

IN THE SUPREME COURT OF OHIO

CASE NO. 09-1936

DON B. KINCAID, JR. , et al.
Plaintiff-Appellees

-vs-

ERIE INSURANCE COMPANY, et al.
Defendant -Appellants.

**ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS CASE NO. 92101**

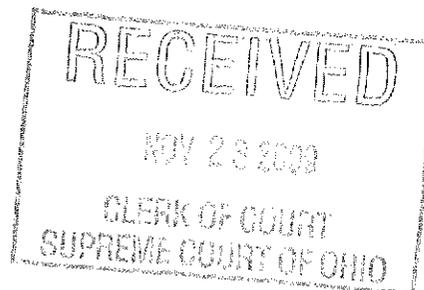
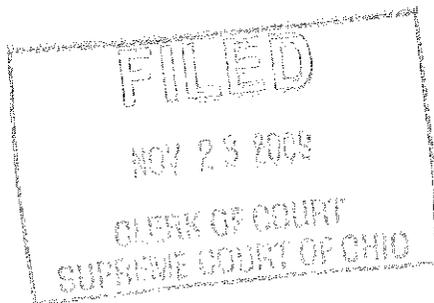
**MEMORANDUM OPPOSING JURISDICTION OF
PLAINTIFF-APPELLEES, DON B. KINCAID, JR., et al.**

John Hurst, Esq. (#0010569)
[COUNSEL OF RECORD]
Terminal Tower, 39th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 771-3239
FAX: (216) 771-5876

*Attorney for Plaintiff-Appellees,
Don B. Kincaid, Jr., et al.*

Shawn W. Maestle, Esq. (#0063779)
Ronald A. Rispo, Esq. (#0017494)
WESTON HURD LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
(216) 241-6602
FAX: (216) 621-8369

*Attorneys for Defendant-Appellant,
Erie Insurance Company*



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STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED

The dramatic rhetoric comprising the Memorandum in Support of Jurisdiction which was submitted by Defendant-Appellants, Erie Insurance Company, on October 23, 2009 ("Defendants' Memorandum"), is seriously misplaced. The underlying class action complaint seeks payment of certain covered litigation expenses which were incurred by policyholders at the request of the motorist insurer's representatives during the course of civil proceedings which had been brought against them. Defendant had been required by Ohio Admin. Code §3901-1-54(E)(1) to affirmatively advise the insureds of the availability of this policy benefit once their claims for coverage had been approved, but (it is no longer being disputed) never did so. Even though there can be no serious disagreement that the expenses were both incurred and covered under the standardized insuring agreements, Defendant has refused to pay anything to the class members and has opted to vigorously contest their Complaint instead.

The instant interlocutory appeal was commenced while the underlying litigation was still in the pleading stage. No discovery had been conducted and no motion for class certification had been submitted. The only issue had been raised in that early part of the proceedings was whether the policyholders are precluded from securing repayment for their covered expenses because they did not first tender satisfactory pre-suit "notice" of their desire to be reimbursed. More specifically, Defendant maintained that: "[N]o lawsuit can be brought against Erie until thirty days after such notice has been received." *Defendant's Motion for Judgment on the Pleadings dated May 8, 2008 ("Defendant's Motion")*, p. 5.

In response, Plaintiffs observed that the actual terms only required "notice" of the accident itself and had no application to the repayment of covered litigation expenses. By definition, all of the putative class members had dutifully complied with these explicit provisions and were furnished with a defense against the motor vehicle accident lawsuits which had been brought against them. The insurer's representatives and/or the attorneys who had been retained to defend them thereafter required them

to incur certain expenses (*i.e.*, travel and parking costs, copying charges, postage, *etc.*) which are reimbursable under the standardized policies. Defendants have yet to comply with this explicit provision

The trial judge agreed with Defendant's policy analysis, but never identified which clauses had been violated by the class members *en masse*. In unanimously reversing this determination, the Eighth District simply confirmed that which should have been obvious: none of the policy's specific notice provisions applied under their express terms to the reimbursement of covered litigation expenses. *Kincaid v. Erie Ins. Co.*, 8th Dist. No. 92101, 2009-Ohio-4372, 2009 W.L. 2624867 ¶ 20.

