

ORIGINAL

In the
Supreme Court of Ohio

DON B. KINCAID, JR.,

Plaintiff-Appellee,

v.

ERIE INSURANCE COMPANY,

Defendant-Appellant.

Case No. 09-1936

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate District,
Case No. 92101

**BRIEF OF AMICI CURIAE PROGRESSIVE PREFERRED INSURANCE
COMPANY, PROGRESSIVE DIRECT INSURANCE COMPANY,
PROGRESSIVE CASUALTY INSURANCE COMPANY, AND
PROGRESSIVE SPECIALTY INSURANCE COMPANY
IN SUPPORT OF JURISDICTION**

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TABLE OF CONTENTS

I.	STATEMENT OF INTEREST.....	2
II.	WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST.....	3
III.	ARGUMENT.....	5
	Proposition of Law No. 1	5
	An insurer cannot be found liable under Ohio law for not paying a claim that was never presented to it	5
	Proposition of Law No. 2:	9
	Where There is a Gap, or Silence, In a Written Contract with Respect to a Particular Matter, That Gap Should be Filled by a Good Faith Undertaking by the Parties	9
	Proposition of Law No. 3:	11
	An Insurer Cannot Be Found Liable for Bad Faith for Failing to Pay a Claim That Was Never Presented to It.	11
V.	CONCLUSION	12
	CERTIFICATE OF SERVICE	14

I. STATEMENT OF INTEREST.

Amici curiae Progressive Preferred Insurance Company, Progressive Direct Insurance Company, Progressive Casualty Insurance Company, and Progressive Specialty Insurance Company (collectively “Progressive”¹ or “amici curiae”) are Ohio insurance companies with their headquarters in Mayfield Village, Ohio. Progressive is one of the largest insurance companies in Ohio, and it both employs and insures thousands of people throughout the state.

Progressive is one of seven groups of insurance companies against whom virtually identical class actions have been filed, wherein insureds under automobile liability insurance policies are seeking recovery for allegedly unreimbursed expenses incurred by them, such as postage, mileage, parking, and lost wages allegedly incurred while attending depositions, hearings, and trials – in connection with lawsuits in which they were the named defendants.² The plaintiffs in each of these seven putative class actions are represented by the same counsel, and the claims and allegations in all seven complaints are virtually identical. Moreover, all of these class actions have been filed on behalf of policyholders who, prior to filing their class actions, never gave their insurance companies notice of the fact that they had incurred such expenses and who never asked for reimbursement.

¹ Each of the Amici Curiae is a separate and distinct entity; the term “Progressive” is used to refer to them collectively solely for convenience and ease of reference.

² In addition to this case brought against Erie Insurance Co., see *Cika v. Progressive Preferred Ins. Co.*, No. CV-08-653115; *Negron v. Nationwide Property & Casualty Ins. Co.*, No. CV-08-650310 (Cuyahoga C.P.); *Hosey v. State Farm Mutual Auto.*, No. CV-08-656919 (Cuyahoga C.P.); *Gallo v. Westfield National Insurance Co.*, No. CV-08-652376 (Cuyahoga C.P.); *Kavouras v. Allstate Ins. Co.*, No. 08-CV-571 (N.D. Ohio); and *Lycan v. Lumbermens Mutual Casualty Co.*, No. CV-07-644127 (Cuyahoga C.P.). Plaintiffs’ counsel also filed another

Thus, the plaintiff in the class action in which Progressive is the defendant – *Cika v. Progressive Preferred Ins. Co.*, No. CV-08-653115 – was originally sued by his wife for causing an accident while operating his motorcycle. He does not claim that Progressive failed to provide him with a defense or in any way mishandled the litigation. Instead, Mr. Cika contends that he should have been reimbursed for unidentified travel and postage expenses and lost earnings allegedly incurred as a result of his participation in certain of the litigation proceedings. Moreover, like plaintiff Kincaid in the Erie Insurance Co. (“Erie”) case now being appealed to this Court, Mr. Cika does not allege that he ever told Progressive about his alleged expenses, or asked for reimbursement, or that Progressive refused to reimburse any claim for expenses that was presented to it. Instead, like Erie, Progressive’s first notice that one of its insureds was contending that he is owed expense reimbursement was the filing of a class action complaint.

