

ORIGINAL

IN THE SUPREME COURT OF OHIO

Don B. Kincaid, Jr.,	:	Case No. 09-1936
Plaintiff-Appellee,	:	
v.	:	ON APPEAL FROM THE CUYAHOGA
Erie Insurance Company,	:	COUNTY COURT OF APPEALS, EIGHTH
Defendant-Appellant.	:	APPELLATE DISTRICT
	:	Court of Appeals Case No. 92101

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE INSURANCE COMPANY OF AMERICA, NATIONWIDE ASSURANCE COMPANY, AND NATIONWIDE GENERAL INSURANCE COMPANY

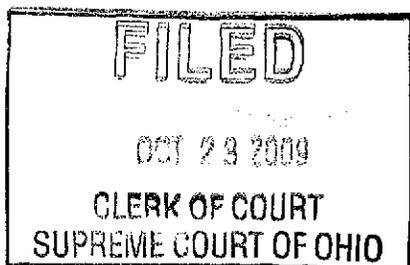
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I. STATEMENT OF INTEREST.

The Nationwide parties filing this amicus brief are insurance carriers who provide auto liability policies to many Ohioans. Nationwide has been sued in a putative class action that is similar to the one filed against Erie in Kincaid v. Erie Insurance Co. At issue in both suits, as well as several other putative class actions against other auto liability insurers in Ohio, are policy provisions that state an insured is entitled to reimbursement of reasonable expenses associated with defense of the insured in auto liability lawsuits. The ruling of the Eighth District Court of Appeals in Kincaid v. Erie Insurance Co., 2009-Ohio-4372 (Cuyahoga) potentially affects the handling of every auto liability lawsuit in Ohio in which the defendant is provided a defense by his or her insurance carrier. Ohio's insurance industry needs the guidance of this Court in addressing the expense reimbursement issues that were wrongly decided by the Eighth District.

II. WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST.

The insurance policy language at issue in Kincaid v. Erie, 2009-Ohio-4372 (Cuyahoga), a putative class action, states that an insured may receive reimbursement for "Reasonable expenses anyone we protect may incur at our request to help us investigate or defend a claim or suit." The legal issue presented in the case below is whether an insured can sue his or her insurance carrier under this policy provision for alleged failure to reimburse incidental litigation expenses, like postage and mileage, without first making a request for expense reimbursement prior to filing suit. The Eighth District answered this question incorrectly.

In what it admitted was an "illogical" result, the Eighth District held that an insured can sue for alleged failure to reimburse expenses, even though the insured never requested expense reimbursement from the insurance carrier prior to filing suit. It held:

While it may seem illogical that an insurer is required to pay for expenses that the insured never notified the company about, we are required to interpret the contract as written and we find no notice requirement in the insurance policy in regard to additional [expense reimbursement] payments. Simply put, the terms of the contract are plain and

unambiguous; there is no notice requirement for additional payments under the policy.

Kincaid v. Erie, 2009-Ohio-4372 at ¶20 (emphasis added).

This admittedly “illogical” interpretation of a widespread insurance policy provision is a matter of public and great general interest. The Eighth District ruling allows for premature lawsuits to be filed and prosecuted, before the insurance carrier is ever requested to reimburse the alleged incurred expense, and before the insurance carrier has the opportunity to reimburse the expense. It is indeed “illogical” to allow a lawsuit to proceed over an alleged expense that the insurance carrier may have been willing to reimburse, if only it had been asked. Multiple insurance carriers, including the Nationwide amici, as well as State Farm, Progressive, Westfield, GEICO, and Lumbermens/Kemper,¹ are facing similar putative class action lawsuits under substantially similar expense reimbursement provisions in their respective auto liability policies. Most were sued in Cuyahoga County Common Pleas Court. Id.

The practical effect of the Kincaid v. Erie holding will be to spawn a cottage industry of expense reimbursement lawsuits, when, in many cases, such lawsuits could have been avoided through a simple request by the insured for expense reimbursement. After all, as the Eighth District noted, "Erie does not dispute that it owes its insureds" reasonable expenses incurred at its request. Kincaid v. Erie at ¶12. Rather, expense reimbursement was not paid to Mr. Kincaid because Erie was never notified of his alleged incurred expenses prior to his lawsuit. The plaintiff in the Erie case does not allege he made a request for expense reimbursement that was refused. His very first request for reimbursement was in the form of a class action lawsuit.

