IN THE SUPREME COURT OF OHIO
NO. 2009-0104

PENNSYLVANIA GENERAL INSURANCE COMPANY, Plaintiff-Appellee, vs. PARK-OHIO INDUSTRIES, INC., et al. Defendants-Appellants.	))))))))))	On Appeal From The Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio Case No. CA-07-090619

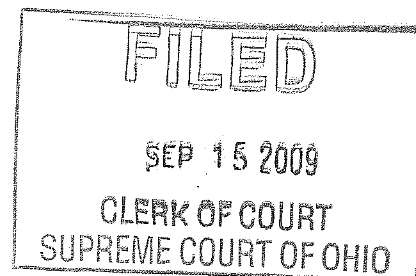
BRIEF OF AMICI CURIAE THE OHIO MANUFACTURERS' ASSOCIATION; BRIDGESTONE AMERICAS TIRE OPERATIONS LLC; DANA HOLDING CORPORATION; DAY-GLO COLOR CORP; GOODRICH CORPORATION; THE GOODYEAR TIRE & RUBBER COMPANY; THE LINCOLN ELECTRIC COMPANY; THE LUBRIZOL CORPORATION; PILKINGTON NORTH AMERICA, INC.; THE PROCTER & GAMBLE COMPANY; RPM, INC.; RESCO HOLDINGS L.L.C.; SHERWIN-WILLIAMS COMPANY; TREMCO INCORPORATED; AND UNITED POLICYHOLDERS, IN SUPPORT OF NEITHER PARTY

Paul A. Rose (0018185) (Attorney of Record)
Sallie Conley Lux (0022477)
Amanda M. Leffler (0075467)
BROUSE McDOWELL
388 S. Main Street, Suite 500
Akron, OH 44311
Telephone: (330) 535-5711
Facsimile: (330) 253-8601
E-mail: prose@brouse.com
slux@brouse.com
aleffler@brouse.com

Attorneys for Amici Curiae The Ohio Manufacturers' Association; Bridgestone Americas Tire Operations LLC; Dana Holding Corporation; Day-Glo Color Corp; Goodrich Corporation; The Goodyear Tire & Rubber Company; The Lincoln Electric Company; The Lubrizol Corporation; Pilkington North America, Inc.; The Procter & Gamble Company; RPM, Inc.; Resco Holdings L.L.C.; Sherwin-Williams Company; Tremco Incorporated; and United Policyholders

John T. McLandrich (0021494)
Thomas S. Mazanec (0009050)
Frank H. Scialdone (0075179)
MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.
100 Franklin's Row
34305 Solon Rd.
Cleveland, OH 44139
Telephone: (440) 248-7906
Facsimile: (440) 248-8861
E-mail: jmclandrich@mrrklaw.com
tmazanec@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendant-Appellant Nationwide Insurance Company



Keven Drummond Eiber (0043746)
Caroline L. Marks (0071150)
BROUSE McDOWELL
1001 Lakeside Avenue, Suite 1600
Cleveland, OH 44114-1151
Telephone: (216) 830-6830
Facsimile: (216) 830-6807
E-mail: keiber@brouse.com
cmarks@brouse.com

Attorneys for Amici Curiae The Ohio Manufacturers' Association; Bridgestone Americas Tire Operations LLC; Dana Holding Corporation; Day-Glo Color Corp; Goodrich Corporation; The Goodyear Tire & Rubber Company; The Lincoln Electric Company; The Lubrizol Corporation; Pilkington North America, Inc.; The Procter & Gamble Company; RPM, Inc.; Resco Holdings L.L.C.; Sherwin-Williams Company; Tremco Incorporated; and United Policyholders

Stephen F. Gladstone (0012128)
Brendan M. Gallagher (0080663)
FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230
Telephone: (216) 515-1660
Facsimile: (216) 515-1650
E-mail: sgladstone@frantzward.com
bgallagher@frantzward.com

Laura A. Foggan
Gregory J. Langlois
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7207
E-mail: lfoggan@wileyrein.com
glanglois@wileyrein.com

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

Richard M. Garner (0061734)
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, OH 44114-2654
Telephone: (216) 348-1700
Facsimile: (216) 621-0602
E-mail: rgarner@davisyoung.com

Elaine Whiteman Klinger
CHRISTIE, PABARUE, MORTENSEN & YOUNG, P.C.
1880 JFK Boulevard, Tenth Floor
Philadelphia, PA 19103
Telephone: (215) 587-1600
Facsimile: (215) 587-1699
Email: ewklinger@cpmy.com

Michael R. Stavnicky (0063726)
SINGERMAN, MILLS, DESBERG & KAUNTZ CO. L.P.A.
3401 Enterprise Parkway, Suite 200
Beachwood, OH 44122
Telephone: (216) 292-5807
E-mail: mstavnick@smdklaw.com

Counsel for Plaintiff-Appellee Pennsylvania General Insurance Company

Paul J. Schumacher (0014370)
Timothy J. Fitzgerald (0042734)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Telephone: (216) 241-5310
Facsimile: (216) 241-1608
E-mail: schumacher@gallaghersharp.com
tfitzgerald@gallaghersharp.com

Rebecca L. Ross
TROUTMAN SANDERS LLP
55 West Monroe Street, Suite 3000
Chicago, IL 60603-5758
Telephone: (312) 759-1921
Facsimile: (773) 877-3733
E-mail: becky.ross@troutmansanders.com

Kathleen M. Sullivan
Jane M. Byrne
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
E-mail: kathleensullivan@quinnemanuel.com
janebyrne@quinnemanuel.com

Counsel for Defendant-Appellant Continental Casualty Company

TABLE OF CONTENTS

I. INTEREST OF AMICI CURIAE 1

II. INTRODUCTION AND SUMMARY 2

III. STATEMENT OF THE CASE AND FACTS 4

IV. LAW AND ARGUMENT 8

A. CONTINENTAL'S FIRST IMPROPERLY TENDERED PROPOSITION OF LAW 8

1. This Court Should Decline to Address Continental's First Newly-Tendered Proposition of Law, as It Is Not Properly Before this Court 8

a. This Court Has Repeatedly Declined to Address an Issue or Proposition of Law that an Appellant Failed to Raise in its Memorandum in Support of Jurisdiction 8

b. Continental Improperly Has Waited until its Merit Brief to Ask this Court to Overrule *Goodyear* 9

i. Continental Confined its Memorandum in Support of Jurisdiction to Insurer-Contribution Issues and Presumed the Continued Viability of *Goodyear* as the Law of Ohio on Allocation 10

ii. Continental Has Pursued a Different, Contradictory Proposition of Law in its Merit Brief 11

iii. Continental Seeks to Eviscerate the Rule of Law Adopted in *Goodyear*, which Directly Implicates Important Policyholder Interests, in a Case *Where no Policyholder is a Party* 13

2. Continental Waived its Present Challenge to *Goodyear* by Failing to Raise the Issue Below 14

3. *Goodyear* was Correctly Decided, and it would be Improper to Overrule it Herein 15

a. Continental Inaccurately Contends that *Goodyear*'s All Sums Approach Has Fallen into Disfavor Nationally 15

b. The Standard for Overruling Ohio Supreme Court Precedent is Stringent 19

c. Even if it Could Properly be Considered, Continental's Challenge to *Goodyear* would Satisfy none of the Requirements of *Galatis* 23

i. *Goodyear* was Correctly Decided 23

ii. There has been no Change in Circumstance that would Warrant Revisiting *Goodyear* 31

iii. *Goodyear* is neither Impractical nor Unworkable 31

iv. Abandoning *Goodyear* as a Precedent would Create Hardship. 32

B. CONTINENTAL'S "ALTERNATIVE" IMPROPERLY TENDERED PROPOSITION OF LAW 33

1. This Court Should Decline to Address Continental's "Alternative" Newly-Tendered Proposition of Law, as it is not Properly Before this Court. 33

2. Continental's "Alternative" Proposition Should be Rejected as a de facto Attempt to Overrule *Goodyear* 34

3. Continental's "Alternative" Proposition Should be Rejected as Seeking an Advisory Opinion. 37

V. <u>CONCLUSION</u> 38

CERTIFICATE OF SERVICE 40

TABLE OF AUTHORITIES

Cases

Aerojet-Gen. Corp. v. Transport Indemn. Co. (1997), 17 Cal.4th 38, 70 Cal.Rptr.2d 118, 948 P.2d 909 .... 16, 30

Aetna Cas. & Sur. Co. v. Commonwealth of Ky. (Ky.2005), 179 S.W.3d 830 17

Al Minor & Assoc., Inc. v. Martin, 117 Ohio St.3d 58, 2008-Ohio-292, 881 N.E.2d 850 .... 8, 13

Allstate Ins. Co. v. Dana Corp. (Ind. 2001), 759 N.E.2d 1049 16

Am. Natl Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc. (1998), 134 Wash.2d 413, 951 P.2d 250 16

Am. Physicians Ins. Exchange v. Garcia (Tex.1994), 876 S.W.2d 842 .... 16, 18

Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co. (2003), 275 Kan. 698, 71 P.3d 1097 17

Blue Cross & Blue Shield Mut. of Ohio v. Hrenko (1995), 72 Ohio St.3d 120, 647 N.E.2d 1358 24

Boston Gas Co. v. Century Indemn. Co. (2009), 454 Mass. 337, 910 N.E.2d 290 .... 17, 18

California Ins. Co. v. Stimson Lumber Co. (May 26, 2004), D.Or. No. Civ. 01-514-HA, unreported, 2004 WL 1173185 17

California v. Continental Ins. Co. (Cal.App.2009), 88 Cal.Rptr.3d 288 18

Carter-Wallace, Inc v. Admiral Ins. Co. (1998), 154 N.J. 312, 712 A.2d 1116 17

Century Indemn. Co. v. Golden Hills Builders, Inc. (2002), 348 S.C. 559, 561 S.E.2d 355 16

Cleveland Bar Assn. v. CompManagement, Inc., 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95 19

CNA Lloyds of Texas v. St. Paul Ins. Co. (Tex.App.1995), 902 S.W.2d 657 18

Commercial Cas. Ins. Co. v. Knutsen Motor Trucking Co. (8th Dist.1930), 36 Ohio App. 241, 173 N.E. 241 26

Commercial Union Ins. Co. v. Sepco Corp. (C.A.11, 1985), 765 F.2d 1543 .... 17, 27

Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co. (2002), 98 N.Y.2d 208, 746 N.Y.S.2d 622, 774 N.E.2d 687 17

Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc., 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701 .... 9, 13

CSX Transp., Inc. v. Admiral Ins. Co. (Nov. 6, 1996), M.D.Fla. No. 93-132-CIV-J-10, unreported, 1996 WL 33569825 16

Davidson v. Motorists Mut. Ins. Co. (2001), 91 Ohio St.3d 262, 744 N.E.2d 713 14

Doe v. Shaffer (2000), 90 Ohio St.3d 388, 738 N.E.2d 1243 31

Domtar, Inc. v. Niagara Fire Ins. Co. (Minn.1997), 563 N.W.2d 724 17

Dow Corning Corp. v. Continental Cas. Co., Inc. (Oct. 12, 1999), Mich.App. No. 200143, unreported, 1999 WL 33435067 17

Eaton Corp. v. Aetna Cas. & Sur. Co. (Aug. 12, 1994), Cuyahoga C.P. No. 189068 26

Egan v. Natl. Distillers & Chem. Corp. (1986), 25 Ohio St.3d 176, 25 O.B.R. 243, 495 N.E.2d 904 38

Emhart Industries, Inc. v. Century Indemn. Co. (C.A. 1, 2009), 559 F.3d 57.........................16, 18

EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's (2007), 156 N.H. 333, 934 A.2d 517 17

