

## Ohio Supreme Court Clarifies Contribution Among Insurers



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The Ohio Supreme Court ruled last week in *Pennsylvania General Insurance Co. v. Park-Ohio Industries*, Slip Opinion No. 2010-Ohio-2745, that insurance companies must pay their proportionate share of equitable contribution for a claim, even if they were not timely notified of the claim, unless lack of notice prejudiced the insurer. The long awaited decision provides some clarification for contribution actions among insurers but still leaves many issues unresolved.

In Ohio, if an insured has a loss that is progressive in nature and covered by multiple insurance policies, an insured is permitted to pick one or more policy periods and obtain up to the policy limits of all policies in effect during the specific policy period, even umbrella and excess policies. This allocation method for multiple triggered policies is called the “all sums” approach. The Ohio Supreme Court first utilized this approach in *Goodyear Tire & Rubber Co. v. Aetna Cas. and Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842.

Once an insured requires one or a handful of insurance companies to pay their damages, the insurers that paid the loss (“targeted insurers”) can seek equitable contribution from other non-targeted triggered policies for their proportionate amount owed on the claim. The contribution action is premised on the theory that it would not be fair for one insurance company to pay more than the amount they owe without requiring other triggered policies to pay their proportionate share. The advantage of the all sums approach is that a policyholder does not have to make multiple claims and track down coverage from multiple insurers. Instead, one or more insurance companies pay a loss and the insurance company or companies have the burden to try to be reimbursed by other relevant insurers who share the risk.

However, many unresolved issues arise with the all sums approach. What happens if other insurers that owe coverage are bankrupt and cannot pay their share of the loss? What if an insured fails to notify a non-targeted insurer and violates the policy notice requirements? What if the insured has a high deductible or self-insured retention (“SIR”) for the non-targeted policies - can an insured owe equitable contribution to a targeted insurer for the deductible or SIR?

The *Park-Ohio* decision addresses the issue of what happens if an insured fails to timely notify a non-targeted insurer of a claim and violates a provision in the policy that requires an insured to provide notice of the claim within a reasonable time as a condition precedent to coverage.

In *Park-Ohio*, the insured, Park-Ohio Industries, Inc. (“Park-Ohio”) was sued in an asbestos-related lawsuit. Five months later, Park-Ohio notified one of its insurers, Pennsylvania General Ins. Co. (“Penn General”) to defend and indemnify Park-Ohio. Ultimately, Penn General paid \$1 million dollars on behalf of Park-Ohio for the settlement of the lawsuit. Almost two years later, Park-Ohio provided Penn General with information of other insurers also responsible to provide coverage for the claim, including Nationwide and Continental Insurance Companies. Within three months, Penn General filed a declaratory judgment action against Nationwide and Continental seeking equitable contribution. Nationwide and Continental refused to contribute their proportionate share of the settlement. They primarily argued their policies were not “applicable” because Park-Ohio failed to timely provide notice of the claim until two and a half years after the lawsuit and settlement of the claim, thus violating the policy notice requirements and barring coverage. The trial court agreed.

However, the Eighth District Court of Appeals reversed and held Penn General was entitled to contribution from Nationwide and Continental. The Court noted that the contribution action was not based on the contract terms between Park-Ohio and the insurers, but rather based upon principals of equitable contribution as set forth in *Goodyear*. The Ohio Supreme Court agreed.

While all the insurers in *Penn General* requested the Ohio Supreme Court to overrule *Goodyear* because of the many unresolved issues it created, the Court chose to clarify *Goodyear* by holding that a targeted insurer is entitled to seek equitable contribution from a non-targeted insurer. With regard to policy notice requirements, the Court held an insured has an affirmative duty to cooperate with the targeted insurer by identifying other potential insurers. Late notice to a non-targeted insurer will not bar coverage unless the late notice prejudiced the non-targeted insurer. While the Court did not

set a bright line test for when an insurer is “prejudiced,” the Court held the non-targeted insurers in *Penn General* were not prejudiced as a matter of law because the terms of the settlement were reasonable and Penn General was properly following the all sums approach in *Goodyear*. The Court failed to address several remaining issues such as the consequence to the targeted insurer if non-targeted insurers are prejudiced and do not contribute their proportionate share as a result, or what are the consequences if an insured breaches its duty to cooperate with a targeted insurer? While additional issues remain regarding *Goodyear* and principals of equitable contribution, the Court’s decision formally adopts the all sums approach and clarifies some of the issues surrounding the application of this allocation method.

For more information regarding the Court’s decision in *Penn General* or other insurance coverage issues, please contact any of our Insurance Coverage Practice Group members.

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