¹ See Hosey v. State Farm Mut. Auto., No. CV-08-656919 (Cuyahoga C.P.); Cika v. Progressive Preferred Ins. Co., No. CV-08-653115 (Cuyahoga C.P.); Gallo v. Westfield Nat. Ins. Co., No. CV-08-652376 (Cuyahoga C.P.); Johnson v. GEICO Gen. Ins. Co., No. 08-80740-CIV-MARRA (S.D. Fla.); Kavouras v. Allstate Ins. Co., No. CV-08-649018 (Cuyahoga C.P.); Lycan v. Lumbermens Mutual Cas. Co., No. CV-07-644127 (Cuyahoga C.P.). The Kavouras v. Allstate case was subsequently removed to federal court, Case No. 08-571 (N.D. Ohio).

With respect to the similar Nationwide lawsuit, it is also undisputed that if an insured requests reimbursement of reasonable expenses incurred at the request of the carrier, Nationwide routinely reimburses the insured's reasonable expenses. These are not cases about whether expense reimbursement is available as a policy coverage: that question is not being debated. Instead, they are lawsuits about whether an insurance carrier should be asked for expense reimbursement prior to being sued for alleged failure to reimburse expenses.

In all of these similar cases, the alleged unreimbursed expenses in these cases are de minimis: plaintiffs in these cases admit that they were duly defended under their liability policies, and were provided with defense attorneys and appropriate liability indemnification, sometimes at a cost of thousands of dollars to the insurance carrier. The plaintiffs claim, however, that they allegedly incurred the cost of a postage stamp in mailing their liability complaints to their carriers for handling, or that they may have incurred mileage or parking expenses in connection with being deposed, or appearing at court.

In each case, the plaintiff never bothered to ask his or her insurance carrier for expense reimbursement of these claimed postage, mileage, and parking expenses. Instead, in each instance, the plaintiffs' very first requests for expense reimbursement came in the form of filing putative class action lawsuits that have entailed enormous time, burden, and expense for the litigants and the Court. This Court needs to review Kincaid v. Erie, and decide whether the law of Ohio permits the premature filing of a lawsuit before a simple request for expense reimbursement has been made to and evaluated by the insurance carrier.

Notably, these are not cases in which the plaintiffs were unaware of the expense reimbursement provisions of their policies. Rather, these are all cases in which the insured had a policy spelling out the availability of expense reimbursement in plain language. The insureds

also had legal counsel representing them pursuant to their policies. And the insureds were sufficiently aware of the expense reimbursement provisions to later file suits that placed the expense reimbursement policy language front and center.

Under the circumstances, the logical course—if the insured thought he or she had unreimbursed expenses—would be simply to ask the insurance carrier for expense reimbursement. That was not done here. In an industry in which insurance carriers routinely reimburse reasonable expenses when requested, it was patently "illogical" for the Eighth District Court of Appeals to hold that the insured need not request expense reimbursement before filing a lawsuit for expense reimbursement. Ohio law does not abide an illogical result.

At the same time that it held that an insured has no duty to request expense reimbursement before filing suit, the Eighth District also held, without explanation, that it would be "premature" to decide if the insurance carrier had an affirmative duty to actively canvass its insureds and solicit requests for expense reimbursement. See Kincaid v. Erie at ¶20, fn. 1. Such a holding leaves the insurance industry in a state of confusion and uncertainty as to expense reimbursement. This Court needs to define the applicable legal duties.

As for Nationwide, in the putative class action lawsuit filed against it, the facts are similar. It was sued by an insured who claimed she was not provided expense reimbursement. She does not claim, however, that she ever requested expense reimbursement. The facts of the Nationwide suit will be briefly set forth herein so that the Court can consider the effect these premature lawsuits-without-controversies are having through Ohio's insurance industry.

III. STATEMENT OF THE CASE, AND THE FACTS OF THE SIMILAR NATIONWIDE LAWSUIT.

The Nationwide amici curiae adopts the Statement of Facts in appellant Erie Insurance Company's jurisdictional brief. They also set forth some of the facts pertinent to the related

lawsuit filed against them, in order to illustrate the way in which the legal questions implicated by Kincaid v. Erie are playing out throughout the insurance industry.