Defendant and its *amici* have made much ado over the appellate court's use of the term "illogical." Defendant has mused "as the Court of Appeals conceded, its ruling seems 'illogical.'" *Defendants' Memorandum*, p. 15. The insurer is, of course, distorting the Court's actual opinion. The panel was simply commenting that the absence of an explicit notice requirement "may seem illogical" to some. *Kincaid*, 2009-Ohio-4372, ¶ 20. It was the drafting of the policy, and hardly the court's own holding, which was being criticized.

Defendant now appears to be acknowledging that all of the proposed class members are indeed owed reimbursement for their covered litigation expenses. Over and over, this Court has been assured that these claims have never been explicitly denied. *Defendants' Memorandum*, pp. 2-3 & 5. Reimbursement has not been issued solely because Defendant disagrees with the manner in which the payments have been sought. *Id.* Instead of a single and expeditious class action proceeding, the insurer expects the claims to be submitted one-by-one in some undisclosed form and prior to the expiration of some undisclosed deadline. This unwritten rule has to be followed even though the insurer's representative's and/or defense attorneys directed that the expenses be incurred in the first place and fully appreciated that reimbursement was owed.

No conflict amongst the intermediate appellate courts has been established. Defendant and its *amici* are demanding instead that this Court correct what they

believe to be an erroneous ruling by setting aside the plain and unambiguous language of the standardized policies and imposing the "notice" requirements which the drafters had neglected to include. This needs to be accomplished immediately, while this action is still at the pleading stage, in order to avoid "a significant economic impact on the [insurance] industry, the over burdened judicial system as well as Ohio's business community in general." *Defendant's Memorandum*, p. 1. Defendant and its *amici* appear to be completely unconcerned that policyholders will be denied their written rights to reimbursement as a result of a new judicially engrafted requirement which they could not have possibly understood existed before this litigation was commenced.

If the continued viability of the insurance industry truly is at stake, Defendant can avert the catastrophe simply by incorporating appropriate language into the standard form insurance policies. The General Assembly can also be petitioned to impose such conditions for coverage statutorily.

There is no sensible reason, of course, for actually believing that Ohio's economic future hinges upon this Court's correction of the perceived injustice which has been identified. One of the *amici* has made it a point to stress that "the alleged unreimbursed expenses in these cases are *de minimis*[".]" *Memorandum in Support of Jurisdiction of Amici Curiae Nationwide Property and Casualty Insurance Company filed October 23, 2009*, p. 3. Defendant has attempted to amplify the stakes and manufacture an issue of public importance by citing six "separate pending cases which involve precisely the same facts, allegations, class action status, and were filed by the same counsel[".]" *Defendants' Memorandum*, p. 7. They have neglected to mention that (as the Cuyahoga County Clerk's online docket report plainly reveals) one of those lawsuits was settled over a month before this appeal was commenced and for a collective amount which is not expected to reach \$150,000. *Lycan v. Lumbermans Mut. Cas. Co.*, Cuyahoga C.P. Case No. 644127.

Of far greater importance than any perceived insurance industry calamity is the fundamental maxim that parties to written contracts (including insurance policies) will be held to the terms which have been adopted regardless of the practical implications.

Ullmann v. May (1947), 147 Ohio St. 458, 72 N.E.2d 63, paragraph one of the syllabus (“Where a written agreement is plain and unambiguous it does not become ambiguous by reason of the fact that in its operation it will work a hardship on one of the parties thereto and corresponding advantage to the other.”) Acceding to Defendant’s demands for the missing terms to be supplied through judicial fiat will serve only to establish a troubling precedent. No longer will unambiguous terms control and countless insuring agreements and other contracts of all forms will be subject to unfettered manipulation and contortion by imaginative lawyers. Public policy will be best served if the appellate court’s denial of Defendants’ Motion for Judgment on the Pleadings is left intact.

