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Gallagher Sharp Newsflash: "All-Sums" Approach Reaffirmed

Today, June 22, 2010, the Supreme Court of Ohio released its long-awaited decision in *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, Slip Opinion No. 2010-Ohio-2745, in which it was asked to revisit the "all-sums" allocation method of insurance coverage for progressive-injury losses (such as asbestos claims) spread over multiple triggered insurance policies. Under that approach, the insured may select or target one policy issued by one insurer. The Supreme Court reaffirmed the "all-sums" method it recognized in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, and declined to adopt the competing pro rata allocation method. Additionally, the Supreme Court held that the insured has a duty to cooperate with the targeted insurer to identify other policies and insurers which may provide coverage for the loss. The targeted insurer may then seek contribution by nontargeted insurers. Failure to timely notify a nontargeted insurer of a pending claim does not automatically make that insurer's policy inapplicable for contribution to the targeted insurer. Further, lack of notification to a nontargeted insurer will bar the targeted insurer's claim for contribution against that nontargeted insurer only if the failure to notify resulted in prejudice to that nontargeted insurer.

In *Penn. Gen.*, the insured settled the claim after giving the targeted insurer notice but without the targeted insurer's formal consent. The insured then sued the targeted insurer for coverage of the settlement but did not notify the targeted insurer of the other policies issued by other insurers for approximately two years. The targeted insurer sued the nontargeted insurers for reimbursement based upon their respective shares. The nontargeted insurers asserted that they were prejudiced by the late notice of the claim and that the settlement reached without their consent violated the consent to settlement clauses in their respective policies. The Supreme Court disagreed, holding that "[b]ecause *Goodyear* created an equitable approach to the unique situation surrounding the allocation of liability in progressive-injury cases, [the insured's] notice to [the nontargeted insurers] can be seen as being 'within a reasonable time in light of all the surrounding facts and circumstances'."

Writing for the majority, Justice Lanzinger reasoned that because "the all-sums allocation method established in *Goodyear* is a remedy that is equitable in nature" "we clarify *Goodyear* by stating that the insured has a duty to cooperate with the targeted insurer." In addition, the Supreme Court held that only where failure to provide timely notice "results in prejudice to the nontargeted insurers" will contribution by nontargeted insurers be barred. The Court found that denying the nontargeted insurers initial notice of the claim/litigation and the ability to control the defense, defend their interests, investigate the claim, choose counsel, set litigation strategy and control settlement "do not amount to prejudice" because "they are the natural result of *Goodyear's* all-sums approach." The Court held that the nontargeted insurers were not prejudiced as a matter of law because "[t]he terms of the settlement were

reasonable" and delaying notice to the nontargeted insurers was not unreasonable "[c]onsidering the Goodyear rule."

Three justices concurred, Justice Lundberg Stratton concurred in part, but dissented as to the majority's conclusion that the absence of prejudice was shown as a matter of law; she would have remanded the case to the trial court for a factual determination on that issue. The recently appointed Chief Justice Brown did not participate in the decision, as the case was submitted to the Supreme Court prior to Chief Justice Moyer's death.

The opinion may be viewed at
<http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2010/2010-ohio-2745.pdf>.

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