Nationwide, like Erie, was also sued in Cuyahoga County Common Pleas Court on or about February 7, 2008, by a policyholder represented by the same law firm who represents the Erie plaintiffs. The lawsuit is a putative class action of Nationwide Ohio policyholders for a 15-year period who allegedly incurred unreimbursed postage expenses, and/or alleged unreimbursed mileage and parking expenses, in connection with an auto liability suit defended by Nationwide.

The named plaintiff in the Nationwide suit is a Nationwide policyholder named Emma Negron. She was sued in Cleveland Municipal Court in 2005 in connection with a 2004 minor auto accident. Pursuant to her Nationwide liability policy, she was provided with an attorney by Nationwide to defend her interests in that suit. The Cleveland Municipal Court lawsuit was voluntarily dismissed in 2006, and was refiled in Cuyahoga County Common Pleas Court.

In the refiled action, Ms. Negron was once again defended by her Nationwide-assigned attorney. The lawsuit was settled well short of trial, with Nationwide paying \$1000 to the adverse party in full settlement and release of the claims against Ms. Negron.

At the same time that the Municipal Court and refiled Common Pleas Court lawsuits were proceeding, Ms. Negron had two privately-retained lawyers who were advising her of her rights, who wrote letters to Nationwide, and who filed a bodily injury lawsuit on her behalf against the driver of the other vehicle in the accident. For a period of time, Ms. Negron's own bodily injury case in which she was a plaintiff was consolidated in Cuyahoga County Common Pleas Court with the other lawsuit in which she was a defendant represented by a Nationwide-assigned lawyer. The Nationwide-defended lawsuit was settled before Ms. Negron's bodily injury lawsuit as plaintiff. Both suits were settled by late 2007.

When the subsequent putative class action lawsuit was filed by Ms. Negron against Nationwide in early 2008, Ms. Negron claimed that she had incurred \$1.80 in unreimbursed expenses in mailing either the Municipal Court or Common Pleas Court auto liability complaint to Nationwide for handling. She also claimed that on four occasions, she incurred unreimbursed expenses in driving to a law firm that was a couple miles from her house, and spending \$7 to park there. She attested to these alleged facts in verified interrogatory responses.

In actuality, Ms. Negron never incurred any expenses in mailing materials to Nationwide. Nationwide obtained the Municipal Court and Common Pleas Court complaints that named her as a defendant when plaintiff's counsel in those cases mailed it a courtesy copy of the complaints back in 2005 and 2006. In fact, it was Nationwide that notified Ms. Negron of the filings, not vice versa. Thereafter, Nationwide provided Ms. Negron with self-addressed stamped envelopes when it asked her to mail information. Recently, Ms. Negron recanted her claim that she incurred postage expenses. She amended her prior interrogatory answers to now admit she incurred no postage expenses whatsoever.

As for her four claimed trips to a law firm, it turns out that the law firm in question was the one that represented her in her bodily injury lawsuit as plaintiff. Ms. Negron has now admitted that at least three of the four trips for which she was originally seeking reimbursement were for travel in connection with her plaintiff's bodily injury lawsuit—not for travel in connection with the lawsuit that Nationwide was defending. Ms. Negron's sole remaining claim is that on the day she was deposed, she drove to the office of her own bodily injury lawyer (not her Nationwide-appointed defense counsel), and wants to be reimbursed for the approximately 2 miles she drove each way, and \$7 she allegedly incurred in parking. Her claim now is for \$9.85.

Ms. Negron does not claim that she ever asked Nationwide to be reimbursed for the

\$9.85. She does not allege that she ever told Nationwide about her alleged incurred expenses. She does not allege that any one of the three lawyers that were representing her at the time ever informed Nationwide about her alleged incurred expenses, and/or her desire to be reimbursed. Instead, Nationwide's first notice that Ms. Negron contends she is owed \$9.85 in expense reimbursement was in the form of the class action lawsuit. Nationwide, for its part, routinely reimburses requests for reimbursement of reasonable expenses, pursuant to its policy language, provided that it is made aware of the expense reimbursement requests.