Progressive is therefore directly affected by the Eighth District’s holding in this case, a holding which leads to a result in all of these class actions that the Eighth District itself admitted “may seem illogical.”

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

The decision of the Court of Appeals for the Eighth District raises issues that will have an impact far beyond the litigants in this case. As has been pointed out above, this case is but one of seven class actions, so far, that have been filed in Ohio against different insurance companies and that make exactly the same claims and are grounded on the same extraordinary and novel legal theories: first, that an insured under an automobile liability insurance can pursue a class action, on behalf of himself and other insureds, to obtain reimbursement for certain

identical action against GEICO in Federal Court in Florida. See *Johnson v. GEICO Gen. Insurance Co.*, No. 08-80740 (S.D. Fla.)

personal expenses (postage, parking, travel, lost wages), allowed by the policy, but for which the insured never sought reimbursement and therefore never gave the insurance company an opportunity to pay; and second, that such an insured (and the other members of the class) are entitled to a judgment of bad faith against the insurance company for non-payment, even though the insurance company never received any request for such payment.

If, therefore, this Court does **not** accept jurisdiction of this case, the decision of the Eight District will be controlling law, and all seven class actions – and countless other copycat class actions that are likely to be filed against all of the other insurance companies that have similar provisions in their standard automobile liability policies – will now go forward in the trial courts, even though the Eighth Circuit has itself acknowledged that its decision “may seem illogical” and even though that decision is so clearly contrary to law. The result will be that trial courts, not to mention all of the defendants in these actions, will be subject to the enormous drain of time, resources and expense that class actions customarily entail. It is one thing to allow such time, resources, and expense to be incurred in class actions where the basic claim against the defendant has some colorable merit; it is quite another thing to allow this to happen – in not just one, but (at the present time) in at least seven such class actions – when the underlying claim is so illogical and so contrary to established principles of law.

Beyond these practical consequences, the issues of law that are being put forward in this appeal have great significance to individual and corporate citizens of Ohio, far beyond the immediate parties. Those issues of law include the following:

First, can an insurance company be sued, in a class action, for failing to pay certain expenses incurred by the company’s insureds when the insurance company never had any knowledge of such expenses and was never asked to pay them?

Second, can an insurance company be sued for bad faith for failing to pay purported expenses of which the company had no knowledge? If so, insurance companies will be placed in the untenable position of being required to seek out claims that have never been made in order to avoid being repeatedly sued for bad faith. The responsibility for making claims will thereby be shifted from the insured to the insurer, even when the insurer has no knowledge that a potential claim exists.

Third, what rules of interpretation should a court follow when a contract is silent on a particular matter and, as a consequence, there is a gap in the contract?

For all of the above reasons, this case is one which this Court should grant jurisdiction.

III. ARGUMENT

Proposition of Law No. 1:

An insurer cannot be found liable under Ohio law for not paying a claim that was never presented to it.

In holding that the plaintiff adequately pled causes of action for breach of contract and bad faith, the Eighth District Court of Appeals held that an insurance company has a duty to pay the insured's expenses under the Additional Payments coverage of the standard automobile liability insurance policy even though the insured never notified the insurance company that he had incurred such expenses and never asked for reimbursement. The Court of Appeals conceded that this result "may seem illogical." 2009 Ohio App. LEXIS 3680 at ¶ 20. It is also contrary to Ohio law.