Estate of Holycross, 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805 19

Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2 ....9, 13

Fortner v. Thomas (1970), 22 Ohio St.2d 13, 51 O.O.2d 35, 257 N.E.2d 371 37

GenCorp, Inc. v. AIU Ins. Co. (N.D.Ohio 2000), 104 F.Supp.2d 740..27

George H. Olmsted & Co. v. Metro. Life Ins. Co. (1928), 118 Ohio St. 421, 191 N.E. 276 18

Glidden Company v. Lumbermens Mut. Cas. Co. (Nov. 17, 2000), N.D.Ohio No. 1:00 CV 1614 27

Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099 15

Goodrich Corp. v. Commercial Union Ins. Co. (June 30, 2008), 9th Dist. Nos. 23585, 23586, 2008-Ohio-3200 ....27, 28, 39

Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 .... passim

Harasyn v. Normandy Metals, Inc. (1990), 49 Ohio St.3d 173, 551 N.E.2d 962..........................31

Hedges v. Nationwide Mut. Ins. Co., 109 Ohio St.3d 70, 2006-Ohio-1926, 846 N.E.2d 16 19

Hercules, Inc. v. AIU Ins. Co. (Del.2001), 784 A.2d 481 16

Holyoke Mut. Ins. Co. v. Cherokee Ins. Co. (1989), 192 Ga.App. 757, 386 S.E.2d 524 30

Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd. (1992), 64 Ohio St.3d 657, 597 N.E.2d 1096 24

In re Timken Mercy Med. Ctr. (1991), 61 Ohio St.3d 81, 572 N.E.2d 673 ....9, 13

In re Uninsured & Underinsured Motorist Coverage Cases, 100 Ohio St.3d 302, 2003-Ohio-5888, 798 N.E.2d 1077 21

J.H. France Refractories Co. v. Allstate Ins. Co. (1993), 534 Pa. 29, 626 A.2d 502 16

Keene Corp. v. Ins. Co. of N. Am. (C.A.D.C.1981), 667 F.2d 1034, cert. denied (1982), 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 23

King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380 24

Kirchner v. Crystal (1984), 15 Ohio St.3d 326, 15 O.B.R. 452, 474 N.E.2d 275 31

Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co. (C.A.6, 2000), 210 F.3d 672 ....26, 27, 32

Mayor & City Council of Baltimore v. Utica Mut. Ins. Co. (2002), 145 Md.App. 256, 802 A.2d 1070 17

Mid-Am. Fire & Cas. Co. v. Heasley, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142 19

Millennium Chemicals, Inc. v. Lumbermens Mut. Cas. Co. (Mar. 13, 2001), N.D.Ohio No. 1:00 CV 1862 27

Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co. (Del.1994), 652 A.2d 30 17

Moorman v. Prudential Ins. Co. of Am. (1983), 4 Ohio St.3d 20, 4 O.B.R. 17, 445 N.E.2d 1122 25

Morton Thiokol, Inc. v. Aetna Cas. & Sur. Co. (Dec. 28, 1988), Hamilton C.P. No. A-8603799, 1988 WL 1520456 26

Motorists Mut. Ins. Co. v. Tomanski (1971), 27 Ohio St.2d 222, 56 O.O.2d 133, 271 N.E.2d 924 25

Munchick v. Fid. & Cas. Co. of New York (1965), 2 Ohio St.2d 303, 31 O.O.2d 569, 209 N.E.2d 167 24

Murphy Oil USA, Inc. v. United States Fid. & Cas. Co. (Feb. 21, 1995), Ark.App. No. 91-439-2 16

N. British & Mercantile Ins. Co. v. Markovich (8th Dist.1955), 103 Ohio App. 42, 44, 3 O.O.2d 138, 126 N.E.2d 810 37

Natl. Fire Ins. Co. v. Dennison (1916), 93 Ohio St. 404, 113 N.E. 260 30

Norfolk S. Corp. v. California Union Ins. Co. (La.App.2003), 859 So.2d 167 17

Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co. (Lucas C.P.1995), 74 Ohio Misc.2d 183, 660 N.E.2d 770 ....25, 27, 30

Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co. (D.D.C.1984), 597 F.Supp. 1515 26

Park-Ohio Industries, Inc. v. Gen. Acc. Ins. Co., Cuyahoga C.P. No. CV-03-511015 ....5, 7

Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc. (8th Dist. 2008), 179 Ohio App.3d 385, 2008-Ohio-5991, 902 N.E.2d 53 ....5, 8

Plastics Eng. Co. v. Liberty Mut. Ins. Co. (2009), 315 Wis.2d 556, 2009 WI 13, 759 N.W.2d 613 ....16, 18

Polk v. Landings of Walden Condom. Ass'n. (Aug. 5, 2005), 11th Dist. No. 2004-P-0075, 2005-Ohio-4042 28

Public Serv. Co. of Colorado v. Wallis & Cos. (Colo.1999), 986 P.2d 924 17

Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty. (1963), 175 Ohio St. 179, 23 O.O.2d 462, 192 N.E.2d 47 15

Rhoades v. Equitable Life Assur. Soc. of the U.S. (1978), 54 Ohio St.2d 45, 8 O.O.3d 39, 374 N.E.2d 643 24

Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116 .... 20, 21, 22, 32

Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co. (2003), 264 Conn. 688, 826 A.2d 107 17

Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i, Ltd. (1994), 76 Hawaii 277, 875 P.2d 894 .... 16, 17

Sharon Steel Corp. v. Aetna Cas. & Sur. Co. (Utah 1997), 931 P.2d 127 17

Shay v. Shay, 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591 19

Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London (N.D.Ohio 1993), 813 F.Supp. 576 26

Shoemaker v. Crawford (10th Dist.1991), 78 Ohio App.3d 53, 603 N.E.2d 1114 30

State ex rel. Advanced Metal Precision Prods. v. Indus. Comm. of Ohio, 111 Ohio St.3d 109, 2006-Ohio-5336, 855 N.E.2d 435 .... 20, 22

State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm. of Ohio, 112 Ohio St.3d 85, 2006-Ohio-6504, 858 N.E.2d 351 19

State ex rel. Internatl. Paper v. Trucinski, 106 Ohio St.3d 203, 2005-Ohio-4557, 833 N.E.2d 728 .... 19, 21

State ex rel. Quarto Mining Co. v. Foreman (1997), 79 Ohio St.3d 78, 679 N.E.2d 706 14

State ex rel. Stevens v. Indus. Comm. of Ohio, 110 Ohio St.3d 32, 2006-Ohio-3456, 850 N.E.2d 55 .... 20, 22

State ex rel. Yates v. Abbott Laboratories, Inc., 95 Ohio St.3d 142, 2002-Ohio-2003, 766 N.E.2d 956 14

State v. Boswell, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422 .... 8, 13

State v. Williams, 103 Ohio St.3d 112, 2004-Ohio-4747, 814 N.E.2d 818 .... 19, 21, 26

Stryker Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA (July 1, 2005), W.D.Mich. No. 4:01-CV-157, unreported, 2005 WL 1610663 17

Texas Property & Cas. Ins. Guar. Assn. v. Southwest Aggregates, Inc. (Tex.App.1998), 982 S.W.2d 600 18

Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co. (2003), 275 Kan. 698, 71 P.3d 1097 17

Towns v. N. Sec. Ins. Co. (Vt. 2008), 964 A.2d 1150 17

Transworld Airlines, Inc. v. Associated Aviation Underwriters (Oct. 20, 1998), Mo.Cir.Ct.No. 942-01848A 17

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 .... passim

Wheeling Pittsburgh Corp. v. Am. Ins. Co., (Oct. 18, 2003), W.Va.Cir.Ct.No. 93-C-340, unreported, 2003 WL 23652106 16

Whitaker v. M.T. Automotive, Inc., 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825 .... 9, 13

Williamson v. Rubich (1960), 171 Ohio St. 253, 12 O.O.2d 379, 168 N.E.2d 876 .... 9, 13

Zurich Ins. Co. v. Raymark Industries, Inc. (1987), 118 Ill.2d 23, 112 Ill.Dec. 684, 514 N.E.2d 150 .... 16, 17

Rules

S.Ct.Prac.R. II(2)(A)(1)(a) 8

S.Ct.Prac.R. III(1)(B) 3, 8, 12

S.Ct.Prac.R. III(6) 8

S.Ct.Prac.R. VI(2)(B)(4) 8

S.Ct.Prac.R. XII(A) 9

Treatises

Zuckerman & Raskoff, *Environmental Insurance Litigation: Law and Practice Current through the November 2008 Update*, 2 Envtl. Ins. Litig.: L. and Prac. §10.8 (2008) 16

I. INTEREST OF AMICI CURIAE

The Ohio Manufacturers' Association ("OMA") is a statewide association of approximately 1,600 manufacturing companies, which collectively employ the majority of the 610,000 men and women who work in manufacturing in the state of Ohio. The United Policyholders ("UP") is a non-profit corporation founded in 1991 to educate the public, the judiciary, and policyholders. Both the OMA and the UP share the interests in this case of the individual amici curiae parties described below.

The remaining amici curiae are companies engaged in various industries in Ohio. They are incorporated in and/or conduct substantial business operations in the state. As a result, they rely significantly upon general liability insurance policies in Ohio to provide coverage for their various risks and, correspondingly, upon the body of Ohio law that protects their insurance rights.

One of their long-standing, fundamental insurance rights has been attacked in this case—the right, in the case of "long-tail" claims involving bodily injury or property damage, to choose from among their various triggered policies to pay legitimate claims. A policyholder's ability to choose from among its purchased policies was confirmed most recently by this Court in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 ("*Goodyear*"). Because this right has been challenged here, these amici curiae have a substantial interest in the outcome of this case. Their interest is heightened by the fact that no policyholder is a party to this appeal. Given this circumstance, but for the participation of these amici curiae, this Court would be faced with the prospect of considering this attack upon policyholder rights without the benefit of any policyholder perspective.

II. INTRODUCTION AND SUMMARY

This is an extraordinary appeal. Appellants are attempting to eviscerate long-established, fundamental rights of Ohio policyholders, and they make this attempt in a case in which no policyholder is a party. Further, the principal right they now challenge, quite remarkably, is one they both endorsed in their memoranda in support of jurisdiction and incorporated into the very proposition of law they asked this Court to adopt as syllabus law. Their dramatic reversal of field not only disregards much substantive law, but it does violence to this Court's rules of practice and greatly dishonors Ohio's bedrock principle of stare decisis.

Seven years ago, this Court correctly decided *Goodyear*. In so doing, it confirmed the well-established principle of Ohio law that a policyholder with a claim triggering multiple liability policies could choose to recover under any of its policies providing coverage for all sums the policyholder was legally obligated to pay, up to the policy limits. At the time that decision was rendered, there was a substantial division on the allocation issue among jurisdictions throughout the country, with a small majority favoring Ohio's all sums approach. Many additional jurisdictions now have addressed the issue, and the balance of authority nationally is unchanged. In addition, as had been the case at the time *Goodyear* was decided, the recent case law trend favors all sums.

This Court also recognized in *Goodyear* that an insurer chosen by the policyholder could assert contribution rights against other "applicable" coverage "when possible." Id. at ¶ 11. The present case was to have been this Court's first opportunity in the seven years since *Goodyear* was decided to build on this area of jurisprudence by considering the extent of such contribution rights. As would be expected in a contribution suit, only insurance companies are parties to this case. The policyholder was dismissed long ago at the trial court level.

The two appellant insurance companies presented an identical proposition of law for the Court to consider adopting herein as syllabus law. S.Ct.Prac.R. III(1)(B) and VI(2)(B)(4). That proposition expressly endorsed *Goodyear* as the law of Ohio:

> No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 unless its policy is "applicable." In order for the policy to be "applicable" to a claim, there must be full compliance with all terms and conditions of coverage in the non-targeted insurer's policy.