At the time the lawsuit was filed, the only existing case law held that as a matter of law and logic, there can be no lawsuit for expense reimbursement where the insurance carrier was never informed of the claimed expense prior to being sued. See Edwards v. Allstate Ins. Co., 814 A.2d 1115, 1120 (N.J. App. Div. 2003) ("The insured's obligation to make such a claim is both logical and necessary to trigger the insurer's duty to reimburse.").²

In the recent Erie case, however, the Eighth District Court of Appeals reached a completely opposite conclusion. It held that a policyholder has no duty to first inform the insurance carrier of his or her request for expense reimbursement prior to filing suit. Under the Eighth District's recent ruling, a policyholder can keep silent about alleged incurred expenses, provide no notice of those expenses or a request for reimbursement, and then file a lawsuit alleging breach of insurance contract and bad faith refusal to pay expense reimbursement. This "don't ask, just sue" approach is indeed an "illogical" result, but not a legally correct one.

At the same time the Eighth District held that the policyholder has no duty to come

² See also Cochran v. State Farm Mut. Ins. Co., No. 2002-CV-54540, 2003 WL 25485811 (Ga. Super. Aug. 13, 2003) ("[T]he Court concludes that, as a matter of law, Defendant's duty to reimburse Plaintiff for lost salary and/or wages presupposes a request or demand for payment by Plaintiff and the presentation of the facts supporting his claim before Defendant had a duty to reimburse.").

forward prior to lawsuit to advise the insurance carrier of alleged expenses to be reimbursed, it also declared that it would be premature to decide whether the insurance carrier was supposed to actively solicit requests for expense reimbursement on its own accord. In footnote one of the Erie decision, the Eighth District stated "We find that it is premature to discuss whether Erie had an affirmative duty to tell insurers [sic] about the 'additional payments' benefit." The Eighth District has not provided any guidance as to whether insurance carriers have a legal duty to actively canvass their insureds to determine if they have incurred any expenses, like a postage stamp or a 2-mile drive, for which they would like reimbursement.

Nationwide's putative class action is pending in Cuyahoga Common Pleas Court, and the Eighth District is the pertinent appellate district for its case. This Court needs to examine the Eighth District's self-described "illogical" holding, and provide certainty to the industry as to the respective duties of insureds and insurance carriers when it comes to expense reimbursement.³

IV. **PROPOSITIONS OF LAW.**

A. **A Suit For Expense Reimbursement Is Premature And Is Not Ripe If The Insured Failed To Provide Notice Of The Claimed Expenses Prior To Suit.**

This is not a situation in which insurance carriers have received requests for expense reimbursement, and then refused to make reimbursement as called for under the insurance policies. Rather, the plaintiff insured has failed to ask for expense reimbursement prior to filing a suit alleging breach of insurance contract and bad faith refusal to pay expense reimbursement.

In the Erie case decided by the Eighth District, it is undisputed that Erie would have paid reimbursement for reasonable expenses incurred by the insured, if only it had known of those

³ Nationwide is presently opposing its plaintiff's motion for class certification. The inherently individualized factual issues of whether a given insured incurred any reasonable expenses at Nationwide's request, what they were told regarding expense reimbursement, and whether they received expense reimbursement, make the case unsuitable for class treatment irrespective of the outcome of the legal duty question in Kincaid v. Erie. Nonetheless, the importance of the legal issues in Kincaid v. Erie causes the Nationwide amici to file this brief in support of jurisdiction, without prejudice to their position regarding class certification.

alleged expenses. See Kincaid v. Erie at ¶12. The same is true with respect to Nationwide: it routinely reimburses reasonable expenses when the insured or his or her lawyer makes it aware of those alleged expenses.

If an insured claims a policy right to reimbursement of reasonable expenses, but the insurance carrier refuses to reimburse reasonable expenses, that creates a controversy capable of resolution in a court of law. That is not the situation presented here.

Where the insurance carrier is willing to pay reimbursement for reasonable expenses, but no request for reimbursement is ever made or presented, that does not create a live case or controversy that is justiciable in a court of law. Plaintiffs should not sue for reimbursement without first asking for reimbursement. If the request is paid, then there is no dispute, and nothing for a lawsuit to adjudicate. If the request is refused, only then is there a dispute between the parties that could give rise to an actual case or controversy. Until the demand is made, a dispute is only hypothetical, and may not occur.

