

IN THE  
SUPREME COURT OF OHIO

MARY JO HUDSON,  
SUPERINTENDENT OF  
INSURANCE,

Plaintiff-Appellant,

v.

PETROSURANCE, INC.

Defendant-Appellee.

:  
CASE NO. 09-1816  
:  
On appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District  
:  
Court of Appeals Case  
No. 08AP-1030

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MEMORANDUM OPPOSING JURISDICTION  
BY DEFENDANT-APPELLEE PETROSURANCE, INC.

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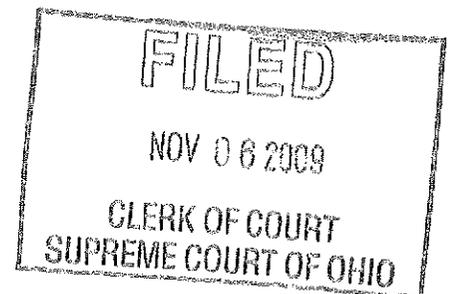
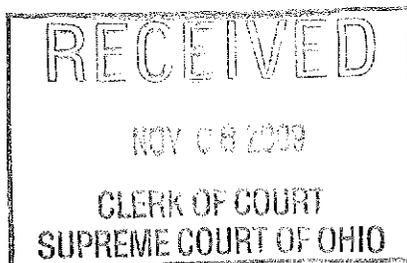
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**I. APPELLEE'S STATEMENT OF THE CASE AND FACTS.**

Ohio Revised Code § 3903.42 sets forth, in clear and unambiguous terms, the priorities for payment to the claimants in insurance company liquidations. Those pertinent here include claims based on insurance policies (Class 2), claims of creditors (Class 5), claims of local and state governments (Class 6), and claims of shareholders (Class 9). The section further requires that every claim in each class be paid in full before the members of the next class receive any payment. (See the Opinion of the Court of Appeals, ¶ 32.)

This liquidation case began in 1990 with the filing by the Liquidator of her Complaint alleging the insolvency of the Oil & Gas Insurance Company ("OGICO"). OGICO's sole shareholder, Appellee Petrosurance, Inc. ("Petrosurance"), was unsuccessful in contesting the alleged insolvency (arguing that the Liquidator's estimated claims reserves were grossly excessive and in effect predicting the eventual amounts accumulated by the Liquidator), and the liquidation proceedings commenced in the Court of Common Pleas of Franklin County. It is undisputed that Petrosurance is an Ohio corporation in good standing with some 50 shareholders, including many individual residents of Ohio.

From liquidation in 1991 until 2004, the Liquidator collected all the assets she says she could collect, and evaluated all the claims filed. She did not pay any policyholder or other claims, except for refundable "early access payments" to State

Insurance Guarantee Funds paid in 2001 and 2003 relating to the 1993 Order of the Court of Common Pleas.

Having paid the expenses of the liquidation (Class 1) as she went along, in 2004 it is undisputed that the Liquidator eventually paid the additional Class 2 (direct insurance policy obligations) over and above the State Guaranty Fund claims totaling about \$4,000,000. It is further undisputed that there being no claims in Classes 3 and 4, in 2006 the Liquidator determined and paid the Class 5 claims (arising under reinsurance policies and all other general creditors) of almost \$20,000,000 (Class 5) and then proceeded to pay the state and local government claims (Class 6) of approximately \$100,000.

During this entire period, Petrosurance continued to urge upon the Liquidator its belief that OGICO was not insolvent and remained in constant contact with the office of the Liquidator. This culminated in a conference in 2006 in the Liquidator's office during which she suggested that despite Petrosurance having always asserted its "as of right" claims, it should in addition file a standard proof of claim form and produced an already part completed form for Petrosurance. (See the Court of Appeals Opinion, ¶ 37.) When Petrosurance completed and filed the form, she refused to accept it.

In April of 2007, the Liquidator instituted this litigation asking only for a declaratory judgment barring any shareholder's claim by Petrosurance. She then filed her Motion for Summary Judgment, and in her Memorandum in Support of that Motion, filed in November of 2007, she, for the first time, suggested that the

“surplus” (by then exceeding \$13,000,000) be distributed “pro rata” among the creditors whom she had already paid. Even at that late stage, she hesitated to call the projected payments “interest” because of the lack of any statutory provision for that kind of a payment.

