

IN THE
SUPREME COURT OF OHIO

ORIGINAL

MARY JO HUDSON,
Superintendent of Insurance, State
of Ohio, acting in her capacity as
Liquidator of The Oil & Gas
Insurance Company,

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

MERIT BRIEF OF APPELLEE, PETROSURANCE, INC.

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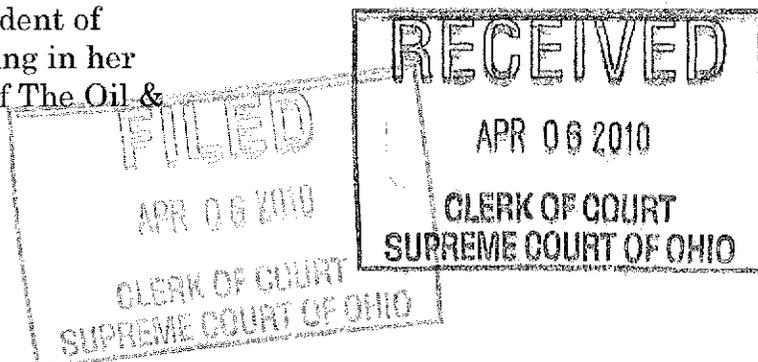


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I. INTRODUCTION.

The Appellant's Introduction to her Brief largely consists of an argument, not as to what the law is, but what she wants the law to be. And she makes that argument without any reference to the specific facts of this case or any case—she simply asserts that the investment of shareholders is a mere “gambit” unworthy of protection and that Appellee's defense of its rights constitutes an attempt “to step in and seize funds,” (see Appellant's Brief, p. 2) as if it were suddenly emerging from the darkness and demanding money. But the Appellee has at all times asserted its rights under specific provisions of Ohio law, and its claim must be resolved under Ohio law.

Ohio Revised Code (“R.C.”) Chapter 3903 requires the Superintendent of Insurance of the State of Ohio, acting in her capacity as Liquidator (hereafter the “Superintendent”), to assemble the assets of insolvent insurance companies and pay its policyholders, creditors, and shareholders in accordance with the priorities set forth in R.C. § 3903.42. These priorities—nine in total—range from claims of policyholders (Class 2) to creditors (Class 5), to the claims of local and state government (Class 6), to shareholders (Class 9). The same statute requires that the claims of each class be paid *in full* before any payment is made to the classes lower in priority. R.C. Chapter 3903, in general, and R.C. § 3903.42, in particular, say nothing about the payment of interest to any claimant.

As will be seen, a few states have provided for the payment of interest to various claimants by statute. There is no such provision in Ohio. The issue arises

infrequently since there is usually not enough money to pay claims in full, let alone interest. The question does not appear to have arisen before in this State.

This liquidation proceeding was commenced by the Superintendent in 1990 against the Oil & Gas Insurance Company ("OGICO"), an Ohio corporation. It is undisputed that the sole shareholder of OGICO was and is Petrosurance, Incorporated ("Petrosurance"), also an Ohio corporation. Petrosurance objected to the Liquidation and contended then, as it has contended continually since, that OGICO had sufficient assets to pay all claims and that the interests of all parties would have been best served by rehabilitation rather than liquidation, and that these proceedings would result in a substantial excess of assets over liabilities, as has proved to be the outcome.

The Complaint in this case was filed by the Superintendent in 2007, 17 years after the institution of liquidation proceedings. During those 17 years, the Superintendent sought orders for and eventually paid *all* approved claims in full, acknowledging that the delays were no fault of Petrosurance but arose from "other circumstances," principally more than a decade long delay caused by her disputes with the U.S. Treasury. *U.S. Dept. of Treasury v. Fabe* (1993), 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449; see also the *amicus curiae* Brief of the National Association of Insurance Commissioners in support of petition for writ of certiorari in *Bowler v. U.S.*, certiorari denied, (2003), 538 U.S. 1031, 123 S.Ct. 2072, 155 L.Ed.2d 1059. The only relief sought by the Superintendent's Complaint was a declaration that Petrosurance, as sole shareholder, should receive *none* of the more