(Continental's Juris. Memo., pp. 8-9; Nationwide's Juris. Memo., p. 8).

Similarly, in the briefing on jurisdiction in this case, all insurers acknowledged the viability of *Goodyear*. There was not a hint that *Goodyear* would be challenged as controlling law. In fact, Pennsylvania General Insurance Company ("Penn General") stated in its Opposition to Jurisdiction, "No one questions the application or authority of *Goodyear* in this case." (Penn General's Juris. Memo., p. 1).

Now that the case has been accepted for review, however, the insurer appellants have taken a completely different approach, arguing, contrary to the very proposition of law they had convinced this Court to accept for review, that *Goodyear* should be reversed. Even more extraordinarily, they have attempted this Trojan Horse exercise to eviscerate a critical right of Ohio policyholders in a case in which no policyholder is a party. It is not the practice of this Court, however, to disregard stare decisis and reverse prior decisions so as to deprive established legal rights to classes of interested parties in cases in which no such parties are directly participating. It is highly improper for the appellants to ask this Court to do so now, and the Court should reject their request.

The most comprehensive attack in this case on policyholder rights is contained in the merit brief of appellant Continental Casualty Company ("Continental"). To simplify the analysis herein, these amici curiae will respond to the key issues as they are addressed in that brief.[1]

III. STATEMENT OF THE CASE AND FACTS

The facts of this case most relevant to the concerns of policyholders in Ohio are those demonstrating the actual impact of the *Goodyear* decision upon the history of this case. In confirming Ohio's use of the all sums approach, this Court in *Goodyear* noted that the approach not only followed the "national majority rule" but also "promote[d] economy* * *." *Goodyear*, 2002-Ohio-2842, at ¶ 10-11. That evaluation has been confirmed emphatically by this case.

The underlying claimant, Mr. DiStephano, contracted mesothelioma from his exposure to asbestos while working on furnace coils manufactured by the policyholder's predecessor, Ohio Crankshaft, in California in the early 1960s. (Supp. pp. 57-79 and p. 48 at ¶ 1-3). He filed suit against Park-Ohio Industries, Inc. ("Park-Ohio"), the Policyholder, in March of 2002, and that suit was resolved and his claim was paid in full with remarkable speed, less than seven months

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[1] In their merit briefs, the two appellants present somewhat inconsistent attacks upon *Goodyear*. Nationwide argues that *Goodyear* did not go far enough in protecting a policyholder's right to choose among triggered policies and that the Court in that case should have prohibited chosen insurers from seeking contribution so as to protect even more thoroughly a policyholder's right to select coverage for a claim. (Nationwide's Merit Brief, pp. 20-21). That contention does not appear to challenge policyholder rights, and these amici curiae, accordingly, do not address it herein. Continental, in contrast, argues that *Goodyear* errs in permitting the policyholder any right at all to choose. (Continental's Merit Brief, pp. 1-3, 11-39). The amicus curiae brief filed on behalf of insurance industry interests by the Complex Insurance Claims Litigation Association ("CICLA") largely incorporates and alternatively states the arguments of Continental. Penn General has not yet filed its merit brief, which is due to be filed on the same date as this brief, and these amici curiae, accordingly, do not yet know the positions it will take. Although Penn General relied extensively upon *Goodyear* both in arguing the case below and in opposing jurisdiction here, it is possible that it also will completely change course, attempting to take advantage of a perceived opportunity to extinguish an important policyholder right in the context of a case in which no policyholder is a party. To any extent that Penn General might choose to attack the *Goodyear* decision of this Court, however, these amici curiae hope this brief will assist the Court in evaluating any such attacks.

later, in October of 2002. (Id.; Supp. pp. 35-36). Park-Ohio filed a coverage action against Penn General in September of 2003. *Park-Ohio Industries, Inc. v. Gen. Acc. Ins. Co.*, Cuyahoga C.P. No. CV-03-511015. That action is different from, although related to, the instant case. The record in this case, however, suggests that Park-Ohio sued only Penn General in that related case because at the time Park-Ohio filed that action it had not yet located policies issued by any other insurer. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.* (8th Dist. 2008), 179 Ohio App.3d 385, 2008-Ohio-5991, 902 N.E.2d 53, at ¶ 1-6. That action also was resolved relatively quickly and without trial, through Penn General's settlement payment of the full amount of the insurance claim in November of 2005. Id. at ¶ 14.

Penn General sought contribution from the other insurers, Travelers Casualty & Surety Company ("Travelers"), Nationwide Insurance Company ("Nationwide"), and Continental, the identities of which Park-Ohio by then had discovered. Following the typical practice in Ohio both before and after *Goodyear*, Travelers agreed to pay a contribution share to Penn General without judicial determination of its contribution obligation. Atypically, however, Nationwide and Continental were unable to come to an agreement with Penn General, leading to the adjudication which has presented this Court with its first opportunity in seven years to further define the insurer contribution rights and obligations it referenced in *Goodyear.*

The rarity of this contribution action is noteworthy for purposes of the issues discussed below, but the adjudicative history of this case is just as noteworthy. The parties herein did not engage in protracted, expensive contribution litigation that served to drain unduly the resources of the trial court. Rather, the contribution rights and obligations at issue were resolved without trial, upon submission of stipulated facts, stipulated exhibits, and briefs. (Supp. p. 35).

All told, then, the history of this dispute includes a remarkably rapid resolution of an underlying fatal disease claim, an expeditious and complete resolution of a policyholder's coverage rights, a partial informal resolution of corresponding contribution claims among insurers, and a determination of the remaining contribution claims without trial and upon a stipulated record. Amici curiae would be hard pressed to envision a course of events that would better vindicate this Court's assessment that the all sums approach would serve the interests of "economy." See *Goodyear*, 2002-Ohio-2842, at ¶ 11.

Most of the remaining facts of this dispute concern matters relevant only to the equitable determination of the contribution rights and obligations between or among insurers, rather than the rights of policyholders under *Goodyear*. Amici curiae note, however, that the insurer appellants and their supporting insurance industry amicus curiae party make factual assertions that do not appear to be established by the record. They suggest throughout their briefs that the policyholder, Park-Ohio, failed to cooperate with Penn General by refusing to provide it with information the policyholder possessed regarding the identities of other insurers. (See, e.g., Nationwide's Merit Brief, p. 15; Continental's Merit Brief, pp. 7-8; CICLA's Amicus Brief, pp. 2-3). Although the record is decidedly incomplete in regard to the policyholder's activities, as might be expected in a case in which the policyholder is not a party, the limited record that exists indicates that Park-Ohio had no knowledge of the implicated insurers when it was sued by Mr. DiStephano, that it sued the first such insurer it was able to identify (Penn General), and that it knew of no other insurers at that time. *Pennsylvania Gen. Ins. Co.*, 2008-Ohio-5991, at ¶ 1-6. The limited record also indicates that Park-Ohio disclosed the additional insurers, including appellants herein, to Penn General after it discovered their identities during the course of Park-Ohio's related coverage litigation. (Id.; Supp. pp. 51-52).

Contrary to the assertions of the insurers, however, Park-Ohio made that disclosure voluntarily following its discovery of these additional insurers. The trial and appellate court decisions in this case contain an indication, which would be inaccurate, to the effect that in its related case Park-Ohio may have withheld from Penn General information regarding its other insurers, and that such information was produced by Park-Ohio only after Penn General moved to compel Park-Ohio to produce this information and the trial court in that related action ordered it to do so. This impression appears to have developed in this case after Park-Ohio had been dismissed and, accordingly, when it had no opportunity to address such matters. This Court, however, can take judicial notice of the docket in Park-Ohio's related case (*Park-Ohio Industries, Inc. v. Gen. Acc. Ins. Co.*, Cuyahoga C.P. No. CV-03-511015), which confirms that no motion to compel was ever filed against Park-Ohio and that no order compelling production was ever issued. Park-Ohio, it appears, produced information regarding its other insurers voluntarily after locating it, consistent with its own interests.[2]

Finally, and perhaps most significantly, it is undisputed that Penn General agreed to pay in settlement Park-Ohio's full insurance claim against it. This further suggests that Park-Ohio did not improperly withhold any information in that related case. If Penn General believed that Park-Ohio had been prejudicially withholding information in that related case in violation of a duty to cooperate, it had the option of not paying the claim on that basis. It did not do so, however, opting instead to pay the claim in full. Its decision to pay indicates that there had been no failure to cooperate by Park-Ohio. Alternatively, if Penn General paid the claim in the face of

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[2] The liberties appellants have taken with the facts of Park-Ohio's knowledge, a non-party herein, during the course of a separate, albeit related case, demonstrate the dangers a court would face in attempting to adjudicate rights of non-parties, such as policyholders, in respect of this case. This circumstance also confirms the wisdom consistently employed by this Court and others throughout Ohio in refusing to do so.

any actual failure by its policyholder to cooperate, it now merely would find itself in a circumstance of its own creation.

IV. LAW AND ARGUMENT

A. CONTINENTAL'S FIRST IMPROPERLY TENDERED PROPOSITION OF LAW

1. This Court Should Decline to Address Continental's First Newly-Tendered Proposition of Law, as It Is Not Properly Before this Court.

a. This Court Has Repeatedly Declines to Address an Issue or Proposition of Law that an Appellant Failed to Raise in its Memorandum in Support of Jurisdiction.

To perfect a discretionary appeal to the Supreme Court of Ohio, the appellant must file a notice of appeal and memorandum in support of jurisdiction. S.Ct.Prac.R. II(2)(A)(1)(a). The memorandum in support of jurisdiction must contain "proposition(s) of law stated in syllabus form" and a thorough explanation of why a case is of public or great general interest. S.Ct.Prac.R. III(1)(B). The propositions of law should be able to "serve as a syllabus for the case if appellant prevails." S.Ct.Prac.R. VI(2)(B)(4). Based on the jurisdictional memoranda, this Court determines whether to accept particular propositions of law for consideration on their merits. S.Ct.Prac.R. III(6).

Due to the importance of the jurisdictional memoranda and the arguments asserted therein, this Court has refused time and again to address as not being properly before the Court issues that an appellant fails to raise in its memorandum in support of jurisdiction. See, e.g., *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, at ¶ 11 (declining to address an argument concerning res judicata because appellant failed to raise the issue in any proposition of law and did not even mention res judicata in its memorandum in support of jurisdiction); *Al Minor & Assoc., Inc. v. Martin*, 117 Ohio St.3d 58, 2008-Ohio-292, 881 N.E.2d 850, at ¶ 9 (declining to decide a proposition of law containing an issue never raised in

appellant's jurisdictional memorandum because the Court "never agreed to consider it"); *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, at ¶ 9, fn. 2 (deciding not to address an issue that appellant failed to raise in his jurisdictional memorandum); *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, 835 N.E.2d 701, at ¶ 5, fn. 1 (refraining from addressing an issue not raised in appellant's jurisdictional memorandum and upon which the Court did not accept jurisdiction); *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, at ¶ 18 (declining to address an argument because appellant failed to raise it or set forth any proposition of law regarding it in its memorandum in support of jurisdiction); *In re Timken Mercy Med. Ctr.* (1991), 61 Ohio St.3d 81, 87, 572 N.E.2d 673 (declining to rule on an issue as not properly before the Court where appellant did not raise or even allude to it in its memorandum in support of jurisdiction). Moreover, "where a case presented on the merits is not the same case as presented on motion to certify, the appeal may be dismissed as being in this court on a motion improvidently allowed." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 259, 12 O.O.2d 379, 168 N.E.2d 876; see, generally, S.Ct.Prac.R. XII(A)(governing disposition of an appeal improvidently accepted).

b. Continental Improperly Has Waited until its Merit Brief to Ask this Court to Overrule *Goodyear*.