It should perhaps be noted that the term “surplus” is being used by the Liquidator with abandon. To her, apparently, any money left in her hands after payments to creditors (Class 5, R.C. § 3903.42) is “surplus,” despite the fact that there are four statutory classes for payment after the creditors, including shareholders (Class 9). As the Court of Appeals has noted (see ¶ 32 in its Opinion), R.C. § 3903.42 provides that the members of each class be paid in full before any payments are made to the next class. It is undisputed that the Liquidator, having paid all Class 5 “claims in full” (see her Complaint in this case, ¶ 5), went on and paid the members of Class 6 (claims of local and state governments). There is simply no statutory authority for the Liquidator’s drawing of a line after Classes 5 and 6 and considering the remaining classes as “surplus.”

The Common Pleas Court granted the Liquidator’s Motion for Summary Judgment, holding that the payment of interest would be proper. It also granted Petrosurance’s Motion for Summary Judgment “in part,” holding that Petrosurance should be paid any funds remaining after the payment to the creditors of “interest as permitted.” (See the Common Pleas Court Decision, p. 10.) Under the opinion of the Court of Appeals, the payment of interest is not permitted.

The Court of Appeals reversed, holding that applicable law (R.C. § 3903.42) did not provide for the payment of interest in any respect, and certainly not after payment of the principal claims of creditors, but before the payment of statutory claims of shareholders (Class 9). In her statement of facts, the Liquidator avoids including some extremely important – and undisputed – facts:

1. Her own Complaint alleges that all claims have been “paid in full” and Petrosurance’s Answer admits that fact.
2. The Liquidator’s Complaint in this case does not ask that interest – by that or any other name – be paid to creditors.
3. The record does not show that any creditor has, at any time, even asked for interest or any other payment in addition to their principal.
4. The Liquidator has obtained a court order barring any further payments to the creditors and any new claims by other creditors (see the Court of Appeals Decision, ¶ 4).
5. The Liquidator has made her “Administrative Operating Procedure” a part of the record of this case, under which she regularly uses OGICO’s “surplus” to advance the compensation and benefits of all her employees involved in all of the other liquidations in her office.

**II. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.**

Since it is insolvency that is the statutory predicate for insurance company liquidations in Ohio (see R.C. § 3903.17), it will always be very rare that the liquidation process gathers up money in excess of sums due to insurance

policyholders, the federal government, creditors, and state and local governments (Classes 2, 3, 5, and 6, respectively, under R.C. § 3903.42). In this case, however, the Liquidator, who says that she has paid all claims (except the shareholder's) is confronted with a surplus of over \$13,000,000 (a situation which Petrosurance predicted from the beginning), and which she has consistently declared to be shareholder equity in her returns to the Internal Revenue Service since 2004. She wants to distribute that money pro rata among creditors (whom she says she has already paid in full) (see her Complaint, ¶ 5) and not to the sole shareholder, Petrosurance, which has always asserted its rights and filed a proof of claim, but has been paid nothing.

Recognizing that this is an unusual situation, the Liquidator has at least twice conceded that the issue raised by this case is "rare," an admission seemingly at odds with her contention that the case presents an issue of "great general interest." In the trial court, she stated that:

It is rare, but not unprecedented for a Liquidator to have funds in excess of those needed to pay preferred (sic) creditors the principal amount of their claims (Liquidator's Memorandum supporting her Motion for Summary Judgment, p. 8) (writer's emphasis).

She repeated that assertion, word-for-word, in her brief in the Court of Appeals, page 10.

While the Liquidator further asserts that there are 11 insurance liquidations pending in Ohio, involving (for whatever relevance that may have) 66,476 claims, she conspicuously fails to indicate that even a single one of them raises any issue of "interest" or "surpluses." She asserts, nevertheless, and totally without any

foundation in fact or the record, that the decision in this case “will affect a massive number of present and future claimants.” (See her Introduction, p. 2.) She does not even suggest that the issue of the payment of interest to creditors will arise in even one of that “massive number.”

The Liquidator makes an unsuccessful attempt to create a “parade of horrors” in support of her contention that matters of great public interest are involved. How else to regard her curious concern (Memorandum, p. 7) that the 10th District Court of Appeals is the only Court of Appeals that can hear insurance liquidation appeals, given the fact that Petrosurance could as well complain that the Common Pleas Court of Franklin County is the only common pleas court in which such cases may be instituted. Unless the Liquidator intends to assault the statutory jurisdiction of the Court of Appeals, the relevance of such a comment is not apparent.