No other Ohio court has ever held that an insurance company can be held liable for failing to pay a loss or expense for which no claim has ever been presented. To the contrary, Ohio courts have long held that failure to provide notice of a claim to an insurer bars any lawsuit

to recover for that loss – even if the insurer is otherwise aware of the loss. *See, e.g., Heller v. Standard Accident Ins. Co.* (1928), 118 Ohio St. 237, holding that the insured’s failure to give his automobile insurer notice that a negligence lawsuit had been filed against him precluded coverage of the lawsuit under the policy even though the insured had notified the insurer about the accident when it occurred. *See also Dover Lake Park Inc. v. Scottsdale Ins. Co.* (Summit, June 25, 2003), Case No. 21324, 2003 Ohio App. LEXIS 2973 at ¶15, holding that because Dover Lake had not provided Scottsdale with timely notice of its claim, “Scottsdale was excused from its obligation to reimburse Dover Lake for its pre-tender litigation expenses”.³

Moreover, the only two cases from outside of Ohio that counsel has been able to locate in which courts have addressed the specific factual situation that is involved in this case (and in the other putative class actions referred to above) – *Cochran v. State Farm Mut. Auto. Ins. Co.* (Ga. Super. Ct., August 13, 2003), Civil Action No. 2002-CV-54540, 2003 WL 25485811 and *Edwards v. Prudential Property and Cas. Co.* (N.J. App. Ct. 2003), 814 A.2d 1115, 1120 – have reached a conclusion directly opposite to that reached herein by the Eighth District.

Thus, in *Cochran* the Georgia Superior Court held that the plaintiff insured was not entitled to reimbursement for lost wages he incurred in connection with the defense of a lawsuit filed against him (even though the liability policy issued to the insured expressly provided for such reimbursement) because the plaintiff had failed to present a claim or request for reimbursement to his insurance company. 2003 WL 25485811 at 1-2. The Court rejected

³ *See also, e.g., Moncada v. Allstate Ins. Co.* (N.D. Cal. 2006), 471 F. Supp.2d 987, 994 (holding that the insurer’s “failure to pay claims that were never made cannot establish a breach of contract” and rejecting plaintiffs’ argument that the insurer was on constructive notice) and *People v. So. Pacific Co.* (1983), 139 Cal. App.3d 627, 641 (“The theory is that it is

plaintiff's argument that the insurance company itself was obligated to alert the plaintiff to his right of reimbursement under the policy. The Court reasoned that:

it is conceivable that an insured testifying at trial would not be entitled to reimbursement because he or she is retired, unemployed, a student, or salaried without loss. Defendant would have no way of knowing whether or not an insured was entitled to wage reimbursement unless the insured provided them with documentation and/or information regarding such. Since Defendant did not have the necessary information with which to perform under the provisions of the policy, it necessarily follows that plaintiff had to actually make a claim for reimbursement in order for Defendant to perform.

The court therefore concluded 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.** Because Plaintiff did not make a request for payment or present any documentation supporting his claim for reimbursement, the Court determines that Defendant did not breach the insurance contract.

Id. (emphasis added).

Likewise, in the *Edwards* case cited above, the New Jersey Superior Court, Appellate Division, upheld a judgment on the pleadings in favor of the insurance company because the plaintiffs therein had "chosen not to make any claim for reimbursement under the policy" prior to filing suit. 814 A.2d at 1120-21. The Appellate Division concluded that the duty to "pay" for such expenses under the provisions of the policy "clearly presupposes a request or demand for payment and the presentation of facts supporting the claim before the insurers have a duty to reimburse. The insureds' obligation to make such a claim is both logical and necessary to trigger the insurers' duty to reimburse." *Id.* at 1120. In support of its conclusion,

unreasonable or unfair to expect a defendant to pay a debt before he is aware of or able to

the Appellate Division cited the statement in 8 *Corbin on Contracts*, § 37.11 (1999) that where the promisee is the only party that possesses information necessary for performance of a contract term, “notice to the promisor is, by construction of law, a condition of the promisor’s duty to perform.”

To the same effect is 15 *Williston on Contracts* §48:7, stating that, when a party to a contract possesses “peculiar knowledge” of something to be done under the contract, then there is an “implied obligation or covenant” that the party must give notice within a reasonable time to the other party to the contract, and “failure to give notice prevent[s] the other party’s duty from ever arising”.

