No. 04-3244

# In the United States Court of Appeals for the Sixth Circuit

**GENCORP INC.,**

*Plaintiff-Appellant,*

v.

**AIU INSURANCE COMPANY, et al.,**

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland, No. 1:02CZ1770.

## BRIEF OF *AMICI CURIAE* CERTAIN UNDERWRITERS AT LLOYD'S, LONDON IN SUPPORT OF DEFENDANTS-APPELLEES AND FOR AFFIRMANCE

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## DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Sixth Circuit Rule 26.1, Certain Underwriters at Lloyd's, London make the following disclosure:

1. Is said party a subsidiary or affiliate of a public-owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

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## INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is filed by Certain Underwriters at Lloyd's, London (hereinafter "Underwriters") who are subscribers to excess insurance liability policies with insureds in the State of Ohio, and who are parties to other coverage litigation pending in Ohio involving environmental liability claims similar to those present here.[1] Like the excess policies at issue in the case at bar, the excess policies subscribed by Underwriters typically provide that the excess insurers will be obligated to indemnify the insured only for losses that exceed the limits of the underlying insurance policies described therein, and require exhaustion of those underlying insurance policies in order to trigger the excess policies. Accordingly, Underwriters are directly interested in the issues presented herein by GenCorp's settlement with all of its underlying insurers, particularly the issue of how those settlements impact on the obligations of GenCorp's excess insurers. This Court

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[1] *Millennium Chemicals, Inc., et al. v. Lumbermen's Mutual Casualty Co., et al.*, Court of Common Pleas, Cuyahoga County, Ohio, Case No. 411388; *The Glidden Company v. Lumbermens Mutual Casualty Co., et al.*, Court of Common Pleas, Cuyahoga County, Ohio, Case No. 409039; *The Goodyear Tire and Rubber Company v. The Aetna Casualty and Surety Company, et al.*, Court of Common Pleas, Summit County, Ohio, Case No. CV 93 09 3226; *Commercial Union, et al. v. B.F. Goodrich Company, et al.*, Court of Common Pleas, Summit County, Ohio, Case No. CV 99 02 0410; *Goodrich Corporation v. Affiliated FM Insurance Company, et al.*, Court of Common Pleas, Summit County, Ohio, Case No. 2002-11-6854. Some Underwriters were parties to GenCorp's initial suit (GenCorp I) and either received summary judgment or were dismissed on the basis of a settlement. Thereafter, some Underwriters were inadvertently named in the second suit that gave rise to this appeal (GenCorp II), and were then dismissed.

has already permitted the filing of an *amici curiae* brief by a number of Ohio companies,[2] similarly situated to GenCorp, on the basis that they have an interest in the development of insurance law in the State of Ohio and seek to preserve policyholders' rights. (Ohio Companies' Brief p. 1.) Underwriters, similarly situated to GenCorp's excess insurers, have the same interest in the development of Ohio insurance law and seek to preserve insurers' rights in the State of Ohio.

## ARGUMENT

### Introduction And Summary Of Argument

For the most part, GenCorp's brief and the *amici curiae* brief of the Ohio Companies are written in a vacuum—as if GenCorp had not entered into voluntary settlements with all of its primary and umbrella insurers who issued policies underlying the excess policies issued by the defendants-appellees (hereinafter "Excess Insurers"). Ultimately, GenCorp and the Ohio Companies agree that the settlements may be considered, but only on a "vertical" basis so that GenCorp can proceed against a given Excess Insurer without regard to GenCorp's settlements with horizontal underlying primary and umbrella insurers whose policies cover the

[2] Brief of *Amici Curiae* The Ohio Chemistry Technology Council; Aeroquip-Vickers, Inc.; The Babcock & Wilcox Company; Eaton Corporation; The Glidden Company; Goodrich Corporation; The Goodyear Tire & Rubber Company; The Lincoln Electric Company; Millennium Holdings, LLC; NCR Corporation; and The Sherwin-Williams Company (hereinafter referred to as the "Ohio Companies").

same loss. (GenCorp Br. 37, Ohio Companies Br. 20.) The United Policyholders' *Amicus* Brief goes even further and says that all of GenCorp's settlements with its underlying insurers (vertical or horizontal) should be ignored in this action against the Excess Insurers. (United Br. 12.)

