

Ohio Appellate Court Holds Insurer Entitled to Contribution From Other Insurers Under 'All Sums' Jurisdiction, Despite Insured's Late Notice

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In *Pennsylvania General Insurance Co. v. Park-Ohio Industries, Inc., et al.*, No. 90619, 2008 Ohio App. LEXIS 5027 (Ohio Ct. App. Nov. 20, 2008), the Ohio Court of Appeals held that a primary insurer, whose policy was "selected" by the insured to pay "all sums," is entitled to contribution from the insured's non-selected carriers.

The appellate court reversed the trial court's determination that the selected insurer was barred from seeking contribution from the insured's non-selected carriers on the basis that the insured breached the notice provisions of the carriers' respective policies.

In the underlying lawsuit, the plaintiff brought bodily injury claims against the insured, Park-Ohio, as well as several other defendants, alleging that his mesothelioma was caused by asbestos-containing coils manufactured by Park-Ohio's predecessor. Park-Ohio notified Pennsylvania General regarding the lawsuit five months after receipt of the plaintiff's complaint and after conducting a search to locate its applicable liability policies. Pennsylvania General initiated an investigation regarding Park-Ohio's claim. However, without notifying Pennsylvania General, Park-Ohio settled the claim for \$1 million.

Following Park-Ohio's settlement with the plaintiff, Pennsylvania General issued a letter to Park-Ohio in which Pennsylvania General reserved all of its rights and offered to pay Park-Ohio \$112,238.70 in post-tender defense costs, along with \$250,000 toward the \$1 million settlement. Park-Ohio initiated a declaratory judgment action against Pennsylvania General, seeking the full amount of its defense costs and its settlement with the plaintiff.

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While litigating Park-Ohio's declaratory judgment action, Pennsylvania General attempted to obtain information regarding Park-Ohio's other insurers, but was only able to do so through motion practice. Seven weeks after receiving copies of the policies issued by Park-Ohio's other insurers, Pennsylvania General wrote to Nationwide, Continental and St. Paul/Travelers in order to seek contribution for the underlying lawsuit, but the non-targeted carriers refused to contribute. Approximately one month later, Pennsylvania General filed a declaratory judgment action against Nationwide, Continental and St. Paul/Travelers, in which it sought equitable contribution for the settlement and defense of the underlying suit.

Pennsylvania General filed a contribution action against Nationwide and Continental, each of whom had also issued policies to Park-Ohio. The trial court found that Nationwide and Continental did not owe a duty to defend or indemnify Park-Ohio because Park-Ohio had breached the notice provisions in the insurers' respective policies, thereby waiving Pennsylvania General's contribution claim. The trial court also determined that Pennsylvania General had not properly preserved its contribution claim against the non-selected carriers because Pennsylvania General should have provided them with notice prior to the settlement of the underlying lawsuit by Park-Ohio. As a result of its findings, the trial court ruled that Pennsylvania General was not entitled to contribution from Nationwide and Continental.

The Ohio Court of Appeals reversed, holding that it was an error of law for the trial court to base its decision upon Park-Ohio's breach of the notice provisions in Nationwide's and Continental's policies. The appellate court concluded that the non-selected insurers could not escape contribution based upon the notice provisions in their policies, as this was a contractual defense inapplicable to Pennsylvania General, who was not a party to those policies. The court also held that Pennsylvania General's contribution claim was an equitable claim that could not be invalidated by a breach-of-contract claim.

In addition, the court concluded that Park-Ohio did not have a duty to notify Nationwide and Continental of its claim regarding the underlying suit because Park-Ohio had not selected those carriers' policies and had, instead, selected Pennsylvania General's policies to provide coverage. The court further rejected Nationwide's and Continental's argument that Pennsylvania General's contribution claim against them should be barred because Pennsylvania General failed to timely notify them about its contribution claim for the underlying suit. Rather, the court found that Pennsylvania General had repeatedly requested information regarding its other insurers from Park-Ohio, and that it was only able to obtain such information through motion practice. Furthermore, once Pennsylvania General was able to identify the other applicable policies, it contacted the insurers within weeks regarding its contribution claim arising from the underlying lawsuit. The court also found that Nationwide and Continental did not suffer any prejudice arising from Pennsylvania General's notice, since, as non-selected insurers, they had no right to participate in the defense and settlement of the underlying suit.

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Finally, the appellate court rejected the argument that Nationwide and Continental should not have Pennsylvania General's coverage, litigation and settlement decisions imposed upon them. The court concluded that the "all sums" approach contemplated this result, because it would not be equitable to allow the insured to select one insurer's policies without allowing that insurer to seek contribution from other triggered policies. The court pointed to the fact that Pennsylvania General "appropriately investigated, handled and resolved the underlying claim in accordance with the terms and conditions of its policies. We find nothing to indicate that the fact or amount of the settlement would have been any different if Nationwide or Continental, with policies nearly identical to Pennsylvania General's, had been selected by Park-Ohio" The court also noted that Nationwide and Continental had not asserted any exclusions under their policies that would preclude coverage for the underlying suit. The court concluded that a selected carrier should not be foreclosed from pursuing contribution from non-selected carriers based upon the insured's actions or lack thereof. To hold otherwise would discourage the prompt settlement of insurance claims because selected insurers would be reluctant to settle until all triggered insurers were identified and given notice.

The Ohio Court of Appeals' decision in *Pennsylvania General v. Park-Ohio* confirms a selected insurer's right to seek contribution from non-selected insurers, even where the insured has breached the notice conditions in the selected insurer's policies. However, based upon the facts emphasized by the Ohio Court of Appeals, selected insurance carriers should be diligent in trying to identify an insured's other carriers and to place them on notice of any contribution claims as soon as possible. In addition, it is notable that the holding in this case does not preclude the application of any applicable exclusions that may be contained within the non-selected insurers' policies.

Should you have any questions about the *Pennsylvania General v. Park-Ohio* decision, or about insurance coverage under commercial liability policies in general, please feel free to contact your Plunkett Cooney attorney, or in the alternative, Charles Browning at (248) 594-6247, Ken Newa, at (313) 983-4848, or any other member of Plunkett Cooney's Insurance Practice Group.

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