The Eighth District's ruling implicates problems of standing and ripeness, and threatens to upend decades of Ohio precedent on these most basic legal issues. Without a request for payment that has been refused, there is no actual case or controversy between the parties. Under this Court's precedent, a legal claim is not ripe before the parties are in actual disagreement:

The basic principle of ripeness may be derived from the conclusion that 'judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote.'

State ex. rel. Elyria Foundry Co. v. Industrial Comm. Of Ohio (1998), 82 Ohio St.3d 88, 89

(quoting comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65

Colum.L.Rev. 867, 876). Indeed:

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. Where a party seeks a judicial ruling on what is only a “potential controversy” that has not ripened into an actual dispute, this Court has recognized that “[a]ttempts to procure such rulings are not only unfair to other litigants who are engaged in legitimate controversies but to the judicial system itself, whose vitality depends, in part, upon the resolution of actual cases and controversies.” Cleveland Trust Co. v. Eaton (1970), 21 Ohio St.2d 129, 146 (Schneider, J., concurring).

The problem of allowing a lawsuit before there is an actual dispute permeates each of the causes of action asserted in the Erie case. The Erie plaintiffs assert a claim for declaratory judgment, for example. But this Court recognizes that a declaratory judgment is premature when it is not yet known whether the parties are in dispute. See, e.g., Mid-American Fire & Cas. Co. v. Heasley (2007), 113 Ohio St.3d 133, 136. Here, the Eighth District ruled that a plaintiff can sue without first asking for expense reimbursement, apparently on the theory that if a request had been made, it may have been refused. Ohio law has never permitted that kind of hypothetical, advisory lawsuit, based on contingencies that may not occur. Id.

As for the claim against Erie for breach of contract, a party that wants to collect under a contract does not get to make the Courthouse the first step in the process. First, there must be a request for performance by the other side. See, e.g., Café Miami v. Domestic Uniform Rental, 2006-Ohio-6596, ¶ 12 (Cuyahoga) (“[F]or the plaintiff to place the defendant in breach, the plaintiff must tender performance of his obligation and demand performance by the defendant of

the reciprocal obligation.”).⁴ Plaintiffs should not be allowed to sue for breach of contract without making a threshold demand for performance. If a request is made and complied with, then the matter is resolved, without need for Court intervention. Parties should not be subject to suit for breach of contract without first being accorded the opportunity to perform.

As for the bad faith claim that the Eighth District allowed to proceed, under Ohio law:

‘An insurer fails to exercise good faith in processing the claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.’ Zoppo v. Homestead Ins. Co. (1994), 71 Ohio St.3d 552. To prevail on a claim of bad faith, the insured ‘must prove that the insurer’s refusal to pay a claim was totally arbitrary and capricious.’ Sprenulli’s Am. Serv. v. Cincinnati Ins. Co. (1992), 91 Ohio App.3d 317, 322.

Johnson v. American General Life Ins. Co., 2006-Ohio-5771, ¶23 (Erie). At its most basic level, a bad-faith claim is predicated on an insurer’s “bad-faith refusal to pay a claim[.]” Helmick v. Republic-Franklin Ins. Co. (1988), 39 Ohio St.3d 71, 75 (emphasis added).

Here, there is no alleged refusal to pay a claim. The plaintiffs do not allege they ever asked to be reimbursed for alleged postage and parking/mileage expenses. The plaintiffs’ claims in these cases are not ripe, and should have been dismissed at the pleadings stage.

B. Holding That An Insured Can Sue Without First Making A Request For Reimbursement Threatens To Clog The Courts With Easily-Avoided Litigation.