than \$13,000,000.00 remaining in the Superintendent's hands after the payment in full of all claimants except Petrosurance. The Superintendent's Complaint did *not* raise the question as to what would be done with the funds on hand if they were not paid to Petrosurance; it said nothing about "general creditors" or "interest" or the claims of any creditors. Even in the briefing of the Superintendent's Motion for Summary Judgment, she never asked that the funds in her hands be paid out as interest: instead, apparently recognizing the necessity of stating an intended disposition of what she calls the "surplus," she suggested a "pro rata distribution" to creditors who (her Complaint said) had already been fully paid. The Franklin County Court of Common Pleas turned that suggestion into a judgment for the payment of interest to the general creditors, calculated from dates uncertain and at rates unstated, but nevertheless assuming that such interest would likely consume the totality of the funds on hand in accordance with a plan to be set forth by the Superintendent, which was not presented to the court. The Franklin County Court of Appeals reversed.

It is the position of Petrosurance that R.C. § 3903.42 does not provide for the payment of interest to any class of claimant; and certainly that no interest could be paid to any claimant before payment to *all* the priority classes defined in R.C. § 3903.42; and that since it is undisputed in this case that the Superintendent has paid all claims in full (except Petrosurance's) and has sought and obtained an Order of the court of common pleas barring any further creditor's claims, that the funds on hand should be paid to Petrosurance, the sole remaining claimant, as the court of

common pleas ruled, without any further delay. Simply put, there being no relevant facts in dispute, 20 years is long enough and it is time for this proceeding to end.

II. STATEMENT OF FACTS.

The Statement of Facts presented to this Court by the Superintendent is strikingly incomplete and it includes none of the pertinent—and undisputed—facts essential to the determination of this case that are detailed below:

1. As the undisputed affidavit filed in this case makes clear, Petrosurance is an Ohio corporation in good standing with 49 individual shareholders as well as a corporate shareholder. (Trial Record ["TR"] 106, ¶ 2) (Supplement ["Supp."] 22) There is absolutely no support in the record for the Superintendent's statement (see Appellant's Brief, p. 6) that Hardy is the majority shareholder—or the owner of any shares—of Petrosurance.
2. While this liquidation was instituted in 1990, the Complaint in this case—aimed solely at barring Petrosurance from recovering funds as the sole Class 9 Claimant (shareholder)—was not filed until 17 years later. It alleged—and Petrosurance's Answer admitted—that all allowed claims had been *paid in full*. The Complaint did not mention the payment of interest in any respect (see TR 3) (Supp. 1-6).
3. The Superintendent did not pay the claims of the general creditors until 16 years after the commencement of the liquidation proceedings, pursuant to an Order of the Franklin County Court of Common Pleas prepared by the Superintendent and endorsed by the court. *That Order made no reference to any payment of interest to the creditors and barred any future or additional claims by them or any other creditors* (see TR 106, Exhibit H) (Supp. 25-26).
4. Even when the Superintendent sought summary judgment in this case in the Franklin County Court of Common Pleas, she did not seek an order to pay "interest" to the general creditors; rather, she sought to make a "pro rata payment" of what she called the "surplus" to the creditors, implicitly recognizing the

fact that the law did not provide for the payment of interest (see TR 43, pp. 2, 13) (Supp. 9, 20).

5. Since the commencement of this liquidation proceeding in 1990, Petrosurance has continually asserted that the funds available to the Superintendent would exceed OGICO's debts, and Petrosurance has claimed these funds as shareholder property. They now exceed \$13,000,000.00 (see TR 106, ¶ 6) (Supp. 22).
6. In 2006, the Superintendent suggested that Petrosurance file a Proof of Claim for its shareholder interest as a Class 9 claim under R.C. § 3903.42. When Petrosurance filed such a claim in the amount of \$13,365,558, she refused to accept it and then refused to set Petrosurance's objection to her decision for a hearing as she is required to do by R.C. § 3903.39(B) (see TR 106, ¶¶ 8-9) (Supp. 23).
7. While Petrosurance's Motion for Summary Judgment in the Franklin County Court of Common Pleas asked that the court order the funds remaining in the Superintendent's hands be paid to Petrosurance, the Franklin County Court of Appeals declined to make that order "in the first instance" (see Appellate Record ["AR"] 28, ¶ 46); but there being no facts in dispute and all the issues in this case having been resolved, the funds remaining in the Superintendent's hands should be paid to Petrosurance forthwith.