Amici submit that the result reached by the *Edwards* and *Cochran* courts is the only fair one. In this situation, an insurance company cannot be expected to presume that an insured incurred reimbursable out-of-pocket expenses in connection with the defense of a lawsuit without the insured telling the company of that fact. An insurance company is not omniscient. Hence, it is only logical and fair that an insurer is under no obligation to reimburse its insured for any expenses until that insured shares that information with the insurer.⁴

compute its amount”).

⁴ Earlier in its decision the Court of Appeals noted that “Kincaid states in his Complaint and Appellate Brief that all duties imposed by the insurance policy were fully satisfied by him and the purported class members”. (Opinion, P 13). Although the Court of Appeals did not rely on this alleged “statement” in reaching its conclusion (See P 20), it should be noted that it **is not an accurate paraphrase of the allegations of the Complaint**. What Plaintiff Kincaid actually alleged in his Complaint was that he had “**cooperated fully** with all of the terms, conditions and duties set forth in the policy including Defendant’s requirement that the insured cooperate in the handling of the claim” (Complaint, ¶ 13) and that he “and the Classes” had performed “[a]ll conditions precedent *** including the payment of all premiums necessary to keep the policy in effect, and cooperation in Defendant’s requested forwarding of suit related documents and attendance at conferences, depositions, arbitrations, mediations, hearings or trials.” (Id., ¶ 33). Notably missing is any mention of any condition precedent requiring notice or the presentation of a request for reimbursement. Indeed, the absence of any such allegation is hardly surprising,

Proposition of Law No. 2:

Where There is a Gap, or Silence, In a Written Contract with Respect to a Particular Matter, That Gap Should be Filled by a Good Faith and Reasonable Undertaking by the Parties.

A second critical question of law raised by this case is one which can arise in any contract case, not just in contract cases involving insurance policies. That question is: what rules of construction should a court apply when asked to interpret and apply a contract where the contract is silent with respect to a particular matter?

In this case, the Court of Appeals first held that “the terms of the contract are plain and unambiguous.” (P20) (Hence, the doctrine of *contra proferentem* has no application here.) The Court of Appeals then pointed out that there is “no notice requirement in the insurance policy in regard to additional payments under the policy.” (*Ib.*) Hence, because of the absence of an **express** notice requirement, the Court of Appeals concluded that no such requirement should be implied. Consequently, under the Eighth District’s interpretation of the standard automobile liability policy, an insured can file suit against its liability insurer at any time within fifteen years after incurring an expense and, in addition, obtain a judgment for bad faith against the company without ever having notified the insurance company that it has a claim for unreimbursed expenses or requesting payment.

The approach taken by the Court of Appeals was clearly erroneous. The fact that a contract may not contain an **express** requirement of notice does **not** mean that the contract should be interpreted as intending the opposite, *i.e.*, that no notice of any kind need be given. Rather, the absence of an **express** provision simply means that there is a “gap” in the contract, and that gap must be filled by taking into account a reasonable and good faith undertaking by the

given the fact that plaintiff has continuously asserted that the policy contained no such notice requirement or condition precedent.

parties. Thus, in *Savedorff v. Access Group, Inc.*, 524 F.3d 754, 763 (6th Cir. 2008), the U.S. Court of Appeals for the Sixth Circuit stated that, “[i]f the contract is silent, as opposed to ambiguous, with respect to a particular matter,” the parties to the contract:

“are required to use good faith to fill the gap of a silent contract.” *Burlington Res. Oil & Gas Co. v. Cox*, 133 Ohio App. 3d 543, 729 N.E.2d 398, 401 (Ohio Ct. App. 1999); accord *Myers v. Evergreen Land Dev. Ltd.*, 2008 Ohio 1062, 2008 WL 650774, at *5 (Ohio Ct. App. 2008) (unpublished) (“An obligation of good faith generally arises only where a matter was not resolved explicitly by the parties. . . .{T}his duty is implied only under limited circumstances, such as when the contract is silent as to an issue. In such a case, the parties must use good faith in filling the gap.”) “‘Good Faith’ is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.” *Ed Schory & Sons v. Francis*, 75 Ohio St. 3d 433, 1996 Ohio 194, 662 N.E.2d 1074, 1082-83 (Ohio 1996) (quoting *Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357-58 (7th Cir. 1990)).

