cir.2012), another case cited by the CICLA Amici, the Sixth Circuit held that an unusually narrow exhaustion clause operated to prevent the policyholder from filling any gaps caused by a less-than-limits settlement. *Id.* Although the OMA Amici believe that the Sixth Circuit has incorrectly predicted Ohio law, this issue does not appear to be before this Court, as there is no indication that Lincoln Electric's policies contain similarly narrow language.

obligated to pay for a loss that should be paid by the primary insurance, i.e., no drop-down liability); *Kelley v. Ernst*, 108 Ohio App.3d 207, 670 N.E.2d 510 (1st Dist.1995) (excess insurer was not required to drop down below its attachment point, which was defined by the required minimum limits of underlying coverage); *State Farm Mut. Ins. Co. v. Mahin*, 92 Ohio App.3d 291, 296, 634 N.E.2d 1058, 1061 (1st Dist.1993) (insureds were required to fill the gap between the settlement amount and the total limits of the tortfeasor's insurance before recovering UM/UIM coverage). None of these cases stands for the principle that all settled primary policies must be exhausted before any excess policy is obligated to pay.

C. THE ARGUMENTS OF THE INSURER AMICI ARE BASED ON FLAWED PUBLIC POLICY ANALYSES.

As the Insurer Amici have disclosed, they speak for an industry with tremendous resources, with the AIA alone representing insurers having more than \$117 billion in annual premium revenues and PCI representing insurers having more than \$195 billion in annual premium revenues. (CICLA Br., pp. 1, 2). These numbers represent just a share of the combined resources of all of the Insurer Amici. Ohio courts, and this Court in particular, long have been a bulwark against overreaching by this vast industry and have weighed and balanced fairly the interests of *all parties* affected by insurance disputes, including policyholders and insurers alike and the courts themselves. In particular, this Court has vigilantly protected against erosion of the practical insurance doctrines it has established over decades for the equitable treatment of all of these stakeholders.¹¹

¹¹ As the CICLA Amici acknowledge, they often have appeared in this Court to advocate for the insurance industry. (CICLA Br., pp. 1-2, fn. 2 & 3). Most of the cases they cite for this history, however, were not Ohio insurance cases. In the cited Ohio insurance cases, the CICLA Amici typically have asked this Court to modify Ohio law to benefit insurers and disadvantage policyholders, undermining judicial economy in the process. This Court repeatedly has declined the CICLA Amici's invitations, doing so entirely in most cases (*See, e.g., Goodyear*, 95 Ohio

On behalf of this vast industry, the Insurer Amici have advanced a number of public policy arguments. These arguments, like the analytical premises and legal analyses they attempt to support, are highly flawed.

For instance, the CICLA Amici assert that failure by this Court to modify one or more of Ohio's four cornerstone principles of insurance coverage law, so as to bring about the outcome the Insurer Amici desire, would be contrary to judicial economy and would lead to "increased litigation" over contribution. (CICLA Br., p. 5). The history of coverage litigation in Ohio, however, establishes otherwise. In the 43 years since *Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 271 N.E.2d 924 (1971), the first case in which this Court in any context adopted "all sums" allocation, this Court has addressed *only one* such contribution claim, in *Park-Ohio*, which was decided 39 years later. Notably, *Goodyear*, which the Insurer Amici have discussed at such length, generated no follow-on contribution actions.

Equally deficient is the Insurer Amici's public policy contention that unfairness would arise if Lincoln Electric's excess insurers were required to pay under the circumstances of this

St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 9 (Court declined to reject Ohio's "all sums" rule in favor of pro rata allocation); *Park-Ohio*, 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800, at ¶ 24 (Court again declined to reject Ohio's "all sums" rule in favor of pro rata allocation); *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 757 N.E.2d 329 (2001) (Court declined to expand scope of pollution exclusion to cover furnace malfunction); *Fed. Ins. Co. v. Executive Coach Travel, Inc.*, 128 Ohio St.3d 331, 2010-Ohio-6300, 944 N.E.2d 215, ¶ 9, ¶ 13 (Court declined to limit scope of a university's automobile insurance policy)). One case cited by the CICLA Amici in this regard, *Ormet Primary Alum. Corp. v. Emp. Ins. of Wausau*, 88 Ohio St.3d 292, 725 N.E.2d 646 (2000), was a mixed result for the insurers. The CICLA Amici did not actually appear in that case, and although the policyholder lost under its peculiar facts, this Court retained the rule that late notice will *not* bar coverage absent prejudice to the insurer. *Id.* The only case cited by the CICLA Amici that reflected a successful effort by them was *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, but in that case, notably, the CICLA Amici were not asking this Court to change Ohio law, as here or in the other cases they cite. As this Court has done in all other cases in which the CICLA Amici have asked it to modify Ohio law to the prejudice of Ohio policyholders and Ohio courts, this Court should decline their invitation here.

case. (CICLA Br., p. 15). There is nothing unfair about requiring excess insurers with “all sums” policy language to pay consistent with that express language. When the CICLA Amici state in this same discussion that “[c]ontribution is not a panacea,” what they mean is that under current Ohio law, which they seek to modify in this case, there are instances in which an insurer liable for a claim will have to pay that claim and may not have equitable contribution rights against anyone else that would serve to limit or eliminate its net exposure—in other words, that such an insurer may simply have to insure. There is nothing contrary to public policy about an insurer fulfilling its ostensible purpose.

A final example of a flawed public policy premise is the assertion by the CICLA Amici that the result advocated here by the policyholder under long-standing Ohio law “creates a perverse incentive for a policyholder to negotiate low settlements....” (CICLA Br., p. 15). Such a premise defies both experience and common sense. Parties in negotiations bargain for the best outcomes they can achieve, and policyholders in particular are incentivized to recover fully in a single coverage action with the lowest possible litigation cost, all in the hope of being made as whole as possible and avoiding further litigation. None of these objectives would be served by reaching artificially low settlements with any insurer and then engaging in subsequent litigation.

The Insurer Amici, however, are correct in one of their public policy observations: “[E]quity favors settlement over serial litigation.” (OneBeacon Br., p. 16). Lincoln Electric and its amici request that Ohio’s four cornerstones of insurance coverage jurisprudence be preserved to effectuate this public policy principle, permitting policyholders such as Lincoln Electric to settle their primary insurance claims without forfeiting their excess coverage, with that excess coverage being enforced exactly as written, all while imposing upon the excess insurers only the

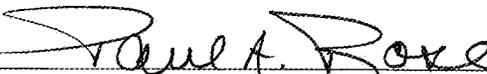
obligations they specifically undertook when they drafted their policies and calculated and collected their premiums.

III. CONCLUSION

The Insurer Amici's attempts at misdirection should be rejected, and the carefully integrated principles of Ohio insurance coverage law implicated by the certified question should be preserved and followed. These principles assure that all policies triggered by long-tail claims are eligible to fully compensate the policyholder who purchased them, while protecting insurers from being obligated to pay sooner than their attachment points require or more than their bargained-for limits of liability. These principles have been extraordinarily effective in fostering the resolution of coverage disputes, promoting judicial economy, and avoiding forfeitures of coverage. For the reasons stated in the OMA Amici's opening brief and this reply brief, the certified question should be answered in the affirmative.

Respectfully submitted,

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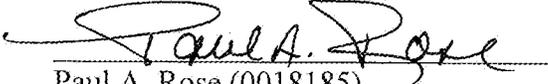
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