

Supreme Court of Ohio Adheres to "All Sums" Allocation, Clarifies Contribution and Timely Notice Issues

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On June 22, 2010, the Supreme Court of Ohio issued its decision in *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries*, 2010-Ohio-2745 ("*Penn General*"), in which the court followed and clarified the "all sums" approach adopted in *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835 ("*Goodyear*").

At issue in *Penn General* was liability for settlement and defense of a bodily injury suit filed in March 2002 by George DiStefano against Park-Ohio Industries, Inc., and a number of other defendants in California state court. Park-Ohio notified one of its insurers ("*Penn General*") of the DiStefano litigation in August 2002 (six weeks before trial), and then settled the case without *Penn General*'s consent for \$1 million. In September 2003, Park-Ohio filed a coverage action against *Penn General*. The trial court in that action ordered production of information regarding other insurers, and *Penn General* learned in July 2004 of policies issued to Park-Ohio by Nationwide, Continental, and Travelers. In September 2004, *Penn General* requested equitable contribution from those insurers for the DiStefano claim, and brought suit in October 2004 when none agreed to contribute.

Justice Lanzinger's majority opinion (joined in by Justices Pfeifer, O'Connor, O'Donnell, and Cupp) affirmed a Court of Appeals ruling in favor of *Penn General*'s ability, as a "targeted" insurer, to seek contribution from other "nontargeted" insurers. As a threshold matter, the Ohio Supreme Court rebuffed requests for adoption of a pro rata allocation methodology. But recognizing "the need to clarify *Goodyear*," the court addressed "how the nontargeted insurers' contractual right to notice must be treated in light of the equitable all-sums approach." *Penn General* at ¶¶12, 18. First, the *Penn General* court recognized a targeted insurer's right of contribution "against a nontargeted insurer with applicable insurance policies." *Id.* at paragraph one of the syllabus. The court then held that "the insured has a duty to cooperate with the targeted insurer" by identifying nontargeted insurers on request. *Id.* at paragraph two of the syllabus; *see also id.* at ¶19. Finally, the Ohio Supreme Court ruled lack of notice only bars a contribution claim when it results "in prejudice to that nontargeted insurer." *Id.* at paragraph three of the syllabus; *see also id.* at ¶20.

The *Penn General* court specifically observed prejudice does not arise from delays that “are the natural result of Goodyear’s all-sums approach, which was designed to streamline the recovery process for the insured by permitting the insured to choose one primary targeted insurer with which to deal during the litigation.” *Id.* at ¶21. The court then held that as a matter of law the nontargeted insurers were not prejudiced by the 2½-year delay in being notified of the DiStefano litigation, because “the DiStefano settlement was reasonable” and because under “ the *Goodyear* rule, Nationwide and Continental were not to become involved in the case until Penn General brought its contribution action.” *Id.* at ¶22. Justice Stratton dissented on this point, and would have remanded “for the trial court to conduct an inquiry into the actual prejudice, if any, suffered . . . as a result of the delay.” *Id.* at ¶25. Justice Stratton concurred in all other respects with Justice Lanzinger’s majority opinion. Chief Justice Brown did not participate as the case preceded his appointment by Governor Strickland to serve out the remainder of the term of Chief Justice Moyer, who died in office on April 2, 2010.

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