Continental has engaged in a bait-and-switch tactic that should not be, and historically has not been, countenanced by this Court. As explained in detail below, Continental convinced this Court that this case involved a question of public or great general interest by asserting a proposition of law premised on the continued viability of *Goodyear* as the law of Ohio. Nowhere in its memorandum in support of jurisdiction does Continental (or any other appellant) ask this Court to overrule its decision in *Goodyear*. After this Court accepted jurisdiction,

however, Continental abandoned that proposition of law in its merit brief, addressing, instead, a proposition of law that directly contradicts the one it convinced this Court to review.[3]

Continental, in other words, has taken advantage of this Court's acceptance of this appeal to request that it overrule *Goodyear*, although Continental neither raised this argument in a proposition of law nor mentioned this issue in its jurisdictional memorandum. Even more troubling than Continental's assertion of its stealth proposition of law, however, is Continental's use of it as the current cornerstone of its appeal. Further, Continental makes this challenge to the *Goodyear* decision, which protects policyholder interests, in a case where no party represents policyholder interests. All of these factors render this case a highly improper vehicle for revisiting *Goodyear*. This Court, therefore, should decline to consider Continental's newly-tendered proposition of law.

i. Continental Confined its Memorandum in Support of Jurisdiction to Insurer-Contribution Issues and Presumed the Continued Viability of *Goodyear* as the Law of Ohio on Allocation.

In its memorandum in support of jurisdiction, Continental requested that this Court accept jurisdiction over three propositions of law:

> Proposition of Law No. I: No claim for contribution can be made against a non-targeted insurer pursuant to *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842 unless its policy is "applicable." In order for the policy to be "applicable" to a claim, there must be full compliance with all terms and conditions of coverage in the non-targeted insurer's policy.

> Proposition of Law No. II: To obtain contribution, a targeted insurer bears the burden to do what is necessary to secure contribution from other applicable insurance carriers, which includes the duty to diligently ascertain the identity of other insurers and to put those insurers on timely notice of the claim.

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[3] Continental also advanced in its merit brief an alternative proposition of law, which also substantially challenged this Court's decision in *Goodyear*. These amici curiae address that alternative challenge in Section IV(B), below.

Proposition of Law No. III: Since contribution between insurers is based upon principles of equity, a trial court's decision is reviewed for an abuse of discretion. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court where there is some competent, credible evidence supporting the trial court's judgment.

(Continental's Juris. Memo., p. i). Nationwide requested that this Court accept jurisdiction over three identical propositions of law. (Nationwide's Juris. Memo., p. i). Through these propositions of law, Continental and Nationwide requested that this Court further develop Ohio insurance coverage law by applying *Goodyear* to Penn General's contribution claim against them, thereby further defining the contours of *Goodyear* with respect to insurers' contribution rights.

Notably, Continental's and Nationwide's jurisdictional memoranda neither contained a proposition of law in which they asked that *Goodyear* be overruled nor even hinted at such an argument. The parties, rather, both presumed the continued viability of *Goodyear* and endorsed its holding. Appellee, Penn General, recognized as much in its opposition to the jurisdictional memoranda, stating, "No one questions the application or authority of *Goodyear* in this case." (Penn General's Juris. Memo., p. 1). None of the parties to this appeal, therefore, signaled any intention of challenging the authority of *Goodyear*. Based on the representations contained in these jurisdictional memoranda, this Court accepted jurisdiction of the appeal, but only as to Continental and Nationwide's First Proposition of Law. (Ohio Supreme Court Entry of 5/6/09).

ii. Continental Has Pursued a Different, Contradictory Proposition of Law in its Merit Brief.

After convincing this Court to accept jurisdiction to consider this inter-insurer contribution issue, Continental now improperly attempts to present a wholly new and different

proposition of law, which focuses not on contribution rights between insurers, but on the rights of policyholders:

> Proposition of Law: This Court should overrule the holding in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, which held that an insured may recover "all sums" from a selected insurer that then bears the burden of obtaining contribution from other insurers, and recognize instead the more equitable and workable pro rata approach for allocating liability that has been increasingly adopted in other jurisdictions.

(Continental's Merit Brief, p. 11). This proposition of law (the "*Goodyear* Proposition of Law") contradicts the proposition of law actually accepted by this Court, as it challenges, rather than accepts, the continued viability of *Goodyear*. Incredibly, Continental makes this new proposition of law its principal argument and devotes the vast majority of its 41-page merit brief to it. In fact, any meaningful discussion by Continental of the proposition it actually convinced this Court to accept for review does not begin until page 39 of its 41-page brief.

Continental attempts to gloss over its tactic by asserting that it could not have challenged *Goodyear* in the courts below because those courts did not possess the requisite authority to overrule precedent of this Court. (Continental's Merit Brief, p. 13). This argument, which suffers from various defects discussed below, principally is an exercise in misdirection by Continental, which misses the principal point. Continental had the opportunity to present a challenge to *Goodyear* to *this Court* in its memorandum in support of jurisdiction, but it did not. Continental did not even allude to such an argument, instead accepting and endorsing *Goodyear's* continued viability as the law of Ohio in its jurisdictional memorandum.

Propositions of law serve as the bases for this Court's acceptance of appeals, and they are presented and advocated by appellants to serve as syllabus law in the event that appellants are successful on the merits. See S.Ct.Prac.R. III(1)(B) and VI(2)(B)(4). Because Continental did not challenge the continued viability of *Goodyear* in its jurisdictional memorandum, and in fact

did just the opposite, this Court never agreed to consider, and now should decline to address, this argument, as has been its practice when faced with such situations in the past. See *Boswell,* 2009-Ohio-1577, at ¶ 11; *Al Minor & Assoc., Inc.*, 2008-Ohio-292, at ¶ 9; *Whitaker*, 2006-Ohio-5481, at ¶ 9, fn. 2; *Corporex Dev. & Constr. Mgt., Inc.*, 2005-Ohio-5409, at ¶ 5, fn. 1; *Estate of Ridley*, 2004-Ohio-2629, at ¶ 18; *In re Timken Mercy Med. Ctr.*, 61 Ohio St.3d at 87, 572 N.E.2d 673; *Williamson*, 171 Ohio St. at 259, 12 O.O.2d 379, 168 N.E.2d 876.

iii. Continental Seeks to Eviscerate the Rule of Law Adopted in *Goodyear*, which Directly Implicates Important Policyholder Interests, in a Case *Where no Policyholder is a Party.*

Other reasons further support the dismissal of the *Goodyear* Proposition of Law, including the lack of representation of policyholder interests by any party in this appeal. Because the policyholder in this case settled its insurance claims very early, at the trial court level, the issues decided at the appellate court concerned only contribution rights between various insurers. The policyholder did not file a jurisdictional memorandum here and, in fact, could not have, because it was not a party at the time of this appeal. Even if it had been a party, it very well may not have filed a jurisdictional memorandum, because Continental's and Nationwide's original propositions of law did not implicate any policyholder interests.

Now, Continental attempts to shift the focus of this appeal and seeks to eviscerate an established legal rule so as to severely limit important policyholder rights. Alternatively, it seeks to impose substantial new burdens on policyholders, and it attempts all this in a case in which no policyholder is a party. This is highly improper under the circumstances here, where no member of the interest group potentially affected by a decision is even a party to the appeal. Contrary to Continental's contentions, then, the issues it now seeks to raise concerning *Goodyear* are *not* fairly presented by the record in this case. (Continental's Merit Brief, p. 12). Rather, this case

has lacked the policyholder participation that would have been necessary for a proper development of a record for the consideration of such issues, and it lacks the policyholder participation necessary to address fairly the arguments Continental now attempts to raise.

2. Continental Waived its Present Challenge to *Goodyear* by Failing to Raise the Issue Below.

Even if Continental had properly raised its challenge to *Goodyear* in its jurisdictional memorandum (which it did not), it still would have been appropriate for this Court to decline to revisit *Goodyear*, because the issue of *Goodyear*'s continuing viability was never raised or decided in the courts below. "'Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.'" (Citation omitted.) *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (applying waiver rules to administrative appeals and determining issue of worker's voluntary retirement waived on appeal because it was not raised below). Arguments not raised below are generally deemed waived on appeal. See, e.g., *State ex rel. Yates v. Abbott Laboratories, Inc.*, 95 Ohio St.3d 142, 2002-Ohio-2003, 766 N.E.2d 956, at ¶ 44 ("Claimant * * * did not raise this argument below, and it is therefore waived."); *Davidson v. Motorists Mut. Ins. Co.* (2001), 91 Ohio St.3d 262, 265, fn. 2, 744 N.E.2d 713 (declining to address insurance contract interpretation not raised below).

This rule is "deeply embedded" in notions of the "fair administration of justice" and is designed to "afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause" as well as to prevent a party from sitting "idly by until he or she loses on one ground only to avail himself or herself of another on appeal." *State ex rel. Quarto Mining Co.*, 79 Ohio St.3d at 81, 679 N.E.2d 706. Indeed, "[t]he parties, through their attorneys, bear responsibility for framing the issues and for putting both the trial court and their

opponents on notice of the issues they deem appropriate for * * * resolution." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 122, 679 N.E.2d 1099.

Here, neither Continental nor any other party challenged *Goodyear*'s viability in the trial court or the court of appeals. As a result of Continental's failure to timely raise this issue, there is no record fairly presenting the issue for resolution herein. These various deficiencies in the record, arising largely from the lack of policyholder participation in this case since its early stages, are described elsewhere in this brief. Even when the policyholder was a party, however, Continental failed to raise this issue. Accordingly, it has waived the argument on appeal.[4]

3. *Goodyear* was Correctly Decided, and it would be Improper to Overrule it Herein.

a. Continental Inaccurately Contends that *Goodyear*'s All Sums Approach Has Fallen into Disfavor Nationally.

In addition to these procedural and jurisdictional problems, Continental's arguments suffer from a great many substantive ones. Underlying all of Continental's challenges is the implicit premise that *Goodyear* in the past seven years has become an outlier, a case which adopted an approach now criticized and rejected throughout the county. In fact, quite the opposite is true. *Goodyear* has been cited and followed in some jurisdictions, cited and not followed in others, but it has not been singled out for criticism in any jurisdiction, and its all sums approach continues to be adopted and utilized throughout the country as the preferred approach.

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[4] The Ohio Supreme Court also has held that "[i]ssues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on review." *Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty.* (1963), 175 Ohio St. 179, 23 O.O.2d 462, 192 N.E.2d 47, syllabus. As explained above, Continental's present challenge to *Goodyear* is directly contrary to, and wholly inconsistent with, its arguments below concerning insurer-contribution rights collateral to *Goodyear*. Consequently, Continental's argument is similarly waived under *Republic Steel*.

The nationwide "trend" in allocation cases remains unchanged. At the time *Goodyear* was announced, courts across the country generally were divided on the allocation issue, with a small majority of jurisdictions having adopted the all sums approach premised upon the unambiguous language contained within the insurance policies. In *Goodyear*, the parties presented the Court with a thorough discussion of this developing body of case law, and this Court considered the degree of division among the courts nationwide. The *Goodyear* decision itself reflects the extent of this discussion and the then near-equipoise of the weight of authority nationally, with the majority decision in *Goodyear* noting that all sums was the "majority" rule, while the dissenting opinion contended that pro rata allocation was the "majority" rule. *Goodyear*, 2002-Ohio-2842, at ¶ 10 and ¶ 29.