But as the district court ruled, GenCorp's settlements with its underlying insurers cannot be ignored—particularly when it is undisputed that: 1) the Excess Insurers do not "drop down"; 2) no Excess Insurer's policy is triggered until the policies underlying that excess policy are exhausted; 3) to the extent that GenCorp settled with any underlying insurer for an amount less than the policy limits, GenCorp is deemed to have received the full policy limits and "has effectively forfeited the right to recover the difference from its excess insurers"; 4) the horizontal underlying insurers are jointly and severally liable up to their limits for the same environmental losses for which GenCorp seeks recovery from the Excess Insurers; and 5) the record demonstrates that the total limits of all the settled underlying policies exceed the maximum amount of GenCorp's potential environmental losses at the six sites in question.

In short, GenCorp of its own volition entered into settlements with all of its underlying primary and umbrella carriers whose policies afforded GenCorp coverage for its environmental liability at the six sites at issue; GenCorp must be deemed to have received those limits; and the record shows that the combined

limits of those settled policies exceed the maximum potential environmental liability for which GenCorp has sued the Excess Insurers. Accordingly, the district court properly entered summary judgment in favor of the Excess Insurers on the ground that GenCorp failed to establish that the Excess Insurers' policies have been, or will be, triggered:

> Even presuming those trigger periods most favorable to GenCorp given the evidence in the record, GenCorp's liabilities at the six sites will not exceed the limit of its primary policy coverage during any policy period.

*GenCorp, Inc. v. AIU Ins. Co.*, 297 F. Supp. 2d 995, 1008 (N.D. Ohio 2003). The district court's ruling was correct in all respects and should be affirmed.

## I. GenCorp's Settlements With All Of Its Underlying Insurers Cannot Be Ignored.

### A. GenCorp Voluntarily Chose To Horizontally Exhaust All Of Its Underlying Coverage.

GenCorp has made the following critical and correct concessions:

- "[T]he non-settled insurers did not have to drop down to fill the 'gaps' created by the settlements [between the limits of the settled underlying policies and the setttlement payments made by those underlying insurers]" (GenCorp Br. 10);

- To the extent GenCorp settled with any underlying insurer for an amount less than that insurer's policy limits, "GenCorp has effectively forfeited the right to recover the difference from its excess insurers" (R. 83 GenCorp Joinder to Liberty Mutual's Motion for Summary Judgment, Apx. p. __); and

- "An excess policy provides coverage only after a predetermined amount of primary coverage has been exhausted" (GenCorp Br. 33).

Nevertheless, citing the Ohio Supreme Court's decision in *Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.*, 95 Ohio St. 3d 512, 769 N.E.2d 835 (2002), GenCorp and its *amici* argue again and again that an insured cannot be compelled to horizontally exhaust all of the underlying coverages applicable to the loss over the years in question, and can choose instead to exhaust any triggered policy in any policy year up to its limits because, under the policies' "all sums" language, all triggered policies are jointly and severally liable for the insured's loss. (GenCorp Br. 20-22, 25; Ohio Companies Br. 8-10, 12; United Br. 3-5, 7.) Thus, GenCorp and its *amici* urge that the district court erred in holding that GenCorp was "mandated" or "required" to "exhaust all of its primary insurance before it could access any excess insurance." (GenCorp Br. 16, 28, 33, 51; Ohio Companies Br. 15; United Br. 2.)

The district court imposed no such mandate or requirement on GenCorp. Nor was the district court presented with the issue of whether an insured is required to exhaust all its primary coverage before accessing its excess insurance. Thus, there is nothing in the district court's opinion requiring GenCorp or any other insured to horizontally exhaust all of its primary and underlying umbrella coverage applicable to a given loss before making a claim against any of its excess

carriers. Indeed, while the district court correctly disagreed with GenCorp's interpretation of *Goodyear*, *GenCorp*, 297 F. Supp. 2d at 1007, the district court concluded that even if, absent the settlements, *Goodyear* would permit GenCorp to recover under any of the policies issued by the Excess Insurers without first exhausting all of its available primary coverage, and even if an excess insurer required to pay could then seek contribution from any other primary insurer whose policy was triggered but who had not paid any part of the loss, "*GenCorp's settlements eliminated this possibility.*" *GenCorp*, 297 F. Supp. 2d at 1007 (emphasis added). As the district court further explained:

> 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.
>
> * * *
>
> *GenCorp has already made its allocation of liability among its primary insurers.* GenCorp made that allocation when it settled with its primary insurers. GenCorp could have settled with just one or two of its primary insurers or sought a partial settlement with any of those insurers. GenCorp did not do this. Instead, GenCorp settled with all primary insurers and released them from any further liability. In so doing, GenCorp exhausted its primary coverage. It exhausted that coverage as to all primary insurers, as to all primary insurance policies, and as to all policy years. It is not possible for GenCorp now to decide to allocate its liability to one policy or to one policy year because this would be contrary to the settlements it has reached.

*Id.* at 1007-08 (emphasis in original).

Having decided to settle with all the underlying insurers, and having conceded that it must be deemed to have recovered the full amount of those

underlying limits and that the Excess Insurers do not "drop down" to pick up any shortfall, GenCorp cannot now create a different scenario for purposes of suing the Excess Insurers or pretend that only one underlying insurer settled.

Indeed, if any of GenCorp's voluntary settlements with its underlying insurers can now be ignored, as GenCorp and its *amici* urge, the joint and several liability principles set forth in *Goodyear* would be stood on their head. *See Klosterman v. Fussner*, 99 Ohio App. 3d 534, 541, 651 N.E.2d 64, 69 (Ohio Ct. App. 1994) (joint tortfeasor against whom judgment was entered after trial ordinarily entitled to credit for pretrial settlements made by other joint tortfeasors with same level of culpability). Furthermore, such a result would mean that "[t]he excess insurers will be indemnifying GenCorp . . . for GenCorp's share of the liability otherwise covered by the primary coverage triggered in other years of the policy period." *GenCorp*, 297 F. Supp. 2d at 1007. This would confer a potential "windfall" on GenCorp and would "saddle the excess insurers with more than their contracted-for share of GenCorp's liability . . ." *GenCorp*, 297 F. Supp. 2d at 1003, 1007.

### B. No Case Supports The Inequitable Result Sought By GenCorp And Its *Amici*.

Numerous decisions across the country support the district court's ruling. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 228-29 (3d Cir. 1999) (New Jersey law) (holding that a policyholder must fill

any gap in coverage caused by its settlement with underlying insurer for less than the settled insurer's actual policy limits before excess coverage must respond and that in order to avoid a possible double recovery, excess insurer entitled to set-off full amount of the limits of the underlying policies despite insured's allocation of lesser amount to the site at issue); *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1453-54 (3d Cir. 1996) ("settlement with the primary insurer functionally 'exhausts' primary coverage . . . though by settling the policyholder loses any right to coverage of the difference between the settlement amount and the primary policy's limits"—non-settling excess insurers entitled to set-offs[3]); *Zeig v Massachusetts Bonding & Ins. Co.*, 23 F.2d 665, 666 (2d Cir. 1928) (when a policyholder settles with an underlying insurer for less than the policy limits, the excess insurer is liable only for the portion of the loss exceeding the actual limits of the underlying policies); *Union Indem. Ins. Co. v. Certain Underwriters at*

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[3] GenCorp urges that in *Koppers*, the set-off for settled underlying policies was done on a *pro rata* basis which was less than the full limits of the settled policies. (GenCorp Br. 55 n.13.) But in *Koppers*, the *pro rata* set-off was applied only to those settled policies that covered periods before and after the period covered by the policies issued by defendant excess insurers. *Koppers*, 98 F.3d at 1455. For those settled underlying policies that covered the same period as the period covered by the policies of the defendant excess insurers, the court ordered a set-off in the full amount of the underlying policy limits. *Id.* Furthermore, in *Koppers*, unlike the case at bar, the insured established liabilities far in excess of the limits of the settled underlying policies covering the same period as the excess policies. *See* District Court decision after remand, *Koppers Co., Inc. v. Certain Underwriters at Lloyd's, London*, No. 85-2136, 1997 U.S. Dist. LEXIS 16123, at *9-10 (W.D. Penn. June 23, 1997).