STATEMENT OF CASE AND FACTS

The following facts were alleged in the Class Action Complaint of February 28, 2008. The Named Plaintiff-Appellee, Don B. Kincaid Jr., had purchased a motor vehicle insurance policy from Defendant-Appellant, Erie Insurance Company. On September 8, 2005, he was sued in a civil action for allegedly injuring Marlene C. Spilar (“Spilar”) in an automobile accident. *Spilar v. Kincaid, Lake C.P. Case No. 03CV001576*. Plaintiff had timely notified Defendant of both the collision as well as the personal injury lawsuit and a defense was arranged for him by the carrier. Like the proposed class members, Plaintiff incurred expenses at the request of Defendant and/or the attorneys who had been hired to represent them, such as copy charges, postage, transportation costs, and parking fees. The insureds also missed time from work attending depositions, hearings, settlement conferences, and trials. Defendant eventually settled the claim against Plaintiff and Spilar’s lawsuit was dismissed with prejudice on October 28, 2004.

Under the “Additional Payments” provision of the “Liability Protection” section of the standard-form motor vehicle insurance policy, Defendant had agreed to reimburse certain litigation expenses incurred by the insureds. Although Plaintiff’s

liability coverage claim had been accepted and approved, Defendant never repaid him for the sums he had incurred at the request of either the insurer or the attorney retained by the carrier to defend him. Plaintiff therefore commenced the instant action on February 28, 2008 to enforce his rights under the policy. He sought to recover the expenses due to him not only in his own right, but also on behalf of all similarly situated policyholders.

ARGUMENT

PROPOSITION OF LAW NO. I: AN INSURED LACKS STANDING TO FILE AN ACTION AGAINST HIS INSURER FOR COVERAGE UNDER AN INSURANCE POLICY WHERE THE CLAIMANT HAS NOT PRESENTED A CLAIM FOR A LOSS POTENTIALLY COVERED BY SUCH POLICY AND WHERE THE CLAIMANT HAS FAILED TO EVEN PRESENT NOTICE TO THE INSURER OF THE ALLEGED LOSS.

PROPOSITION OF LAW NO. II: COURTS WILL NOT ISSUE ADVISORY OPINIONS ON WHETHER AN INSURED IS ENTITLED TO COVERAGE UNDER AN INSURANCE POLICY WHERE NO LOSS HAS BEEN SET FORTH AND WHERE NO CLAIM WAS MADE TO THE INSURER FOR PAYMENT.

Although two separate Propositions of Law have been fashioned, Defendant has lumped them together for purposes of argument. Plaintiff will thus proceed in similar fashion.

This interlocutory appeal arises from a Motion for Judgment on the Pleadings that had been brought under Civ.R. 12(C), which involves largely the same standard of review as motions to dismiss under Civ.R. 12(B)(6). *Vinicky v. Pristas* (8th Dist. 2005), 163 Ohio App.3d 508, 510-511 2005-Ohio-5196, 839 N.E.2d 88, 90; *Duff v. Coshocton County*, 5th Dist. No. 03-CA-019, 2004-Ohio-3713, 2004 W.L. 1563404 ¶ 15. The main difference simply is that a Civ.R. 12(C) application permits consideration of the defendant's answer. *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 1996-Ohio-459, 664 N.E.2d 931, 936. Only pure questions of law may be

resolved. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165-166, 297 N.E.2d 113, 117; *Lin v. Gatehouse Constr. Co.* (8th Dist. 1992), 84 Ohio App.3d 96, 98-99, 616 N.E.2d 519, 521.

Plaintiff's primary claim for relief was for breach of contract, which requires proof of "(1) the terms of the contract, (2) the performance by the plaintiff of [his/her] obligations, (3) the breach by the Defendant, (4) damages, and (5) consideration." *American Sales, Inc. vs. Boffo* (1991), 71 Ohio App.3d 168, 175, 593 N.E.2d 316, 321; *Chou v. Chou* (October 3, 2002), 8th Dist. No. 80611, 2002 WL 31195424, *4. Upon a successful demonstration of an unexcused breach, the aggrieved party is entitled to complete compensation for all of the damages and harm following therefrom. See *Kirshmarton v. William Bailey Constr., Inc.*, 93 Ohio St.3d 226, 229-230, 2001-Ohio-1334, 754 N.E.2d 785.

The issue of "constitutional standing" has received far more attention in Defendant's Memorandum to this Court than was the case in the insurer's briefing below. This requirement is not particularly difficult to satisfy, as this Court has explained that:

"Standing" is defined at its most basic as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8th Ed. 2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bickling* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. "[T]he question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy ***" as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.