“It is common sense that the law favors ‘the prevention of litigation, by the compromise and settlement of controversies.’” State ex rel. Wright v. Weyandt (1977), 50 Ohio St.2d 194,

⁴ See also Diem v. Koblitz (1892), 49 Ohio St. 41, 55 (“The holding, that to entitle the seller to sue, he must offer to perform and request performance by the purchaser, is in accordance with the now generally recognized rule on the subject.”); Telxon Corp. v. Smart Media of Delaware, Inc., 2005-Ohio-4931, ¶54 (Summit) (“From a reasonableness standpoint, this may be the most troubling aspect of this whole case - that [plaintiff] never demanded that [defendant] perform this alleged promise. Therefore, [plaintiff’s] claim is legally insufficient[.]”); Thomas v. Matthews (1916), 94 Ohio St. 32, 51 (“It is not the duty of the defendant in a suit for damages for breach of contract to demand performance on the part of the plaintiff or to notify him of his readiness and willingness to perform. That duty is upon the party to the contract who seeks to recover for its breach.”).

197 (citations omitted).

Allowing lawsuits where there is no ripe controversy between the parties threatens to flood the courts with needless litigation, and defies common sense. If a simple pre-suit request could have yielded everything the plaintiff is seeking, then what is the point of a lawsuit? A plaintiff like Emma Negron, who currently believes she is entitled to \$9.85 in expense reimbursement, is better served to first request payment from Nationwide of \$9.85. Instead, she bypassed any request for reimbursement, and immediately filed a putative class action lawsuit.

That does not serve anyone's interests:

- The insured incurs the time and expense associated with litigation in order to receive what the insurance carrier may well have been willing to pay through a simple request.
- The insurance carrier faces the enormous time and expense inherent in the defense of any class action lawsuit, despite the obvious presence of myriad individualized factual issues.
- The courts are faced with all the time and resources consumed by adjudicating a (non-ripe) class action lawsuit.
- Other parties involved in legitimate disputes face diminished available judicial resources.

All of this when, in many instances, the parties may not actually be in disagreement, and the insurance carrier may be perfectly willing to provide reasonable expense reimbursement once informed of and asked about the alleged expenses.

This Court and the state and federal judicial systems in Ohio have engaged in a variety of measures to assist parties in resolving their disputes short of a full blown trial. This Court is on the record as favoring alternative dispute resolution, like mediation and arbitration.⁵ To allow

⁵ See, e.g., Derolph v. State (2001), 93 Ohio St.3d 628, 629 (“This court has supported and promoted mediation since at least 1989, when the court formed the Committee on Dispute Resolution,” and noting that Ohio is a national leader in promoting alternative dispute resolution); ABM Farms, Inc. v. Woods (1998), 81 Ohio St.3d 498, 500 (“Ohio and federal courts encourage arbitration to settle disputes.”); Mahoning Cty Bd. of MRDD v. Mahoning County TMR Ed. Ass’n (1986), 22 Ohio St.3d 80, 83 (“[Arbitration] provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.”).

lawsuits to proceed where there is no actual controversy between the parties, and where the defendant may well be willing to pay the expense reimbursement that the plaintiff has incurred, is contrary to this state's public policy in favor of avoiding litigation where there exist streamlined means for providing full and fair recovery to a plaintiff. In a judicial system in which the courts have the power to order the parties to mediation, then surely the courts have the power to say to an insured "ask for expense reimbursement before suing for expense reimbursement." That is the result the New Jersey courts reached six years ago in the Edwards case. And that is the result that is consonant with long-held Ohio precedent, and common sense.

C. It Is Against The Manifest Weight Of Ohio Precedent To Interpret An Insurance Policy So As To Produce An "Illogical" Result.

This Court should not permit to stand what the Eighth District admits is an "illogical" interpretation of an insurance policy provision. "Illogical" interpretations or construction of any legal instrument, be it a statute or a contract, should be rejected in favor of a logical one. This Court does not embrace "illogical or absurd results[.]" In re T.R. (2008), 120 Ohio St.3d 136, 139. This Court also recognizes that "[w]hen possible, courts should also avoid interpretations that create confusion or uncertainty." State v. Cabrales (2008), 118 Ohio St.3d 54, 59.