*Lloyd's*, 614 F. Supp. 1015, 1017 (S.D. Tex. 1985) (explaining that an excess insurer's obligations do not begin until the policyholder's loss exceeds the applicable limits of the primary policy); *Siligato v. Welch*, 607 F. Supp. 743, 747 (D. Conn. 1985) (stating that "Allstate's liability cannot be increased by the fact, if true, that the present value of [the primary insurer's] settlement agreement did not equal its $300,000 coverage."); *Gould, Inc. v. Arkwright Mut. Ins. Co.*, No. 3 CV-92-403, 1995 WL 807071, at *3 (M.D. Pa. Nov. 8, 1995) (observing that "an excess insurer has no rational interest in whether the insured collected the full amount of the primary policies, so long as it was only called upon to pay such portion of the loss . . . in excess of the limits of those policies."); *Drake v. Ryan*, 514 N.W.2d 785, 787, 789 (Minn. 1994) (holding that excess insurer over a $30,000 primary policy should be liable only if the judgment against the insured was in excess of $30,000, even though primary insurer paid only $20,000 in settlement); *Teigen v. Jelco of Wis., Inc.*, 367 N.W.2d 806, 810 (Wis. 1985) (holding that even though primary insurer settled with insured for less than primary policy limit, excess insurer would be credited with full amount of the policy limits if judgment exceeded those policy limits).

Nevertheless, the United Policyholders' *amicus* brief claims that ignoring GenCorp's settlements with the underlying insurers is permitted by three decisions. (United Br. 12-18.) However, as the district court noted, *GenCorp*, 297 F. Supp.

2d at 1001-05, none of these cases support the inequitable result that GenCorp and its *amici* seek here. Most importantly, none of these cases involves the effect of an insured's settlement with all of its underlying insurers in a case where the insured is unable to demonstrate that it sustained a loss in excess of those limits. Each case is further distinguishable as follows:

1. *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, No. 82 CIV. 7327, 1997 WL 251548 (S.D. N.Y. May 13, 1997) (*Squibb I*), on appeal as *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154 (2d Cir. 2001) (*Squibb II*). *Squibb* involved New York law under which some of the underlying insurers who settled actually paid a larger amount than was ultimately determined to be their *pro rata* share of the overall liability. *Squib II*, 241 F.3d at 172. To prevent a "windfall," the court held that the excess carriers would be credited with the actual amounts paid by the primary insurers. *Id.*; *Squibb I*, 1997 WL 251548 at *3. Thus, to the extent *Squibb* is relevant at all, it is contrary to GenCorp's and its *amici's* contention that the settlements by underlying insurers should be ignored.

2. *Insurance Co. of North America v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001). *Kayser-Roth* involved an excess insurer who was guilty of numerous discovery violations and did not negotiate in good faith; accordingly, the Rhode Island court concluded that "[a]lthough a setoff may be applied in an appropriate case, this is not such a case." 770 A.2d at 411-14. No such issues are present here.

Moreover, the excess insurer in *Kayser-Roth* was given credit for the limits of the settled underlying policies. 770 A.2d at 413.

3. *Weyerhauser Co. v. Commercial Union Ins. Co.*, 142 Wash. 2d 654, 15 P.3d 115 (Wash. 2000) (en banc). In this case, the record before the court demonstrated that the insured had sustained losses "greatly exceed[ing]" the settlements from other insurers. *Id.* at 675, 15 P.3d at 127. Moreover, the excess insurer in *Weyerhauser* was given a $500,000 per occurrence set-off reflecting the limits of the underlying policy. *Id.* at 693, 15 P.3d at 136.