Ohio Pyro, Inc. v. Ohio Dept. of Comm., 115 Ohio St.3d 375, 381, 2007-Ohio-5024, 875 N.E.2d 550, 557. In the case *sub judice*, the pleadings establish that the Named Plaintiff and class members are entitled to funds which – the two Answers and Motion to Dismiss attest – Defendant is refusing to tender. All of them thus possess a real and immediate stake in the controversy.

Attached as Exhibit A to the Class Action Complaint is the Named Plaintiff's applicable motor vehicle insurance policy. In addition to the promise of indemnity and a defense against accident claims, the "Liability Protection" section of the insuring agreement provides that:

ADDITIONAL PAYMENTS

We will make the following payments in addition to the limit of protection:

5. reasonable expenses **anyone we protect** may incur at **our** request to help **us** investigate or defend a claim or **suit**. This includes up to \$100 a day for actual loss of earnings.

Id., pp. 5-6. Noticeably absent from the policy is any requirement that an application for expenses must be submitted in a particular manner or within a certain timeframe. *Id.* There will be no dispute in this case that the Named Plaintiff and the class members have yet to receive the reimbursement which is due to them pursuant to this clause. They are now seeking these payments through this class action lawsuit, which Defendant is vigorously contesting. Nothing further is needed to state a *prima facie* breach of contract claim under Ohio law.

Defendant has refused to accept the reality throughout this appeal that the "notice" defense which has been devised simply cannot be resolved on the pleadings. The argument that the Named Plaintiff and class have all violated an unwritten

precondition to coverage is precluded at this early stage of the lawsuit by the allegations of the Complaint.

33. All conditions precedent to Defendant's payment obligations under its standard form motor vehicle liability insurance policies have been performed by the named Plaintiff and the Classes, including the payment of all premiums necessary to keep the policies in effect, and cooperation in Defendant's requested forwarding of suit related documents and attendance at conferences, depositions, arbitrations, hearings or trials. [emphasis added]

Class Action Complaint, p. 14 These allegations must be accepted as true for purposes of the Rule 12(C) motion. *Greeley v. Miami Valley Maint. Contractors* (1990), 49 Ohio St.3d, 228, 230-231, 551 N.E.2d 981; *Michael v. Whitehall* (10th Dist. 1999), 134 Ohio App.3d 719, 721, 732 N.E.2d 398, 399-400.

One of the cases which Defendant has openly acknowledged "involve[s] precisely the same facts, allegations, class action status, and were filed by the same counsel" is *Kavouras v. Allstate Ins. Co.*, U.S. Dist. Ct., N.D. Ohio, Case No. 1:08 CV 571. *Defendant's Memorandum in Support of Jurisdiction, pp. 7-8*. The federal judge in that action had also rejected the insurer's attempts to imply "notice" provisions which would defeat the claims for reimbursement which had been brought. Just like the Eighth District below, the court concluded in a decision which was rendered on December 3, 2008 that the insureds' allegations that they had satisfied all conditions precedent to coverage were sufficient to overcome the motion to dismiss that had been brought.

Another compelling decision reaching the same sensible result was issued in *Johnson v. Geico Gen. Ins. Co.* (November 3, 2008), U.S. Dist. Ct., S. D. Fla., Case No. 08-80740-CIV-MARRA, 2008 W.L. 4793616. An identical class action proceeding had been filed which also sought unreimbursed expenses from a motorist insurer. The carrier filed a motion to dismiss which was strikingly similar to that which was granted

in the trial court proceedings below. Notably, the insurer in *Johnson* relied heavily upon *Edwards v. Prudential Prop. & Cas. Co.* (2003), 357 N.J. Super. 196, 814 A. 2d 1115, which is also the focus of the Memorandum presently at bar. But the District Judge was unimpressed and denied the motion with respect to the claims for breach of contract, declaratory relief, and equitable remedies. Since there is no meaningful difference in the legal standards applicable in Ohio, the same sound result is warranted.