The state of the law that existed at the time of *Goodyear* still exists today. The decisions among the various jurisdictions remain roughly in equipoise, with a small majority of jurisdictions continuing to follow the all sums approach. Specifically, seventeen jurisdictions[5]

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[5] *Murphy Oil USA, Inc. v. United States Fid. & Cas. Co.* (Feb. 21, 1995), Ark.App. No. 91-439-2 (cited in Zuckerman & Raskoff, *Environmental Insurance Litigation: Law and Practice Current through the November 2008 Update*, 2 Envtl. Ins. Litig.: L. and Prac. §10.8 (2008)); *Aerojet-Gen. Corp. v. Transport Indemn. Co.* (1997), 17 Cal.4th 38, 56-57, 70 Cal.Rptr.2d 118, 948 P.2d 909; *Hercules, Inc. v. AIU Ins. Co.* (Del.2001), 784 A.2d 481, 491; *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C.1981), 667 F.2d 1034, 1047-1050; *CSX Transp., Inc. v. Admiral Ins. Co.* (Nov. 6, 1996), M.D.Fla. No. 93-132-CIV-J-10, unreported, 1996 WL 33569825, at *8 - *9 (applying Florida, Indiana, Michigan, Pennsylvania, South Carolina, and Virginia law); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai'i, Ltd.* (1994), 76 Hawaii 277, 298, 875 P.2d 894; *Zurich Ins. Co. v. Raymark Industries, Inc.* (1987), 118 Ill.2d 23, 56-57, 112 Ill.Dec. 684, 514 N.E.2d 150; *Allstate Ins. Co. v. Dana Corp.* (Ind. 2001), 759 N.E.2d 1049, 1057-1058; *Goodyear*, 2002-Ohio-2842; *J.H. France Refractories Co. v. Allstate Ins. Co.* (1993), 534 Pa. 29, 37-42, 626 A.2d 502; *Emhart Industries, Inc. v. Century Indemn. Co.* (C.A. 1, 2009), 559 F.3d 57, 70-72 (applying Rhode Island law); *Century Indemn. Co. v. Golden Hills Builders, Inc.* (2002), 348 S.C. 559, 563-564, 561 S.E.2d 355; *Am. Physicians Ins. Exchange v. Garcia* (Tex.1994), 876 S.W.2d 842, 855; *Am. Natl. Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.* (1998), 134 Wash.2d 413, 423-424, 951 P.2d 250; *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, (Oct. 18, 2003), W.Va.Cir.Ct.No. 93-C-340, unreported, 2003 WL 23652106 at *19 - *20; *Plastics Eng. Co. v. Liberty Mut. Ins. Co.* (2009), 315 Wis.2d 556, 2009 WI 13, 759 N.W.2d 613, at ¶ 55-60.

apply the all sums method of allocation, and fifteen[6] purport to apply pro rata allocation under certain circumstances.[7] Similarly, the highest courts of twelve states, including two of the states that border Ohio, have adopted the all sums approach (California, Delaware, Hawaii,[8] Illinois,[9]

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[6] *Commercial Union Ins. Co. v. Sepco Corp.* (C.A.11, 1985), 765 F.2d 1543, 1544-1546 (applying Alabama law); *Public Serv. Co. of Colorado v. Wallis & Cos.* (Colo.1999), 986 P.2d 924, 939-941; *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.* (2003), 264 Conn. 688, 710, 826 A.2d 107; *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.* (2003), 275 Kan. 698, 753-754, 71 P.3d 1097; *Aetna Cas. & Sur. Co. v. Commonwealth of Ky.* (Ky.2005), 179 S.W.3d 830, 842; *Norfolk S. Corp. v. California Union Ins. Co.* (La.App.2003), 859 So.2d 167, 196; *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.* (2002), 145 Md.App. 256, 313-314, 802 A.2d 1070; *Boston Gas Co. v. Century Indemn. Co.* (2009), 454 Mass. 337, 358-359, 910 N.E.2d 290; *Domtar, Inc. v. Niagara Fire Ins. Co.* (Minn.1997), 563 N.W.2d 724, 731-733; *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's* (2007), 156 N.H. 333, 344, 934 A.2d 517, 526; *Carter-Wallace, Inc v. Admiral Ins. Co.* (1998), 154 N.J. 312, 324-325, 712 A.2d 1116; *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.* (2002), 98 N.Y.2d 208, 221-224, 746 N.Y.S.2d 622, 774 N.E.2d 687; *California Ins. Co. v. Stimson Lumber Co.* (May 26, 2004), D.Or. No. Civ. 01-514-HA, unreported, 2004 WL 1173185 at *13; *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.* (Utah 1997), 931 P.2d 127, 140-141; *Towns v. N. Sec. Ins. Co.* (Vt. 2008), 964 A.2d 1150, 1167.

[7] Also, courts have taken inconsistent positions regarding this issue in regard to the law of two states. For example, in Michigan, state appellate courts and federal courts have found in favor of all sums allocation on occasion, and in favor of pro rata allocation on occasion. Compare *Dow Corning Corp. v. Continental Cas. Co., Inc.* (Oct. 12, 1999), Mich.App. No. 200143, unreported, 1999 WL 33435067 at *6 - *7 with *Stryker Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, PA* (July 1, 2005), W.D.Mich. No. 4:01-CV-157, unreported, 2005 WL 1610663, at *6. Similarly, the Delaware Supreme Court has predicted that Missouri would adopt the all sums method of allocation, but one Missouri trial court has found in favor of pro rata allocation. Compare *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.* (Del.1994), 652 A.2d 30, 35 with *Transworld Airlines, Inc. v. Associated Aviation Underwriters* (Oct. 20, 1998), Mo.Cir.Ct. No. 942-01848A (cited in Zuckerman & Raskoff, *Environmental Insurance Litigation: Law and Practice Current through the November 2008 Update*, 2 Envtl. Ins. Litig.: L. and Prac. §10.8 (2008)).

[8] Hawaii has determined that insurers are liable among themselves on a pro rata basis based on time on the risk, but that they are liable to policyholders "jointly and severally * * * to the extent of their policy limits." *Sentinel Ins. Co., Ltd.*, 76 Hawaii at 283, 875 P.2d at 900.

[9] Although some Illinois appellate courts have apparently failed to honor the Illinois Supreme Court's pronouncement in *Zurich* adopting the all sums allocation method, *Zurich* has not been overruled and remains good law in Illinois today. *Zurich Ins. Co.*, 118 Ill.2d at 56-57, 112 Ill.Dec. 684, 514 N.E.2d 150.

Indiana, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas,[10] Washington, and Wisconsin), and twelve courts have adopted pro rata allocation under certain circumstances (Colorado, Connecticut, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Utah, and Vermont).[11]

Moreover, if there is any particular recent "trend," it is in favor of all sums. Of the four cases decided thus far in 2009, by state appellate or Supreme Courts or federal appellate courts, three have found in favor of all sums, while only one adopted pro rata allocation. *Emhart Industries, Inc.*, 559 F.3d at 70-72 (First Circuit applying all sums); *Plastics Eng. Co.*, 315 Wis.2d 556, 2009 WI 13, 759 N.W.2d 613, at ¶ 55-60 (Wisconsin Supreme Court adopting all sums); *California v. Continental Ins. Co.* (Cal.App. 2009), 88 Cal.Rptr.3d 288, 299-302 (appeal pending) (California appellate court applying all sums); and *Boston Gas Co.*, 454 Mass. at 358-359, 910 N.E.2d 290 (Massachusetts Supreme Court adopting pro rata). Further, the sole such case during 2009 that adopted a pro rata approach currently is the subject of a pending petition for a rehearing. (*Boston Gas* Docket, Mass. Supr. Jud. Ct., Case No. SJC-10246). Simply put, Continental's assertion that courts around the country have "increasingly" adopted the pro rata method of allocation and its suggestion that pro rata allocation has become the majority rule does not withstand scrutiny. The balance of authority on the issue of allocation, while unquestionably

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[10] Though some federal courts in Texas have applied pro rata allocation, the Texas Supreme Court and state appellate courts in subsequent decisions make clear that Texas follows the all sums method of allocation. See, e.g., *Am. Physicians Ins. Exchange*, 876 S.W.2d 842 at 855; *CNA Lloyds of Texas v. St. Paul Ins. Co.* (Tex.App.1995), 902 S.W.2d 657, 661; *Texas Property & Cas. Ins. Guar. Assn. v. Southwest Aggregates, Inc.* (Tex.App.1998), 982 S.W.2d 600, 605.

[11] This Court, notably, has held that such conflicting judicial interpretations of policy language in itself establishes the existence of an ambiguity which must be construed in favor of the policyholder. *George H. Olmsted & Co. v. Metro. Life Ins. Co.* (1928), 118 Ohio St. 421, 191 N.E. 276, syllabus.

divided nationwide, has remained fundamentally the same since *Goodyear* and does not warrant this Court revisiting its decision.

b. The Standard for Overruling Ohio Supreme Court Precedent is Stringent.

Even if the state of the law nationally were otherwise, Continental's challenge to *Goodyear* would be without merit in Ohio. "Stare decisis is the bedrock of the American judicial system." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 1. It creates "continuity and predictability in our legal system" and serves "as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." Id. at ¶ 43. Honoring the fundamental importance of stare decisis, this Court has formulated a high standard for determining when it may depart from a past decision:

> A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Id., at paragraph one of the syllabus. Since *Galatis*, this Court has applied this tripartite test on ten occasions and has refused to overrule its prior decisions in all but two of them.[12] Those two

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[12] Cases refusing to overrule precedent after applying the *Galatis* standard include *State ex rel. Internatl. Paper v. Trucinski*, 106 Ohio St.3d 203, 2005-Ohio-4557, 833 N.E.2d 728, at ¶ 5; *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, 863 N.E.2d 591, at ¶ 27; *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, at ¶ 14; *Estate of Holycross,* 112 Ohio St.3d 203, 2007-Ohio-1, 858 N.E.2d 805, at ¶ 29; *State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm. of Ohio*, 112 Ohio St.3d 85, 2006-Ohio-6504, 858 N.E.2d 351, at ¶ 6; *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, at ¶ 21; *Hedges v. Nationwide Mut. Ins. Co.*, 109 Ohio St.3d 70, 2006-Ohio-1926, 846 N.E.2d 16, at ¶ 27; *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, 814 N.E.2d 818, at ¶ 11.

cases, like *Galatis*, abandoned precedent under circumstances that contrast starkly with those at issue in the present matter.

In *Galatis*, this Court limited its prior decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, which held that an uninsured-motorist endorsement that identified "you" as the named insured where "you" was a corporation extended coverage to an employee outside the scope of employment. *Galatis*, 2003-Ohio-5849, at ¶ 2. This Court determined that *Scott-Pontzer* was wrongly decided because this Court "should have followed [certain] well-settled and intrinsically sound precedent." Id. at ¶ 49. Here, as discussed more fully below, this Court made no such mistake in deciding *Goodyear*, basing its adoption of the all sums approach on the plain contract language and on long-standing and widely recognized principles of insurance law and insurance contract interpretation. See *Goodyear*, 2002-Ohio-2842, at ¶ 7-9.

In *Galatis*, this Court held that *Scott-Pontzer* defied practical workability and, in doing so, noted a staggering number of undesirable ramifications of *Scott-Pontzer*:

> *Scott-Pontzer* and its progeny defy practical workability. The multitude of post-*Scott-Pontzer* issues before this court, the widespread criticism of the decision from other jurisdictions, and the numerous conflicts emanating from the lower courts indicate that the decision muddied the waters of insurance coverage litigation, converted simple liability suits into complex multiparty litigation, and created massive and widespread confusion—the antithesis of what a decision of this court should do. Attorneys are forced to file briefs and appendixes that are several inches thick in an attempt to form a coherent picture out of the post-*Scott-Pontzer* morass.