The Superintendent simply ignores the facts that she does not like. Most especially, she ignores the order which she sought and received from the Franklin County Court of Common Pleas, which provided for payment of over nineteen million dollars (\$19,000,000.00) to the creditors, *in full* payment of their claims. Those claimants had not—then or now—claimed interest and that order barred any further claims from those creditors or any other creditors.

The Court will observe the misleading footnote appended by the Superintendent to page 9 of her Brief, in which she all but promises to continue to engage Petrosurance in protracted litigation in order to determine the propriety of

Petrosurance's claim,¹ a claim which the Franklin County Court of Appeals already held did not interfere with the administration of the liquidation. The Superintendent also attempts in this footnote to suggest that a holding in favor of Petrosurance will mean that other creditors could still file timely claims—ignoring, of course, the fact that any such filing is barred by the order that she sought and obtained. (See TR 106, Exhibit H) (Supp. 25-26). Contrary to the Superintendent's argument in the subject footnote, there are *no* issues that would need to be resolved on remand.

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 Proposition of Law:

R.C. Chapter 3903 does not authorize the Superintendent to pay interest on the claims of general creditors or other claimants in liquidation proceedings, and, in any case, she must make payments in accordance with the statutory priorities of R.C. § 3903.42 before making any other payments.

A. R.C. Chapter 3903 does not authorize the Superintendent to pay interest on the claims of general creditors or other claimants in liquidation proceedings.

The Federal government granted the states the authority to regulate the business of insurance by way of exemption from Federal control of interstate

¹ The Superintendent's threat of protracted litigation in this case is of great benefit to the Liquidator's department since the Petrosurance surplus is conveniently being used to fund the common expenses of that entire department, in violation of statute, as set forth in the an Order obtained by the Liquidator on April 2, 2009 (Supp. 36). See R.C. § 3903.21(A)(4).

commerce under the McCarran-Ferguson Act, which provides that the regulation of the insurance industry is generally a matter for the states and that “[t]he business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business.” 15 U.S.C. § 1012(a). R.C. Title 39 is a result of this deferral of authority under the McCarran-Ferguson Act. It is only under this deferred authority that judicial power and jurisdiction may be exercised in relation to insurance.

The Superintendent not only argues that Ohio statutes should be interpreted to authorize her to pay interest to claimants whom she says she has already paid “in full,” but that she has the absolute duty to do so. The Court will examine R.C. Chapter 3903 in vain for any trace of such explicit power or duty. If she has such discretion (and she does not), the order she sought and obtained authorizing payment to the creditors and barring any further claims by them constituted an exercise of that discretion.

Nothing in R.C. Chapter 3903 and, specifically, nothing in R.C. § 3903.42, either confers such authority or creates this purported “duty.” R.C. § 3903.42 details the order in which the funds on hand should be distributed, beginning with policyholders and ending with shareholders, without ever mentioning the allocation of any funds for “interest.” Even the Superintendent has implicitly recognized that the payment of “interest” is not provided for by statute: In the Franklin County Court of Appeals, she initially called the payment she wants to make to creditors a “pro rata distribution” (AR 23, p. 19), and she did not propose

even that when she filed her Complaint in this case (TR 3, pp. 5-6) (Supp. 5-6). Now she suddenly takes the position that the funds she has on hand are “surplus,” before she ever gets to Class 9 (shareholder) distributions, and she wants to distribute such “surplus” to persons who have already been “paid in full,” and whom the court of common pleas has barred from making any further claims.

The Superintendent has searched the statutes of Ohio in vain for the authority to pay interest. She cites at pp. 5 and 16 of her Brief, for example, R.C. § 3903.43 for that authority. That statute states, in pertinent part, as follows:

(A) The liquidator shall review all claims duly filed in the liquidation and shall make such further investigation as he considers necessary. He may compound, compromise, or in any other manner *negotiate the amount for which claims will be recommended to the court* except where the liquidator is required by law to accept claims as settled by any person or organization, including any guaranty association or foreign guaranty association * * * As soon as practicable, he shall present to the court *a report of the claims against the insurer with his recommendations.*

* * *

(B) *The court may approve, disapprove, or modify the report on claims by the liquidator.* (Emphasis added.)