The Motion for Judgment on Pleadings was properly denied, moreover, on the additional grounds that Defendant has misconstrued its own standard-form policy. The motorist insurer had assured the trial court that: "The policy requires as a condition precedent to coverage that the insured provide notice and that no lawsuit can be brought against Erie until thirty days after such notice has been received." *Defendant's Motion*, p. 5 [emphasis added]. The trial judge apparently agreed, and thus erred.

The court erred because the policy language which has been cited in support of the "30 day" notice rule merely provided, in its entirety, that:

RIGHTS AND DUTIES - - GENERAL POLICY
CONDITIONS

We, you and anyone else protected by this policy must do certain things in order for the terms of this policy to apply:

* * *

8. LAWSUITS AGAINST US

You must comply with the terms of this policy before you may sue us. The legal liability of anyone we protect must be determined before we may be sued. This determination may be made by a court or law or by written agreement of all parties, including us. No one has the right to make us a party to a suit to determine the liability of anyone we protect. In the event of a Medical Payment claim or a Comprehensive or Collision loss, no suit may be brought against us until 30 days after proof of loss is filed. [emphasis added]

Id. Obviously, no references to "notice" appear anywhere within the cited text. The

“thirty days” requirement which was the linchpin of the underlying Motion applies only to a “Medical Payment claim or a Comprehensive or Collision loss”. *Id.* At the risk of overstating the obvious, the instant action is limited to claims for coverage under the Liability Protections of the policy. *Class Action Complaint*, ¶ 2, 12 & 23. By all appearances, the lower court was thus lead astray by Defendant’s erroneous assertion that “the insured is obligated to make a claim for reimbursement and then wait 30 days before suing.” *Defendant’s Motion*, p. 6.

Defendant has never disputed that the Named Plaintiff and each of the proposed class members supplied the insurer, or its agent, with all of the information and paperwork necessary with respect to the motor vehicle accident. *Class Action Complaint*, ¶ 14. They would not have been furnished with both indemnity and a defense at the carrier’s expense had they failed to do so. Compliance with the “What to do When an Accident or a loss Happens” requirement thus is not an issue, and certainly not one which may be resolved from the pleadings as a matter of law.

Plaintiffs are confident that discovery will confirm in this litigation that Defendant has long been in possession of all the information needed to reimburse the class members for covered expenses incurred during the personal injury/property damage lawsuits the insurer was defending pursuant to the liability protection provisions. The files they have maintained will undoubtedly contain evidence of postal charges incurred in mailing complaints, notices, and other documents during the course of the litigations. It is further anticipated that the carriers’ records will confirm that the insureds were required to travel to conferences, depositions, and trials at the direction of Defendant and/or the attorneys the insurer had hired. They are certainly entitled to “reasonable” reimbursement which may be easily calculated through standard mileage rates. The policy also provides for “up to \$100 a day for actual loss of earnings” sustained while attending such judicial proceedings. *Class Action*

Complaint, Exhibit A, p. 6.

To the extent that any further proof is required, notice can be afforded to each of the class members directing them to provide additional evidence of copying and mailing charges incurred while sending requested information to Defendant, earnings lost attending judicial proceedings, travel expenses necessitated by the litigation, and all other expenses covered under section 5 or the "Additional Payments" section of the Liability Protection provisions. *Class Action Complaint, Exhibit A, p. 6.* Such class-wide notices are, of course, commonplace in proceedings brought under Civ. R. 23. Since the policy does not impose any time limits upon the submission of applications for such reimbursement, Defendant can have no conceivable right to complain that some class members may receive their payments long after the expenses were incurred.

Defendant and its *amici* should be careful what they wish for, as it is more often than not the policyholder who is urging the courts to adopt "reasonable" and "logical" interpretations of otherwise straightforward policy language. Largely at the urging of the insurance industry, Ohio's judiciary has steadfastly refused to glean new terms and provisions from unambiguous insurance contracts. *Atwood v. State Farm Mut. Ins. Co.* (4th Dist. 1990), 68 Ohio App.3d 179, 182, 587 N.E.2d 936, 937 (***) insurance policies are to be given their ordinary meaning and are not to be expanded by judicial fiat ***) Regardless of the practical implications for the parties, the courts of Ohio have never been in the business of judicially re-writing insurance policies which appear to have been drafted improvidently. *McNally v. American States Ins. Co.* (6th Cir. 1962), 308 F.2d 438, 445; *Schwartz v. Stewart Title Guar. Co.* (8th Dist. 1999), 134 Ohio App.3d 601, 607, 731 N.E.2d 1159, 1163.