Such an approach is particularly appropriate in the instant case, where the Court of Appeals recognized that the result of its interpretation of the policy’s “silence” on notice – *i.e.*, that the insurance company should be required “to pay for expenses that the insured never notified the company about” – would therefore “seem illogical.” (opinion ¶ 20). It should be self-evident that if construing the policy’s silence on the matter of notice to mean that no notice should be required would be “illogical”, the Court should have at least considered applicable rules of construction before issuing its decision.

It should be noted that the *Burlington Resources* case (133 Ohio App.3d 543), cited by the Sixth Circuit in *Savedorff*, is actually quite analogous to the instant case. *Burlington Resources* involved an oil and gas lease that allowed the lessor to assign the lease to a successor lessor, but was “silent on notification” of any such assignment. The issue before the court was whether rental payments by the lessee to the original lessor (rather than to the successor lessor,

of whose existence the lessee had no knowledge) entitled the successor lessor to terminate the lease for non-payment of rentals. Holding that “the parties to a contract are required to use good faith to fill the gap of a silent contract,” the Court of Appeals quoted the holding of this Court, in *Ed Schory & Sons v. Francis* (1996), 75 Ohio St. 3d 433, 443-444, that “Good faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.”

Proposition of Law No. 3:

An Insurer Cannot Be Found Liable for Bad Faith for Failing to Pay a Claim That Was Never Presented to It.

It has long been established in Ohio that the liability of an insurance company for bad faith in dealing with its insured is predicated on the insurance company’s “bad faith refusal to pay a claim” (*Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 75), or, in the case of a liability policy, on a bad faith refusal to settle a claim against the named insured. As one Court of Appeals has noted:

“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 therefore.” *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.” *Spremulli’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) (emphasis added).

However, in the instant case, the Eighth District in effect held that an insurance company can be held liable for bad faith if it fails to pay \$1.25 in postage and an \$8.00 parking fee incurred by an insured (the actual facts of *Negron v. Nationwide Property & Casualty Ins. Co.*, No. CV-08-650310, described in the amicus curiae Memorandum of Nationwide Property

and Casualty Insurance Company, et al.), even though the insurance company never had any knowledge of such expenses, and was never asked to pay them, until receiving a class action complaint in the mail. What possible rationale or justification can there be for imposing bad faith liability in such a situation? Doesn't the fact that the insurance company never had any knowledge that the insured incurred such expenses, and was never asked by the insured for reimbursement, establish, as a matter of law, "circumstances that furnish reasonable justification" for non-payment (*Zoppo*, 71 Ohio St.3d at 554), and therefore preclude any finding of bad faith? Yet, if permitted to stand, the Court of Appeals' decision would allow bad faith judgments to be rendered against insurance companies in this situation.

V. CONCLUSION.

For all of the reasons set forth above, the Progressive amici curiae respectfully urge this Court to accept jurisdiction of Erie Insurance Company's appeal. The issues of law being raised by this case are of considerable significance to individual and corporate citizens of Ohio far beyond the immediate parties. Moreover, the resolution of those issues at this point in time will, if resolved differently than they were by the Court of Appeals, avoid tying up several

trial courts with a flock of meritless claim actions, and, in the bargain, save the defendants in those class actions enormous and unnecessary costs and expenses.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Amici Curiae Progressive Preferred Insurance Company, Progressive Direct Insurance Company, Progressive Casualty Insurance Company, and Progressive Specialty Insurance Company in Support of Jurisdiction was served via regular United States mail on this 23rd day of October, 2009, on the following:

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