In addition, the Liquidator asks the Court to find that this is a case of great general interest because the decision appealed from “provides an incentive for a shareholder to delay the liquidation process.” (Liquidator’s Memorandum, p. 6) Shareholders, whose rights are last in priority in R.C. § 3903.42, are in no position to delay the Liquidator’s evaluation and settlement of other claims. Totally absent is any claim that Petrosurance has done anything to delay this liquidation, which has dragged on for two decades in spite of, and not because of, Petrosurance. It should be clear that delay is no kinder to shareholders than it is to creditors: either is just as capable as the Liquidator of earning interest on their own money, and

both would like to have that money sooner rather than later. Her “Administrative Operating Procedure,” pursuant to which she has been using OGICO’s “surplus” to advance the expenses of other liquidations, furnishes explanation enough of why this liquidation has dragged on so long. The decision of the Court of Appeals does not produce an “enormous windfall” for Petrosurance (which has now been deprived of its property for 20 years), or for OGICO’s officers and directors who are now the subject of a gratuitous and irrelevant attack by the Liquidator, an attack that clearly demonstrates her determination not to pay Petrosurance’s claim, no matter what the law is.

In short, the issue raised by the Liquidator’s attempted appeal of this case is limited to the facts of this case and is of no concern to anyone but the parties involved.

### III. ARGUMENT.

#### Appellant’s Proposition of Law.

*When all creditors’ claims against a liquidated insurance company have been paid in principal and a surplus remains, the liquidator must pay the creditors for interest that accrued during liquidation before paying any remainder to the company’s shareholders.*

#### Appellee’s Counterstatement of Law.

*The Liquidator has no authority to pay interest and even if she did, she would still be required to pay all claims filed under R.C. § 3903.42(A)(9) before payment of any amounts for other purposes not specifically authorized by R.C. § 3903.42, including interest.*

The Liquidator’s proposition of law is not only wrong, but is incomplete. Her statutory duties include the protection of the rights of shareholders, as well as those

of creditors. R.C. § 3903.21(A)(19), R.C. § 3903.21(A)(23), R.C. § 3093.42; *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 2006-Ohio-2739. Regardless of whether a liquidator might have the authority to pay interest to creditors in the absence of statutory authority (and she does not), R.C. § 3903.42 requires her to pay the shareholders first as Class 9 claimants, before making any other payments not provided for by statute. (See the Court of Appeals Opinion, ¶ 35.)

As the Liquidator concedes (see her Memorandum, p. 8), when construing a statute, a court must first look at the plain language of the provision. But the plain language of R.C. § 3903.42 says nothing about the payment of interest. It certainly says nothing about the payment of interest after Classes 5 and 6 claimants have been paid in full.

The Liquidator has no difficulty in contending (Memorandum, p. 9) that the priority schedule established by R.C. § 3903.42, which includes claims of shareholders and does not allow for interest, nevertheless implies the requirement to pay interest before paying Class 9 claims. The Liquidator contends that “the statutory preference is to repay all creditors in full,” and that interest is part of a creditor’s claim (see her Memorandum, p. 9). If that is the case, then why did the Liquidator pay the Class 2 through 6 claimants without interest while aware of the “surplus,” which she recognized as shareholder equity in the 2004 IRS returns and the provision requiring prior full payment to the classes of higher priority? Why did she then state in her Complaint in this case (¶ 5) that all claims had been paid in

full? The answer to both questions is that the statute does not provide for the payment of interest.

The federal and state cases cited in the Liquidator's Memorandum are totally and completely irrelevant to the issue raised in this case. While the Liquidator claims (Memorandum, p. 11) the discretionary power to pay interest, the statutes she cites in this regard do not support her contention (see the comments of the Court of Appeals in this regard at ¶ 31), and do not contain even a suggestion in that direction.

When all is said and done, the statute, R.C. § 3903.42, does provide for the payment of shareholders' claims (Class 9). It does not provide for the payment of interest or any other payment to creditors over and above the principal amount of their claims. The Liquidator wants the Court to read into the statute authority to use liquidation funds, not only to pay interest to creditors whom it has already paid in full, but to do so before paying any Class 9 claims, effectively barring the shareholder from any recovery, all in direct contravention of the specific provisions of R.C. § 3903.42.

When interpreting statutes, it is the duty of the court to give effect to the words used, not to delete words used or insert words not used. *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364; *State v. Bartholomew*, 119 Ohio St.3d 359, 2008-Ohio-4080.