Examples of Ohio courts refusing to "imply" new terms in insurance contracts at the request of policyholders are legion. In *Travelers Indem. Co. v. Reddick* (1974), 37 Ohio St.2d 119, 308 N.E.2d 454, the insureds urged the court to construe a purportedly

ambiguous “physical contact” requirement in a hit-and-run motor vehicle clause to permit uninsured motorist coverage even though the tortfeasor’s vehicle had never struck their automobile. The unanimous opinion concluded that there was “nothing uncertain” about the terms appearing in the policy and refused to stray beyond the actual language employed. *Id.*, 37 Ohio St.2d at 122. Likewise, the insureds argued in *Cincinnati Indemn. Co. v. Martin*, 85 Ohio St.3d 604, 1999-Ohio-322, 710 N.E.2d 677, that a “bodily injury to an insured” clause should be read to permit coverage even for non-insureds. In affirming the entry of summary judgment in favor of the insurer, the majority specifically observed that:

It is well established that when the language in an insurance policy is clear and unambiguous, we must enforce the contract as written and give the words their plain and ordinary meaning. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096, 1102.

Id., 85 Ohio St.3d at 607. This principle has been upheld again and again during the course of Ohio jurisprudence. *Rhoades v. Equitable Life Assur. Soc. Of U.S.* (1978), 54 Ohio St.2d 45, 47, 374 N.E.2d 643, 644 (“Where the provisions of the policy are clear and unambiguous, courts cannot enlarge the contract by implication so as to embrace an object distinct from that originally contemplated by the parties.”); *Cincinnati Ins. Co. v. Kramer* (1st Dist. 1993), 91 Ohio App.3d 528, 531, 632 N.E.2d 1333, 1334 (“When the provisions of an insurance contract are clear and unambiguous, courts cannot enlarge the coverage by implying terms that are not in the agreement.”); *Progressive Ins. Co. v. Tarpeh* (8th Dist. 1996), 116 Ohio App.3d 634, 637, 688 N.E.2d 1102, 1104 (refusing to “liberally” construe policy in favor of insured since language was “clear and unambiguous”); *Mueller v. Taylor Rental Cntr.* (8th Dist. 1995), 106 Ohio App.3d 806, 809, 667 N.E.2d 427, 429 (affirming grant of summary judgment in favor of insurer because unambiguous policy language “must be applied as written,

without judicial interpretation.”); *White v. Ogle* (8th Dist. 1979), 67 Ohio App.2d 35, 39, 425 N.E.2d 926, 929 (“An insurance company is only liable according to the terms and provisions of its contract, and not otherwise.”)

The great irony is, of course, that Defendant is now imploring this Court to imply conditions precedent into the Additional Payment provision of the Liability Protection coverage which will deny reimbursement to every insured, save for those few who are somehow privy to this unwritten rule of law. *Defendant’s Motion*, pp. 4-6. The insurer plainly is in no position to suggest that some sort of “ambiguity” exists, given that a small army of attorneys and insurance experts undoubtedly had been retained for the purpose of ensuring that Defendant’s rights and interests were fully protected under the standard form policies. There is simply no dancing around the fact that the plain and ordinary terms of the insuring agreement do not impose any “conditions precedent” for expense reimbursements which the Named Plaintiff and class members could have conceivably violated, as a matter of law. The Motion for Judgment on the Pleadings was thus properly denied.

PROPOSITION OF LAW NO. III: AN INSURED MUST FIRST SUBMIT A CLAIM TO HIS INSURER AS A CONDITION TO FILING A DECLARATORY JUDGMENT ACTION, BREACH OF CONTRACT OR BAD FAITH ACTION.