Galatis, 2003-Ohio-5849, at ¶ 50. This Court then held that limiting *Scott-Pontzer* would not jeopardize any reliance interest. Id. at ¶ 59. However, even under these extreme circumstances,

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Cases overruling precedent after applying the *Galatis* standard include *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm. of Ohio*, 111 Ohio St.3d 109, 2006-Ohio-5336, 855 N.E.2d 435, at ¶ 19; *State ex rel. Stevens v. Indus. Comm. of Ohio*, 110 Ohio St.3d 32, 2006-Ohio-3456, 850 N.E.2d 55, at ¶ 12-13.

which could not differ more vastly from those presented by *Goodyear*, the decision to limit *Scott-Pontzer* was a close one, with three justices dissenting. Id. at ¶ 63.

Here, the *Goodyear* decision, unlike *Scott-Pontzer*, did not give rise to comparable ramifications. *Goodyear* has not caused utter "chaos" in the court system by muddying "the waters of insurance coverage litigation," converting "simple liability suits into complex multiparty litigation," or creating "massive and widespread confusion[.]" Id. at ¶ 50. Nor has *Goodyear* generated a multitude of lawsuits clogging the dockets of Ohio courts. All indications, in fact, are decidedly to the contrary. *Scott-Pontzer*, on the other hand, burdened this Court's docket alone with approximately 100 related cases. See, e.g., *In re Uninsured & Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888, 798 N.E.2d 1077.

In contrast, this Court's experience since *Goodyear* was decided seven years ago reflects that the case sub judice is the first case presented to this Court involving a potentially reviewable contribution issue arising from the application of *Goodyear*. This belies any suggestion that *Goodyear* has engendered docket-crippling litigation. Cf. *State ex rel. Internatl. Paper*, 2005-Ohio-4557, at ¶ 10 (rejecting appellant's allegations that certain precedent created "dire financial consequences to the workers' compensation system as a whole and to the state's employers" where the Court had decided only four cases invoking the precedent in the prior three years).

Moreover, unlike *Scott-Pontzer*, *Goodyear* neither represented a departure from precedent nor has created confusion in Ohio courts, because, as discussed below, the all sums allocation approach taken in *Goodyear* had been applied by other Ohio courts for decades. Cf. *Galatis*, 2003-Ohio-5849 at ¶ 51; see, also, *Williams*, 2004-Ohio-4747, at ¶ 14 (determining that a prior decision did not "defy practical workability" because it "created no confusion in the courts of Ohio, [the Court] fully explained [its] rationale, and it did not depart from precedent").

Conversely, *Scott-Pontzer* represented an abrupt departure from precedent and created new law. *Galatis*, 2003-Ohio-5849, at ¶ 49. Further, *Goodyear* has not "spawned a complex body of law characterized by 'a patchwork of exceptions and limitations.'" *Williams, 2004-Ohio-4747,* at ¶ 14, quoting *Galatis*, 2003-Ohio-5849, at ¶ 57. Instead, the application of the all sums allocation approach is straightforward, has been consistently applied, and has been proven to promote judicial economy, as seen in this very case.

The two post-*Galatis* cases from this Court overruling prior decisions are similarly distinguishable. In *State ex rel. Stevens*, 2006-Ohio-3456, at ¶ 12, this Court "subsequently recognized that it was the statutory compensation cap, not the method of calculating average weekly wage, that was the source of the problem in [the prior decisions]." It further acknowledged that those decisions caused practical problems, including encouraging potentially all workers' compensation claimants to seek recalculation of their average weekly wages based on the faulty rationale of those prior decisions. Id. at ¶ 10-12. Thus, the prior decisions in *Stevens*, unlike *Goodyear*, created the potential for a deluge of new claims.

In *State ex rel. Advanced Metal Precision Prods.*, 2006-Ohio-5336, this Court concluded that the *Galatis* tripartite test was satisfied, holding: (1) the prior decisions "contradict the purpose of specific safety regulations by excluding certain injuries caused by negligence or inadvertence," (2) the prior decisions "specifically exclude *accidental* injuries, although those are the very injuries covered by the Workers' Compensation Act," and (3) abandoning precedent "would foster a safer work environment." (Emphasis sic.) Id. at ¶ 19. *Goodyear* does not implicate analogous safety concerns or otherwise undermine statutory regulations; rather, it gives effect to the parties' intent as expressed in their insurance contracts.

Since *Galatis*, then, this Court consistently has reaffirmed its adherence to the doctrine of stare decisis and, consequently, has overruled precedent in only a very small minority of cases, which posed factual situations fundamentally different from this one. This Court, accordingly, should decline to abandon the correct and highly workable decision of *Goodyear*.

c. Even if it Could Properly be Considered, Continental's Challenge to *Goodyear* would Satisfy none of the Requirements of *Galatis*.

i. *Goodyear* was Correctly Decided.

Goodyear was correctly decided by this Court in 2002. The decision was consistent with (1) the plain language of the contract, (2) established Ohio law regarding insurance policy interpretation, (3) previous decisions of courts in Ohio, and (4) the weight of authority from other jurisdictions. In addition, the *Goodyear* decision was reached only after substantial briefing by all parties and their numerous amici curiae, extensive oral argument, and careful consideration by this Court.

Contrary to Continental's arguments, *Goodyear* did not "inadvertently eliminate[] the rights non-targeted insurers have under" their policies and did not "effectively [write] the words 'during the policy period' out of the policies." (Continental's Merit Brief, pp. 16-17). Rather, *Goodyear* properly protected the policyholder's rights under its policies, pursuant to the language of the policies themselves.

The allocation issue addressed in *Goodyear* concerns the extent to which a policyholder can call upon a particular policy for the full coverage it purchased, up to the policy's limits, once the policy is "triggered" by the existence of covered damage or injury during the policy period. See, generally, *Keene Corp. v. Ins. Co. of N. Am.* (C.A.D.C.1981), 667 F.2d 1034, cert. denied (1982), 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875. In resolving the allocation issue, courts look to the "all sums" language contained in a policy's basic grant of coverage, which requires

the insurers to pay "all sums" the policyholder becomes legally obligated to pay in regard to the underlying liability. The language and structure of the policies, therefore, provide that a primary policy, once triggered by the existence of property damage or bodily injury during the policy period, is liable for all sums for which the policyholder is liable by virtue of that property damage or bodily injury, up to the policy's limits.

As appellants acknowledge, well-established Ohio law holds that insurance policies, like other contracts, are to be enforced in accordance with their stated contract terms. See *Rhoades v. Equitable Life Assur. Soc. of the U.S.* (1978), 54 Ohio St.2d 45, 47, 8 O.O.3d 39, 374 N.E.2d 643. Thus, to determine the meaning of an insurance policy, a court first examines the policy language and accords that language "the usual meaning and understanding accorded it by persons in the ordinary walks of life." *Munchick v. Fid. & Cas. Co. of New York* (1965), 2 Ohio St.2d 303, 305, 31 O.O.2d 569, 209 N.E.2d 167. Courts may not re-write an insurance policy when "the language of the policy's provisions is clear and unambiguous[.]" *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.

As this Court observed in *Goodyear*, the "plain language" of the policies requires that, once triggered, they will pay "all sums" for which the policyholder is liable, up to the policy limits. *Goodyear*, 2002-Ohio-2842, at ¶ 9. Even if this language had not been as clear as it is, however, any ambiguity would have been unavailing to the insurers. "It is well-settled law in Ohio that insurance policies should be construed liberally in favor of the insured." *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, 122, 647 N.E.2d 1358. If a court finds that a policy provision may be interpreted in different ways, it "will be construed strictly against the insurer and liberally in favor of the insured." *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. In other words, if there is any "uncertainty" about

the coverage, "this court must adopt the construction most favorable to the insured which would allow recovery[.]" *Moorman v. Prudential Ins. Co. of Am.* (1983), 4 Ohio St.3d 20, 22, 4 O.B.R. 17, 445 N.E.2d 1122.

Goodyear also was decided consistent with a long line of Ohio cases holding that a policyholder can choose to assign its claim to any of its policies triggered by damage or injury during the policy period. This Court, for instance, construed all sums in *Motorists Mut. Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 56 O.O.2d 133, 271 N.E.2d 924, an uninsured motorists insurance case. In that case, this Court unanimously held that when an insurance contract provides for the payment of all sums, the presence of other available insurance does not serve to "postpone[], reduce[], or eliminate[]" the coverage obligations of the all sums insurer. Id. at 223. In so holding, this Court declined "to change the meaning of language contained in an insurance contract when that wording is directly applicable to the facts under consideration," unanimously rejecting the uninsured motorists carrier's argument that the availability of other insurance excused it of its all sums payment obligation. (Citations omitted.) Id. at 226. This Court, therefore, previously had recognized that all sums means what it says, not "some sums," or "partial sums," or "an allocated portion of sums."

In addition, at the time *Goodyear* was decided, other courts applying Ohio law, in cases involving multiple triggered policies over a continuum of years, had consistently construed the plain language of standard liability insurance policies, which contain these same express contractual obligations to "pay all sums" and "defend any suit," to mean that each triggered policy provides full indemnification and defense coverage up to the limits of that policy and that the policyholder may choose to apply its claim to any of these triggered policies. See *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.* (Lucas C.P.1995), 74 Ohio Misc.2d 183,

216, 660 N.E.2d 770 (The policyholder "is permitted to, at its discretion, pursue its remedy in full against *one* insurer, regardless of the existence of other triggered policies.")(Emphasis sic.); *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London* (N.D.Ohio 1993), 813 F.Supp. 576, 590, fn. 9 (applying Ohio law and rejecting pro rata allocation in case involving prolonged exposure to lead paint); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.* (D.D.C.1984), 597 F.Supp. 1515, 1524 (applying Ohio law and holding an insured "may assign its liability for asbestos-related disease to a policy if any part of the injurious process associated with asbestos occurred while that policy was in effect"); *Eaton Corp. v. Aetna Cas. & Sur. Co.* (Aug. 12, 1994), Cuyahoga C.P. No. 189068, slip op. at 2, vacated as a condition of settlement and not upon grounds (Mar. 30, 1995) (In regard to environmental claims, "As a matter of law, each triggered policy is jointly and severally liable for Plaintiffs' * * * liabilities."); *Morton Thiokol, Inc. v. Aetna Cas. & Sur. Co.* (Dec. 28, 1988), Hamilton C.P. No. A-8603799, 1988 WL 1520456 (policyholder may "assign each asbestos claim to any Aetna policy"); see, also, *Commercial Cas. Ins. Co. v. Knutsen Motor Trucking Co.* (8th Dist.1930), 36 Ohio App. 241, 246, 173 N.E. 241 (the policyholder "had the right to pursue his remedy in its entirety" under one policy with no allocation). Thus, prior to *Goodyear*, courts applying Ohio law consistently upheld the policyholder's right to obtain full recovery under any triggered policy and resisted any invitation to fashion a court-created pro rata allocation formula.

The only decision to have suggested a contrary result at the time *Goodyear* was decided was the federal court case of *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.* (C.A.6, 2000), 210 F.3d 672, a case urged by Continental in support of its argument that *Goodyear* was wrongly

decided.[13] However, the *Lincoln Electric* decision was extensively briefed by the parties in *Goodyear*, and this Court rejected its approach.

