



James P. Nolan, Esq.
600 Vine Street, Suite 2600
Cincinnati, Ohio 45202
jnolan@smithrolfes.com

RE: NEW OHIO SUPREME COURT DECISION ON EQUITABLE CONTRIBUTION

On June 22, 2010 the Ohio Supreme Court issued a very important decision which further explains the “all-sums” approach in cases involving continuous injury. A link to obtain a copy of the decision in *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries* is below:

- [*Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, Slip Opinion No. 2010-Ohio-2745.](#)

This case involves allocation of insurance coverage among multiple liability insurers where an injury has occurred over a period of time. In its decision, the Supreme Court of Ohio applied and clarified the “all-sums” approach, which it previously adopted in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842. The case arises from a claim of equitable contribution by one insurer against other insurers of the same insured.

The Court based its decision on the following facts. A suit alleging asbestos-related injuries was filed against Park-Ohio Industries, Inc. and other defendants after the plaintiff was diagnosed with mesothelioma. Park-Ohio notified one of its insurers, Penn General. Park-Ohio settled the case the following month without Penn General’s consent, agreeing to pay \$1,000,000.00 in exchange for a full release. Penn General’s counsel concluded the amount of the settlement was reasonable. Park-Ohio initially filed suit against Penn General, but the suit was eventually dismissed when Penn General ultimately paid its entire policy limit to Park-Ohio.

Although the personal injury suit had been filed in March 2002, Park-Ohio did not notify Penn General until 2004 of its discovery of other potentially applicable insurance policies. Within two months of discovering the identity of other insurers, Penn General mailed notification letters to Park-Ohio’s other carriers. The other carriers denied any obligation for contribution, claiming Park-Ohio’s delay in notifying them was unreasonable and resulted in prejudice to them.

CINCINNATI

600 Vine Street • Suite 2600
Cincinnati, Ohio 45202
(513) 579-0080
Fax: (513) 579-0222

COLUMBUS

65 E. State Street • Suite 2000
Columbus, Ohio 43215
(614) 469-7130
Fax: (614) 469-7146

DETROIT

39555 Orchard Hill Place • Suite 600
Novi, Michigan 48375
(248) 374-5020
Fax: (248) 348-5760

FT. MITCHELL, KY

300 Buttermilk Pike • Suite 324
Ft. Mitchell, Kentucky 41017
(859) 547-1200
Fax: (859) 547-1219

The Court initially explained the “all-sums” approach (based on joint and several liability) it pronounced in the *Goodyear* case.

The all-sums approach allows an insured “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.” *Goodyear*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 6. The insured selects one insurer (the “targeted insurer”), from which it is able to obtain a defense to the action and full coverage for any eventual judgment. The targeted insurer is then able to file a later action against any other insurers (the “non-targeted insurers”) to obtain contribution. The pro rata approach, on the other hand, requires an insurer to pay “only a portion of a claim based on the duration of the occurrence during its policy period in relation to the entire duration of the occurrence.” *Id.*

We adopted the all-sums approach and held that “when a continuous occurrence of environmental pollution 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.* at ¶ 11. In such an instance, any targeted insurer bears the burden of obtaining contribution from other applicable primary insurance policies as it deems necessary. *Id.*

Penn General ¶ 11, ¶ 12.

The Court reasoned it would be inequitable to eliminate Penn General’s right to contribution from the other insurers, based on the insured’s failure to abide by the notice provisions in the other insurance policies. The Court noted Penn General notified the other insurers within a reasonable time after Penn General first learned of the identity of the other insurers. The Court also found the other insurers were not prejudiced by the delay with which they received notice, and the terms of the settlement were reasonable.

The following syllabus of the Court comprises the rules of law pronounced in the decision. (Citations to the *Goodyear* case are omitted).

1. When loss or damage occurs over time and involves multiple insurance-policy periods and multiple insurers, a claim may be made by the targeted insurer against a nontargeted insurer with applicable insurance policies for contribution.

June 22, 2010

Page 3

2. When the targeted insurer requests information from the insured regarding other policies that may also cover the claim, the insured has a duty to cooperate with the targeted insurer by identifying those policies; but failure to timely notify a non-targeted insurer of a pending claim does not automatically make that insurer's policy inapplicable for contribution to the targeted insurer.
3. Lack of notification to a nontargeted insurer will bar the targeted insurer's claim for contribution against the nontargeted insurer only if the failure to notify resulted in prejudice to that nontargeted insurer.

If you have any further questions regarding the impact of this decision, please do not hesitate to contact our firm.

Yours truly,



James P. Nolan, II