As worded by Defendant, this Proposition of Law is pointless. By definition, each of the class members did “submit a claim to his [or her] insurer” which was approved. *Class Action Complaint*, pp. 5-6. Had these claims for liability coverage not been presented in a timely and appropriate fashion, the insureds never would have been provided with a defense against the automobile accident lawsuits which had been brought against them. Once the claims were successfully submitted, Ohio Admin. Code 3901-1-54(E)(1) required all the available benefits to be affirmatively disclosed to the insureds. Defendant is now conceding *sub silentio* that no such disclosure was ever

made. The insurer is really arguing here that, despite the noncompliance with this binding regulation, a second claim had to be submitted and denied before declaratory relief could be sought.

In the final Proposition of Law, Defendants have implored this Court to add a new requirement for relief under the Declaratory Judgment Act which the General Assembly, for reasons known only to the legislators, has never deemed to be necessary. As R.C. Chapter 2721 now stands, the only three elements necessary for securing a declaratory judgment are (1) a real controversy between adverse parties, (2) which is justiciable in character, and (3) requires speedy relief to preserve rights which may be otherwise impaired or lost. *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 148-149, 586 N.E.2d 80, 82; *Grange Mut. Cas. Co. v. Smith* (4th Dist. 1992), 80 Ohio App.3d 426, 430, 609 N.E.2d 585, 587. The "actual controversy" requirement of R.C. §2721.02 is not as strict as Defendant had maintained. The Cuyahoga County Court of Appeals has explained that:

A "controversy" exists for purposes of a declaratory judgment when there is a genuine dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.
[citation omitted]

Wagner v. City of Cleveland (8th Dist. 1988), 62 Ohio App.3d 8, 13, 574 N.E.2d 533, 536; *see also Halley v. Ohio Co.* (8th Dist. 1995), 107 Ohio App.3d 518, 524-525, 669 N.E.2d 70, 74-75.

Citing no decisions from anywhere in the United States, Defendants have theorized: "Even if there is no specific notice requirement found which specifically addresses supplementary or additional payments (as found by the Appellate Court) general notice provisions in a policy are sufficient to put an insured on notice of the fact that he or she must present evidence of a claim and documentation of his expenses before he or she can expect payment." *Defendant's Memorandum*, pp. 12-13. One

would have thought that the insurer's inability to locate a decision from any court so holding would have generated pause for concern, but apparently not. *Id.* The far more sensible approach is for Ohio courts to continue to expect that all preconditions to coverage will be expressly stated in the insuring agreements so that the insureds will understand precisely what is required of them. So long as Defendant continues to contest Plaintiffs' claims for reimbursement, a legitimate "controversy" will exist which can be justly and expeditiously resolved under the Declaratory Judgment Act.

CONCLUSION

Because the Eighth District's analysis of the standardized motor vehicle insurance policies at issue is unassailable and no legitimate reason exists to believe that this Court's intervention truly is necessary to avert another insurance industry crisis, Defendant's demand for further review of the three Propositions of Law which have been devised should be rejected and this action should be returned to the trial court for further proceedings.

Respectfully submitted,



John Hurst, Esq. (#0010569)
*Attorney for Plaintiff-Appellees,
Donald B. Kincaid, et al.*

CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Memorandum** was served via regular U.S.

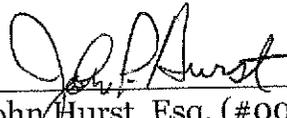
Mail on this 20th day of November, 2009 upon:

Shawn W. Maestle, Esq.
Ronald A. Rispo, Esq.
WESTON HURD LLP
The Tower at Erievuew
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862
*Attorneys for Defendant-Appellant,
Erie Insurance Company*

Michael Hiram Carpenter, Esq.
Katheryn Lloyd, Esq.
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
*Attorneys for Amicus,
Nationwide Ins. Cos.*

Thomas Szykowny, Esq.
Michael Thomas, Esq.
VORYS, SATER, SEYMOUR & PEASE
52 East Gay Street
Columbus, Ohio 43216-1008
*Attorneys for Amicus,
Ohio Insurance Institute*

Marvin Karp, Esq.
Joseph Castrodale, Esq.
Brad Sobolewski, Esq.
ULMER & BERNE LLP
1660 W. 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448
*Attorneys for Amicus,
Progressive Ins. Cos.*



John Hurst, Esq. (#0010569)
*Attorney for Plaintiff-Appellees,
Donald B. Kincaid, et al.*