It is noteworthy, however, that even before this Court's rejection of the approach taken in *Lincoln Electric,* two federal judges from the Northern District of Ohio recognized that Ohio courts in their application of Ohio law would not have been bound by the Sixth Circuit decision in *Lincoln Electric* and could have disregarded it in favor of the long-established law of Ohio, which permitted policyholders to choose from among triggered policies. In *Glidden Company v. Lumbermens Mut. Cas. Co.* (Nov. 17, 2000), N.D.Ohio No. 1:00 CV 1614, Judge Wells, in deciding to remand a case to an Ohio common pleas court, noted

> Ohio courts have held that an insurance carrier whose policy is triggered by a claim for gradual, continuous injury is jointly and severally liable to pay the entire claim. The court in Owens-Corning Fiberglass (sic) Corp. v. American Centennial Ins. Co., for instance, found that "the insured has discretion to choose which one of many triggered insurers will be required to pay." Even "the right of dueling excess insurers to have obligations pro-rated between themselves does not affect a policyholder's right to full contribution from the insurer of its choice." Under this reasoning, Glidden can "pick and choose" which triggered insurance policy it wishes to apply to cover any given claim.

(Internal citations omitted.) Id., slip op. at 10. Similarly, in *Millennium Chemicals, Inc. v. Lumbermens Mut. Cas. Co.* (Mar. 13, 2001), N.D.Ohio No. 1:00 CV 1862, slip op. at 7, Judge Oliver, also ruling on a motion to remand, engaged in the same reasoning.

Since, *Goodyear*, of course, courts applying Ohio law have continued to apply Ohio's all sums approach. See, e.g., *Goodrich Corp. v. Commercial Union Ins. Co.* (June 30, 2008), 9th

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[13] Another federal court decision urged by Continental as a basis for finding that *Goodyear* was decided wrongly is *GenCorp, Inc. v. AIU Ins. Co.* (N.D.Ohio 2000), 104 F.Supp.2d 740. The insurer parties in *Goodyear* also addressed the *GenCorp* decision in their briefs, and, as with *Lincoln Electric*, the Court considered and rejected it.

Dist. Nos. 23585, 23586, 2008-Ohio-3200 at ¶ 130-132; *Polk v. Landings of Walden Condom. Ass'n.* (Aug. 5, 2005), 11th Dist. No. 2004-P-0075, 2005-Ohio-4042 at ¶ 84-85.

Continental is incorrect in its further argument that this Court in *Goodyear* ignored the standard occurrence definition and other policy language that makes reference to coverage for damage occurring "during the policy period." Far from ignoring this language, this Court quoted and even italicized it, and the Court expressly stated that "[t]he italicized portions of this language provide the point of contention." See *Goodyear*, 2002-Ohio-2842, at ¶ 7. This Court did not miss the insurers' argument. It simply did not agree with it. Rather, this Court understood that the insurers in that case, like Continental in this case, were misconstruing this language and confusing the concept of trigger, to which it relates, with the concept of allocation, to which it does not. All sums is the language that expressly mandates the allocation approach to be applied to policies once they are triggered by damage or injury during policy periods. In so holding, this Court in *Goodyear* correctly gave effect to all the language in the policies.

Continental's argument that *Goodyear* was wrongly decided because it "inadvertently eliminated the rights non-targeted insurers have under other policy provisions" is baseless. (Continental's Merit Brief., p. 16). Nothing in *Goodyear* relieves a policyholder of its contractual obligations under any insurance policies against which it makes a claim, including conditions related to notice and cooperation. Indeed, *Goodyear* expressly addressed the defense of late notice raised by insurers to which Goodyear chose to present the claim, stating that the policyholder was obligated "to notify its insurers of an occurrence 'as soon as practicable'" and "to give the insurers notice of a claim 'immediately.'" *Goodyear*, 2002-Ohio-2842, at ¶ 13.

Perhaps more to the point, this Court in *Goodyear* did not require policyholders to make claims against any particular policy or policies it had purchased. Rather, this Court recognized

that a policyholder could select and choose to recover under any of the policies it owned. "[T]he insured is entitled to secure coverage from a single policy of its choice[.]" Id. at ¶ 11. That was the whole point. If the chosen policy proved insufficient to cover a claim completely, the policyholder then could pursue other policies. "In the event that this policy does not cover Goodyear's entire claim, *then* Goodyear may pursue coverage under other * * * policies." (Emphasis added.) Id. at ¶ 12. Goodyear owned the policies it had purchased, just as Park-Ohio owns the policies it purchased, and this Court recognized Goodyear's ability to use those assets in any way it wished, in any sequence it wished. (See also Nationwide's Merit Brief, p. 19, citing *Mut. of Enumclaw v. USF, Inc.* (Wash 2008), 191 P.3d 866, 872-873 ("Selective tender preserves the insured's right to invoke or not to invoke the terms of its insurance contracts."))

While it recognized that the targeted insurer may have a right of contribution against other insurers on the same risk, *Goodyear* did not confer absolute contribution rights on such insurers. Contribution, after all, is an equitable doctrine under Ohio law, and its application always will be highly fact specific. If, based on the facts of a given case, equity does not support the efforts of the targeted insurer to obtain contribution, then contribution may not be appropriate in that case. The Court reasoned that its all sums approach "promotes economy for the insured while still permitting insurers to seek contribution from other responsible parties *when possible*," and it stated that "the insurers bear the burden of obtaining contribution from other *applicable* primary insurance policies as they deem necessary." (Emphasis added.) Id. at ¶ 11. Contribution, appropriately, was regarded as (1) being subject to the facts and equities of each case, and (2) a matter between insurers.

Goodyear in this respect merely recognized pre-existing law that would permit an insurer to seek contribution from other insurers under certain circumstances, and it reiterated that the

burden is on the insurer seeking contribution. The law in Ohio, and elsewhere, had already provided that insurers could be entitled to contribution from other insurers if compelled to pay more than their share of loss. See *Natl. Fire Ins. Co. v. Dennison* (1916), 93 Ohio St. 404, 113 N.E. 260; *Holyoke Mut. Ins. Co. v. Cherokee Ins. Co.* (1989), 192 Ga.App. 757, 386 S.E.2d 524. *Goodyear* did not address, and certainly did not preclude, defenses that may be available to such contribution claims. Indeed, this is the very matter properly before this Court now.

Finally, the decision in *Goodyear* is not unfair to insurers. This argument, like Continental's other arguments, does no more than rehash arguments that were fully presented to this Court and fully briefed and argued by the parties in *Goodyear*. Fundamentally, there is nothing unfair or contrary to public policy in holding an insurer to the specific language it chose to include in its coverage grant or in affording a policyholder the full benefit of the express coverage it purchased. See *Aerojet-Gen. Corp.*, 17 Cal.4th at 75-76, 70 Cal.Rptr.2d 118, 948 P.2d 909. The insurers, which collected premiums commensurate with their limits of coverage, wrote into their policies "other insurance" provisions and subrogation provisions in recognition that circumstances might arise that would afford them an opportunity to recover paid amounts from third-parties, including other insurers. These rights, however, cannot fairly serve to limit the policyholder's contractual rights against each of its insurers, which the Court in *Goodyear* recognized as the right to recover all sums, or to diminish the policyholder's right to recover fully under its chosen policy. The policyholder "is not required to contribute a pro rata share to the selected insurer." *Owens-Corning Fiberglas Corp.*, 74 Ohio Misc.2d at 216, 660 N.E.2d 770; cf. *Shoemaker v. Crawford* (10th Dist.1991), 78 Ohio App.3d 53, 66-67, 603 N.E.2d 1114.

In addition, this Court repeatedly has recognized that the public policy of Ohio favors the application of private insurance proceeds to address damage or injuries, such as that suffered by

Mr. DiStephano in this matter. See, e.g., *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 395, 738 N.E.2d 1243 (public policy favors making insurance coverage available to provide a fair and adequate recovery for claimants for unintentional conduct); see, also, *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 176, 551 N.E.2d 962; *Kirchner v. Crystal* (1984), 15 Ohio St.3d 326, 330, 15 O.B.R. 452, 474 N.E.2d 275. Accordingly, even if, contrary to present circumstances, it were appropriate for this Court to consider Continental's challenge to *Goodyear*, for all of the foregoing substantive and public policy reasons, this Court should decline to overrule *Goodyear*.

ii. There has been no Change in Circumstance that would Warrant Revisiting *Goodyear*.

Continental argues that a change in circumstance that warrants revising *Goodyear* is a change in the balance of authority nationally on this issue. First, this is not the type of change in circumstance that was the focus in *Galatis*. This Court in *Galatis*, rather, focused upon the change in litigation activity in this state. No such change, however, has occurred in regard to insurance contribution actions. In fact, as discussed below, and as predicted by this Court, *Goodyear* has had a very beneficial effect in promoting judicial economy. Second, even assuming arguendo that a change in the balance of authority were the type of change addressed by *Galatis*, there has been no such change in regard to national authority on the allocation issue.

iii. *Goodyear* is neither Impractical nor Unworkable.

Continental argues without factual foundation or legal support, and in disregard of the last seven years of jurisprudence in this state, that *Goodyear's* all sums allocation ruling will generate a multitude of duplicative, complex, and unmanageable litigation and will incentivize policyholders and targeted insurers to manipulate coverage by withholding information or "gaming discovery." Accordingly, Continental argues, *Goodyear* defies practical workability.

Continental, however, points to no flood of contribution litigation swamping Ohio dockets, as was the case after this Court decided the *Scott-Pontzer* case. Indeed, the fact that insurers routinely have been able to resolve these contribution issues without court intervention, as evidenced by the relative dearth of Ohio case activity on the subject, demonstrates the opposite. This case, in fact, is an example of just how efficient the all sums approach is in resolving coverage disputes for all concerned—the underlying claimant, the policyholder, and multiple insurers.

Continental's argument that policyholders and targeted insurers are incentivized to manipulate their coverage or "game discovery" also defies logic. A policyholder that chooses not to cooperate with its targeted insurer or comply with other policy obligations risks losing its coverage from that insurer as a result of breach of the selected insurer's policy provisions, such as cooperation clauses. These policy provisions serve to discourage such practices. In this case, Penn General settled with Park-Ohio, however, rather than litigate its alleged notice and cooperation defenses. Penn General voluntarily made that choice. Nothing in *Goodyear* compelled that result, and nothing in *Goodyear* addressed whether non-targeted insurers have defenses in a contribution action such as this under these particular circumstances. This is the question this Court will decide in this case, and it can and should be addressed without destroying the basic all-sums framework laid out in *Goodyear*.

iv. Abandoning *Goodyear* as a Precedent would Create Hardship.

As discussed above, Ohio has followed the all sums approach since the time courts first began to consider the issue. Aside from a brief period just before this Court issued its decision in *Goodyear*, during which the *Lincoln Electric* case from the Sixth Circuit caused some temporary uncertainty, even among lower federal courts in Ohio, all sums has always been the clear and

unequivocal law of this state. Parties, including policyholders and insurance companies, buy and sell insurance programs, evaluate claims, reserve for losses, and resolve both underlying claims and resulting insurance claims based on this long-standing principle of Ohio law. The right to enforce the language of their insurance policies by picking and choosing from among the triggered policies they own is an extremely important right to policyholders, a right that makes purchasing insurance from Ohio insurers and conducting operations under the protection of Ohio law comparatively appealing options for policyholders. Accordingly, changing this well-established and heavily relied upon principle of Ohio law would have a profound impact upon claimants, policyholders, insurers, and, ultimately, the State of Ohio. Continental's suggestions to the contrary are in error.

B. CONTINENTAL'S "ALTERNATIVE" IMPROPERLY TENDERED PROPOSITION OF LAW

1. This Court Should Decline to Address Continental's "Alternative" Newly-Tendered Proposition of Law, as it is not Properly Before this Court.