As the Court of Appeals observed (see the Decision at ¶ 23) the provisions of R.C. § 3903.42 are unambiguous, and "the plain meaning of the statutory language

is paramount and must be applied.” Those provisions award creditors a Class 5 priority, shareholders a Class 9 priority – and no priority at all to interest for any claimant. The Supreme Court has repeatedly held that if a statute is not ambiguous, the court need not interpret it, but should simply apply it. See *Portage County Bd. of Commrs v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 52. Courts cannot insert language into a statute through the guise of interpretation. *Hall v. Banc One Mgt. Corp.*, 114 Ohio St.3d 484, 2007-Ohio-4640, ¶ 24. Changes of substance are for the consideration of the legislature, not the Courts, and if the Liquidator desires a change in Ohio law to permit the payment of interest to creditors, she should seek that change from the legislature, not the courts.

Neither Ohio law, nor the Ohio or the U.S. Constitutions, permit the freewheeling judicial legislation that would be necessary to read “interest” as a priority into the statutory order of R.C. § 3903.42. The statute not only does not provide for payment of interest to creditors ahead of shareholder claims, it does not provide for payment of interest at all. The Liquidator implicitly recognized that fact when she did not label the payments she wants to make to the creditors as “interest” until this case got to the Court of Appeals. In her Memorandum supporting her Motion for Summary Judgment, she sought permission, not to pay “interest,” but to make a “pro rata distribution” of the “surplus” to the creditors as an “equitable right” or “damages”; but whatever the Liquidator wants to call it, there is simply nothing in R.C. § 3903.42 that permits any payment outside of the statutory scheme.

As the Court of Appeals pointed out, when the legislature wants to provide for the payment of interest, it does so. In the case of liquidated banks, for example, R.C. § 1125.24(B) specifically provides for the payment of interest to creditors. In the case of insurance companies, R.C. § 3903.42 does not. (See Decision, ¶ 35.)

As the Court of Appeals observed:

Upon review, we conclude that the Liquidator's position regarding interest is irreconcilable with the unambiguous language of the Liquidation Act. (Decision, ¶ 30)

...

While the General Assembly addressed the payment of interest in R.C. 1125.24 with respect to banking liquidations, it has not done so in R.C. 3903.42 with respect to insurance liquidations. In the absence of legislative authority, we conclude that interest is not available on creditors' claims already paid by the Liquidator in this case. (Decision, ¶ 35)

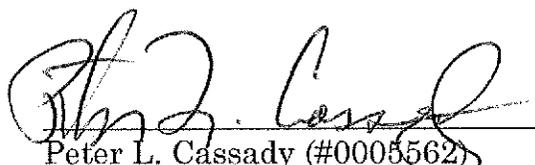
#### IV. CONCLUSION.

It is clear that when the Liquidator instituted this litigation on April 5, 2007, it was her position that the creditors had been "paid in full" (see Complaint, ¶ 5) and were owed nothing by way of interest or anything else. She had paid the creditors (R.C. § 3903.42, Class 5) the principal amount of their claims in 2006 and then in the same year went on and paid the claims of state and local governments (Class 6) in full compliance with the statutory command (R.C. § 3903.42) that she not pay any class until all claims in prior classes had been paid in full. Only when it appeared that she might have to follow her statutory obligation to pay shareholders' claims did she develop the "interest" argument (it appears nowhere in

her Complaint), which she now seeks to develop into a matter of “public and great general interest.”

The Liquidator is grasping at any theory that would justify payment of the amount on hand to anyone but Petrosurance, OGICO’s sole shareholder. The Liquidator justifies this attitude by claiming that the Decision of the Court of Appeals grants “an enormous windfall” to Petrosurance, ignoring the fact that, like the creditors, it too has been deprived of its property for nearly two decades. In short, the only important issue to the Liquidator is the avoidance of any payment of Petrosurance’s statutory claim; the issue of payment of interest to the creditors is not only not of great general interest, but exists as an issue only because the Liquidator wants an alternative to her statutory obligation to pay the shareholder’s claim.

Respectfully submitted,



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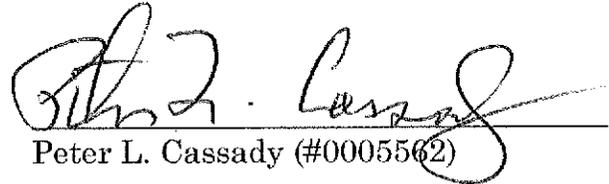
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served the 5th day of November 2009, by U.S. Mail, postage paid, on the following:

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