This statute deals with her authority to recommend the compromise of claims. Nothing in the record discloses *any* claim by *any* creditors for the payment of interest. Further, as the Franklin County Court of Appeals pointed out, the cited statute deals with the *report* that the Superintendent makes to the court of common pleas. (AR 28, ¶ 31) In this case, she recommended the payment of more than \$19,000,000.00 to general creditors without suggesting any interest payments, and

the court gave her exactly what she asked for. Then, complying with the Superintendent's request and the terms of R.C. 3903.43, the court of common pleas *approved* the Superintendent's Report and barred any further claims by these or any other creditors. (See TR 106, Exhibit H) (Supp. 25-26). Complying with the court's Order, the Superintendent proceeded to pay the Class 5 creditors, and, having paid them, proceeded to pay the Class 6 claims of local and state government.

By requiring that the members of each class be paid "*in full*" or "*adequate funds retained for such payment*" before payments are made to the next lower class in the priority, R.C. § 3903.42 renders the Superintendent's "interest" claim unreasonable as well as unauthorized—there is no way that interest could or should be paid until *all* claims of *all* classes are paid, and that includes the local and state governments of Class 6 as well as the shareholders of Class 9. Or does the Superintendent really contend that Ohio statutes authorize her to pay the members of one class interest (for periods of time and at rates to be selected by her) before she pays the members of the next priority anything?

The Superintendent struggles mightily to find something—anything—in R.C. § 3903.42 that would enable her to argue that it somehow authorizes her to select one priority class (creditors) for the payment of interest four years *after* she paid them the amount of their claim and *before* she pays the remaining classes. The best she can do is to cite the "adequate funds" provision mentioned above, but she isolates the phrase "adequate funds" from its context (retention of enough money to

enable payment of claims in that priority “in full”) and attempts to render it synonymous with “interest,” which, of course, it is not. It means exactly what it says: she must pay claimants in each class “in full” or hold back enough money to pay them in full, before she moves on to the next class of claims. As the record in this case makes clear, the payment of \$19,970,587.68 was approved just as requested by the Superintendent as “100% distribution,” (Supp. 30-31) and paid to Class 5 creditors, and the payment of \$91,479.89 was approved and paid to Class 6 (local and state government) claimants. (TR 106, Exhibit H) (Supp. 25-26). There is not a word about “interest” or “adequate funds” or “retention” or “hold-backs.” Instead, there is this language:

The Court orders that any contingent or future Class 4, Class 5 or Class 6 Claims or any Class 4, 5, or 6 claims not included in the Superintendent’s Reports of Class 4, Class 5 and Class 6 Claims and not previously disallowed or zero valued are hereby foreclosed and/or disallowed.

(TR 106, Exhibit H) (Supp. 26). In short, any Class 5 claims not already allowed are barred. There is no exception for interest, the Superintendent did not seek to reserve any funds to pay interest, and there is nothing in the record to indicate that any claim for interest was even made by any creditors. All that remains is the Superintendent’s desperate desire to pay it.

In this connection, the Superintendent irrelevantly cites this Court’s decision in *Sogg v. Zurz* (2009), 121 Ohio St.3d 449, 905 N.E.2d 187 (see Appellant’s Brief, p. 11). That case dealt with the Ohio forfeiture statute and held that the old maxim that “interest follows principal” applies only in the *absence of statute*. A

statute is present both in this case and in that case. The holding of *Sogg* was that the State could not, by statute, deprive the owners of unclaimed funds of the interest earned on their money. In this case, the funds being retained by the Superintendent after payment of all claims belong to the shareholders and are not “unclaimed.”

In fact, the Superintendent’s mantra of “interest follows principal” is not always the case. Ohio courts such as the Tenth District Court of Appeals have held “in the absence of a contractual provision for interest, the right to interest arises as damages for late payment of the debt, and such right to interest is extinguished when payment of the debt is accepted.” *Kuntz Drug Stores, Inc. v Ohio Dept. of Public Welfare* (Aug. 3, 1982), Franklin App. No. 82AP-23, unreported, 1982 WL 4316; see also *Gawne v. Casanova* (1948), 86 Ohio App. 230, 41 O.O. 97, 90 N.E.2d 444. All creditors in Classes 1 through 8 have accepted payment of the debts, thus any right to interest has been extinguished.