It is illogical to hold that an insurance carrier can be sued for failure to reimburse expenses when it was never asked to reimburse the expenses. The Eighth District apparently believed it was constrained by the general maxim that insurance policies are to be construed in favor of coverage to hold that an insured can sue for expense reimbursement without first requesting expense reimbursement. This case, however, is not about a coverage dispute, or denial of coverage.⁶ This Court should accept jurisdiction to clarify that even though insurance

⁶ Coverage disputes could arise, however, in individual factual situations where an insured seeks reimbursement of expenses that were not reasonable, or were not incurred at the request of

policies may be construed in favor of coverage as a general matter, no court is obligated to impose an admittedly “illogical” result in interpreting an insurance policy. See Westfield Ins. Co. v. Galatis (2003), 100 Ohio St.3d 216, 220 (“Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy.”) (overturning Scott Pontzer).⁷ The Eighth District, in reaching what it admits is an “illogical” result (regarding absent language, not express policy language, no less), has defied common sense. Its holding cries out for review by this Court.

D. The Availability Of Expense Reimbursement Is Not Concealed From Insureds, Who Are Given Policies, And Lawyers To Defend Them.

It bears repeating that this is not a situation in which insureds were unaware of the availability of expense reimbursement. With respect to the Nationwide plaintiff, Emma Negron, she received a policy that stated that the company would reimburse her for “reasonable expenses, incurred at our request, other than loss of earnings,” in connection with the defense of her auto liability lawsuit. Ms. Negron does not contend that those words were somehow concealed from her. It is undisputed that she received her policy. Under Ohio law, it has been long held that an insured is presumed to know the contents of his or her policy.⁸

Moreover, the issue of expense reimbursement arises specifically in the context of lawsuits against the insured. When insureds are sued as defendants, and defended by their insurance carriers under auto liability policies, they are assigned defense lawyers to defend them

the insurance carrier. Ms. Negron's lawsuit request of Nationwide to be reimbursed for expenses that had nothing to do with her Nationwide-defended lawsuit is an example.

⁷ See also State ex rel. United Foundries v. Indus. Comm'n (2004), 101 Ohio St.3d 207, 209 (“[A] corollary forbids an interpretation that 'gives rise to a patently illogical result.'”) (rejecting interpretation that is “vague, unworkable, and illogical.”).

⁸ See, e.g., Michigan Auto. Ins. Co. v. Van Buskirk (1927), 115 Ohio St. 598, 606 (“The insured had the policy in his possession and is presumed to know its provisions.”).

and protect their interests. Those defense lawyers owe a duty of loyalty and confidentiality to the insured, despite the fact they are being paid by the insurance carriers.⁹ The insureds are claiming only defense-related expenses, like mailing their complaints, or driving to a hearing.

Under the circumstances, where the insurance carrier retains a competent legal professional to independently defend the interests of the insured, there should be no legal presumption that the insured was unaware of the availability of reimbursement for reasonable defense-related expenses. Tellingly, Ms. Negron in the Nationwide case has asserted "attorney-client privilege" as to her communications with her Nationwide-assigned defense lawyer. Moreover, with respect to Ms. Negron, the insured simultaneously had an additional two lawyers representing her personally—not through the insurance carrier—in connection with the underlying auto accident. There is no reason in these situations why the insured should be absolved of the common-sense responsibility to speak up about alleged incurred expenses. In holding that the insured has no duty to request defense-related expense reimbursement before filing suit, the Eighth District ignored the fact that insureds are presumed to know the contents of their policies, and have lawyers advising them of their defense-related rights.

V. CONCLUSION.

The Eighth District reached what it admitted was an "illogical" interpretation of an insurance policy provision. This Court should accept jurisdiction to clarify that common sense should prevail, and an "illogical" result should not stand. Instead, an insured should be required to ask for expense reimbursement from his or her insurance carrier before suing for expense reimbursement. Any other result will encourage a flood of baseless litigation, in which in many instances, there is no actual controversy between the parties.

⁹ See, e.g., O. R. Prof. Conduct 1.8 ("[T]he lawyer cannot act on the insurance company's instructions when they are contrary to your interest....The lawyer hired by the insurance company is only representing you in defending the claim brought against you.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum In Support Of Jurisdiction Of Amici Curiae Nationwide Property And Casualty Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Insurance Company Of America, Nationwide Assurance Company, And Nationwide General Insurance Company was served, this 23rd day of October, 2009, upon the following via regular U.S. mail, postage prepaid:

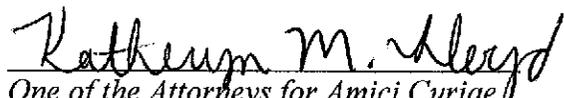
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