### C. The District Court's Decision Does Not Violate Any Public Policy Of The State Of Ohio.

Contrary to GenCorp's and its *amici's* assertions, the district court's decision does not violate any public policy in favor of settlements. (GenCorp Br. 52-54; Ohio Companies Br. 2-3, 24-25; United Br. 12-14.) In the words of the district court, "GenCorp's argument [about settlement] is unpersuasive" and "steps on public policy." *GenCorp*, 297 F. Supp. 2d at 1001. As the district court further noted, GenCorp's and its *amici's* pro-settlement logic would result in penalizing parties who fail to settle, regardless of the merits of the claims. *Id.* Moreover, no policy in favor of settlement can justify a result whereby the Excess Insurers are obligated to indemnify GenCorp for "more than their contracted-for share of GenCorp's liability." *Id.* at 1007.

Furthermore, the rule advocated by GenCorp—settlements with underlying insurers for undisclosed amounts with no effect on the insured's claim against its excess insurers—could actually frustrate settlements. Settlements are more easily achieved when parties understand the exact nature of their risk and the exact amount of their exposure. *See Allstate Insurance Co. v. Dana Corp.*, 759 N.E.2d 1049, 1063 (Ind. 2001). In evaluating their risk and exposure, excess insurers are entitled to rely on the fact that they will not ultimately be obligated for amounts that fall within the coverage and the limits of underlying policies.

### D. The Excess Insurance Policies Were Never Triggered.

While GenCorp and its *amici* raise the issue of "settlement credits" (GenCorp Br. 52; Ohio Companies Br. 3, 13-14; United Br. 12-14), the district court never had to reach that issue. *GenCorp*, 247 F. Supp. 2d at 1008. Rather, the case was decided on the fundamental Ohio law of trigger acknowledged in GenCorp's own brief, *i.e.*, that Excess Insurers' policies are not triggered until the limits of the underlying policies are exhausted. (GenCorp Br. 33.) Again, the district court itself said it best:

> [T]he court does not reach the question of whether Ohio law permits "settlement credits" because it does not need to do so. In settling fully with its primary insurers, GenCorp allocated the liability it accrued during any policy period as broadly as possible among all primary policies in effect during that period. The excess insurers have liability, therefore, only if, after distributing liability as broadly as possible during any primary policy period, the payment limits of any primary policy are exceeded. The defendant excess insurers point to

> the primary policies covering the six sites at issue during the relevant periods and to the estimated, worst-case liabilities which GenCorp accrued at those sites as the result of the dumping and of the spread of waste material. *Even presuming those trigger periods most favorable to GenCorp given the evidence in the record, GenCorp's liabilities at the six sites will not exceed the limits of its primary policy coverage during any policy period.* GenCorp offers no evidence that the defendants' erred in their estimates of the extent of GenCorp's primary coverage, in their estimates of GenCorp's potential liability at the six sites, or in their estimates of the trigger periods most favorable to GenCorp. GenCorp has failed, therefore, to offer even a scintilla of the evidence it must offer to resist defendants' motion for summary judgment.

*GenCorp*, 247 F. Supp. 2d at 1008 (emphasis added).

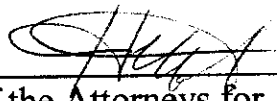
In sum, this case was correctly decided by the district court on the basis of GenCorp's decision to settle with all of its underlying insurers; fundamental trigger and exhaustion principles applicable to the excess policies; GenCorp's admission that it bore the risk of any shortfall between the amount of its settlements with the underlying insurers and the amount of the underlying limits; and GenCorp's failure to demonstrate any loss in excess of the limits of the settled underlying policies. Nothing in that decision conflicts with the Ohio Supreme Court's decision in *Goodyear* or merits any relief on appeal.

## CONCLUSION

For all the reasons set forth herein and in the brief filed on behalf of the Excess Insurers, Certain Underwriters at Lloyd's, London respectfully request that this Court affirm the judgment below.

Respectfully submitted,

LORD, BISSELL & BROOK LLP

By: 

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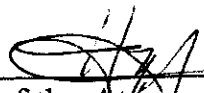
## CERTIFICATE OF COMPLIANCE

Under Rule 32(a)(7)(C)(i), Fed. R. App. P., I certify that this brief complies with the requirements of Rule 32(a)(7)(B)(i), Fed. R. App. P. The brief contains 3,140 words as reported by Microsoft Word 2000.

LORD, BISSELL & BROOK LLP

By: 

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