Continental also advances an "Alternative" proposition of law, regarding which it makes many arguments, some on issues that are properly before this Court, and many on issues that are not. (Continental's Merit Brief, pp. 28-41). This section of the brief, however, does contain some discussion that actually bears upon the proposition of law Continental advanced in its memorandum in support of jurisdiction and this Court accepted for review. Continental's more focused discussion of these points, however, does not begin until page 39 of Continental's 41-page brief.

To the extent that this "Alternative" proposition varies from the one earlier advanced by Continental and accepted by this Court for review, it suffers from the same procedural and

jurisdictional deficiencies as Continental's "First" proposition in its merit brief, which were addressed at length above. These amici curiae will not repeat that discussion here.

Further, Continental's "Alternative" proposition of law suffers from the additional defect of largely repeating or recasting appellants' second proposition of law in their jurisdictional memoranda, which this Court rejected for review. For instance, Continental argued in its jurisdictional memorandum in support of its "Proposition of Law No. II":

> Thus, *Goodyear* should be clarified to confirm that whether the insured *selects* any particular insurer, the insured must still comply with all terms and conditions of coverage found in the policies of other non-targeted insurers whose policies may be triggered, including *giving timely notice* of the claim.

(Emphasis sic.) (Continental's Juris. Memo., p. 11, fn. 7). Continental's "Alternative" proposition in its merit brief is largely a paraphrase of this argument made in support of that rejected proposition:

> In the alternative, this Court should clarify that *Goodyear* does not permit any claim for contribution against a non-selected insurer unless the insured and selected insurer have fully complied with all terms and conditions of coverage in the non-selected insurer's policy.

(Continental's Merit Brief, p. 28). Continental's contention, previously made in support of a rejected proposition of law, is not appropriate to be repackaged and raised at this stage as an "Alternative" proposition of law.

2. Continental's "Alternative" Proposition Should be Rejected as a de facto Attempt to Overrule *Goodyear*.

As discussed at length above, *Goodyear* was correctly decided, and this case does not present a proper opportunity for it to be revisited. Imbedded within Continental's "Alternative" proposition argument, however, is a further request that this Court do just that. In various guises, Continental requests that this Court abandon its all sums doctrine and adopt, instead, the pro rata

allocation this Court much more directly considered and rejected in *Goodyear.* Continental purports to seek a clarification of *Goodyear*, but it in effect seeks *Goodyear*'s rejection.

Continental asks that the Court accept pro rata allocation indirectly through various requests, including its requests that this Court "clarif[y] * * * the duties and responsibilities of the insured" when multiple policies are triggered (Continental's Merit Brief, p. 28), "restrict the insured's rights against a selected insurer to a pro rata share of a loss" (Id.), and determine that "the insured should be made to take responsibility" for a share of the loss (Id. at p. 32). These and other, similar requests are veiled invitations to this Court to overrule *Goodyear*, and they should be rejected as such.

In addition, many of these requests by Continental suffer from a circularity in reasoning. As discussed above, this Court in *Goodyear* made clear that a policyholder could proceed against any of its triggered all sums policies and was not required to proceed against any particular policy, much less against all policies. Continental, however, presumes inaccurately for purposes of its argument that unless a policyholder proceeds against every one of its policies, it is in breach of all of them. It also presumes that the policies require not only that a policyholder notify its chosen insurer, but that the policyholder notify all other insurers, as well. The policies, however, contain no provisions imposing such conditions. As emphasized by Nationwide at page 15 of its merit brief, this Court in *Goodyear* made clear, "The starting point for determining the scope of coverage is the language of the insurance policies," and the policies "'should be enforced in accordance with their terms * * *.'" (Citations omitted.) *Goodyear,* 2002-Ohio-2842, at ¶ 7-8. Continental, in contrast, is asking this Court to re-write the policies by inserting such requirements.

Continental's inaccurate, circular presumption of breach by non-party Park-Ohio is reflected in various statements, including its assertions that Park-Ohio has "ignore[d] its contractual obligations under its insurance contracts" (Continental's Merit Brief, p. 31) and "breach[ed] the policies of the non-selected insurers with impunity." (Id. at p. 32). Making a presumption contrary to fact is analytically unsound, and such presumptions are particularly poor bases for requesting this Court to disregard stare decisis and overrule a well-reasoned prior decision that was thoughtfully rendered, on a proper record, in a case in which all interest holders participated.

Further, and even more fundamentally, in making these arguments, Continental disregards certain critical aspects of the history of this case. First, no insurer ever has asserted a claim against Park-Ohio, either directly or indirectly, for the type of relief Continental asks this Court to impose. In addition, Park-Ohio long ago was dismissed from this case, and it is not a party to this appeal. In effect, Continental asks this Court to impose a remedy against a party not appearing before it. It would be inappropriate for this Court to do so in any case, but doing so would be particularly inappropriate in a case such as this one, in which the Court preliminarily would have to reverse its own existing rule of law.

To the extent that Continental has a proper, justiciable dispute, it is with Penn General. At the core of that dispute is Continental's assertion that Penn General should have refused to pay Park-Ohio's claim on the basis of alleged defenses, such as prejudicial "late" notice or failure to cooperate. The record does not appear to establish that Penn General would have prevailed in regard to any of its purported defenses against Park-Ohio. Evidently, Penn General did not believe that such defenses had merit, because it not only paid Park-Ohio's claim, but it paid the claim in full. Whether its doing so bears upon its contribution rights against other

insurers is the matter this Court has accepted for review. It is, however, the only matter properly before this Court.[14]

3. Continental's "Alternative" Proposition Should be Rejected as Seeking an Advisory Opinion.

In effect, Continental asks this Court to impose obligations on non-party policyholders in the abstract, on issues that were neither presented to nor reviewed by the lower courts. In essence, Continental seeks to significantly impact and diminish policyholder rights in a case where the issues have not been litigated and the parties who stand to be most impacted and penalized under Continental's proposed approach are not even parties to the case. This Court, however, has long declined any such role.

> It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

Fortner v. Thomas (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. Further, this Court has been particularly unwilling to do so when the theoretical issues presented have never been addressed by an underlying court.

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[14] Continental's challenges to *Goodyear* also suffer from a great many additional defects, too numerous to catalogue thoroughly. For instance, Continental argues as if the notice provision in a standard form insurance policy, such as those at issue in this case, requires a policyholder to provide notice to all insurers, not just the insurer issuing the subject policy. Such policies, however, contain no such requirement. Continental also argues as if a policyholder is required to purchase policies in multiple years so that a single insurer in any particular year will be able to sue for contribution insurers in other years—a kind of de facto reinsurance program for the selected insurer. Policyholders, however, buy policies for their own protection. They are not required to buy or preserve policies for the benefit of prior or future insurers. "'The purpose of insurance is to insure.'" (Citation omitted.) *N. British & Mercantile Ins. Co. v. Markovich* (8th Dist.1955), 103 Ohio App. 42, 44, 3 O.O.2d 138, 126 N.E.2d 810. Continental's brief suffers from other such analytical defects, which are seen clearly when viewed from the policyholder's perspective.

> This court will not ordinarily consider a claim of error which is neither raised nor considered by the court below. Additionally, "'* * * it is well-settled that this court does not indulge itself in advisory opinions.'"

(Internal citations omitted.) *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 177, 25 O.B.R. 243, 495 N.E.2d 904. Consideration of Continental's Alternative Proposition of Law and related arguments, therefore, would be contrary to this Court's long-established principles and practices.

V. CONCLUSION

For the reasons stated herein, these amici curiae respectfully request that this Court decline to consider any proposition of law it has not accepted for review and that the Court also decline to render any decision in this case which would overrule or limit its decision in *Goodyear* or would otherwise eliminate or limit policyholder rights.

BROUSE McDOWELL

Paul A. Rose (0018185)
(Attorney of Record)
(prose@brouse.com)
Sallie Conley Lux (0022477)
(slux@brouse.com)
Amanda M. Leffler (0075467)
(aleffler@brouse.com)
BROUSE MCDOWELL
388 S. Main Street, Suite 500
Akron, OH 44311
Telephone: (330) 535-5711
Fax: (330) 253-8601

Keven Drummond Eiber (0043746)
(keiber@brouse.com)
Caroline L. Marks (0071150)
(cmarks@brouse.com)
BROUSE MCDOWELL
1001 Lakeside Ave., Suite 1600
Cleveland, OH 44114-1151
Telephone: (216) 830-6830
Fax: (216) 830-6807

Attorneys for Amici Curiae The Ohio *Manufacturers' Association; Bridgestone Americas Tire Operations LLC; Dana Holding Corporation; Day-Glo Color Corp; Goodrich Corporation; The Goodyear Tire & Rubber Company; The Lincoln Electric Company; The Lubrizol Corporation; Pilkington North America, Inc.; The Procter & Gamble Company; RPM, Inc.; Resco Holdings L.L.C.; Sherwin-Williams Company; Tremco Incorporated; and United Policyholders*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by ordinary U.S. mail, postage prepaid, on all counsel of record listed below, this 15th day of September, 2009.

Paul J. Schumacher (0014370)
Timothy J. Fitzgerald (0042734)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Telephone: (216) 241-5310
Facsimile: (216) 241-1608
E-mail: schumacher@gallaghersharp.com
tfitzgerald@gallaghersharp.com

Rebecca L. Ross
TROUTMAN SANDERS LLP
55 West Monroe Street, Suite 3000
Chicago, IL 60603-5758
Telephone: (312) 759-1921
Facsimile: (773) 877-3733
E-mail: becky.ross@troutmansanders.com

Kathleen M. Sullivan
Jane M. Byrne
QUINN EMANUEL URQUHART OLIVER & HEDGES LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
E-mail: kathleensullivan@quinnemanuel.com
janebyrne@quinnemanuel.com

Counsel for Defendant-Appellant Continental Casualty Company

Richard M. Garner (0061734)
DAVIS & YOUNG
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, OH 44114-2654
Telephone: (216) 348-1700
Facsimile: (216) 621-0602
E-mail: rgarner@davisyoung.com

Elaine Whiteman Klinger
CHRISTIE, PABARUE, MORTENSEN & YOUNG, P.C.
1880 JFK Boulevard, Tenth Floor
Philadelphia, PA 19103
Telephone: (215) 587-1600
Facsimile: (215) 587-1699
E-mail: ewklinger@cpmy.com

Michael R. Stavnicky (0063726)
SINGERMAN, MILLS, DESBERG & KAUNTZ CO. L.P.A.
3401 Enterprise Parkway, Suite 200
Beachwood, OH 44122
Telephone: (216) 292-5807
E-mail: mstavnick@smdklaw.com

Counsel for Plaintiff-Appellee Pennsylvania General Insurance Company

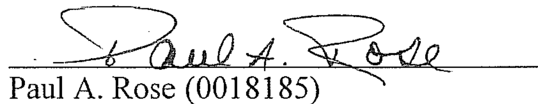
Stephen F. Gladstone (0012128)
Brendan M. Gallagher (0080663)
FRANTZ WARD LLP
2500 Key Center
127 Public Square
Cleveland, OH 44114-1230
Telephone: (216) 515-1660
Facsimile: (216) 515-1650
E-mail: sgladstone@frantzward.com
bgallagher@frantzward.com

Laura A. Foggan
Gregory J. Langlois
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7207
E-mail: lfoggan@wileyrein.com
glanglois@wileyrein.com

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

John T. McLandrich (0021494)
Thomas S. Mazanec (0009050)
Frank H. Scialdone (0075179)
MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.
100 Franklin's Row
34305 Solon Rd.
Cleveland, OH 44139
Telephone: (440) 248-7906
Facsimile: (440) 248-8861
E-mail: jmclandrich@mrrklaw.com
tmazanec@mrrklaw.com
fscialdone@mrrklaw.com

Counsel for Defendant-Appellant Nationwide Insurance Company



Paul A. Rose (0018185)

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