There being no support in Ohio statutes or case law for the payment of interest, the Superintendent next asserts the power to pay interest is discretionary on her part. But even she must concede that her “discretion” is limited by statute and that statute (R.C. § 3903.42) tells her precisely how the funds under her control should be distributed. At page 4 of her Brief, she cites to R.C. § 3903.21 as a possible source of the discretion she asserts, but there is nothing in that statute that even suggests she can pay interest; as a matter of fact, R.C. § 3903.21(19) requires her to enforce the rights of *shareholders* as well as creditors. See *Benjamin*

v. Ernst & Young LLP (2006), 167 Ohio App.3d 350, 357, 855 N.E.2d 128, 133.

There is no evidence of any concern for the rights of shareholders to be found anywhere in the Superintendent's Brief.

The Superintendent, nevertheless, maintains that somehow, in some way, she can interpret some statute to give her the authority she seeks. But as the Supreme Court of Ohio has observed,

When this court has been called upon to give effect to an Act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous. For example, a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation. In ascertaining the legislative intent of a statute, "(I)t is the duty of this court to give effect to the words used (in a statute), not to delete words used or to insert words not used." Furthermore, whether an act is wise or unwise is a question for the General Assembly and not this court.

Bernardini v. Board of Ed. (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 4, 387 N.E.2d 1222, 1224.

As the Franklin County Court of Appeals has pointed out, the General Assembly has provided for the payment of interest when it has desired to do so. (See AR 28, ¶¶ 33 and 34). In the statutory scheme dealing with liquidations of banks, for example, R.C. § 1125.24 specifically provides that interest shall be given the same priority as the claim on which it is based; and R.C. § 1125.24 expressly provides for the payment of interest on creditor's claims *before* shareholders are entitled to recover. In the insurance context, there are no similar provisions whatsoever; R.C. § 3903.42 *does not* provide for interest and *does* include

shareholders in the priority of claims. These two very different payment schemes evidence different legislative intent.

The Supreme Court of Ohio has observed that courts may consider laws on similar subjects in order to determine legislative intent. *D.A.B.E. Inc. v. Toledo-Lucas Bd. of Health* (2002), 96 Ohio St.3d 250, 773 N.E.2d 536, ¶ 20; see also, *Ratchford v. Proprietors' Ins. Co.* (1989), 47 Ohio St.3d 1, 546 N.E.2d 1299 (finding it instructive to look at statutes dealing with insolvent savings and loan associations as an indication of the General Assembly's intent in R.C. Chapter 3903). The Superintendent concedes, with reluctance, that "the General Assembly could have expressed the ability to pay interest more clearly" (Appellant's Brief, p. 13). The General Assembly did make a clear expression—no authority to pay interest is given in insurance liquidations as opposed to bank liquidations. The Superintendent's argument at that same page that "shareholders are only allowed to take after all of their company's debts have been *paid in full*" rings hollow in view of her allegation in her Complaint in this case that all allowed claims have been *paid in full*.

Having exhausted every attempt to find authority in Ohio law for the payment of interest in insurance company liquidations, the Superintendent moves outside of Ohio in her fruitless search for some authority. It is true that a few states, including Kentucky, Maine, Minnesota, Nevada, New Hampshire, and Wisconsin have enacted statutes expressly providing for interest payments in insurance company liquidations. It is also true that a recent Model Act proposed by

the National Association of Insurance Commissioners provides for interest payments to creditors in such situations. But the insurance liquidation act in Ohio does not provide for such interest payments, and neither has Ohio adopted the proposed Model Act. The Superintendent is certainly free to approach the Ohio General Assembly with proposals to amend R.C. § 3309.42 to provide for the payment of interest to creditors before payment to shareholders or to propose the adoption of the Model Act, but neither of those events have occurred. Until then, the commentary of former United States Supreme Court Justice Frankfurter remains pertinent:

[T]he courts are not at large * * * they are under the constraints imposed by the judicial function of our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature. A judge must not rewrite a statute, neither to enlarge or contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must not eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.

Frankfurter, J, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 533, 535 (1947).

In a misguided effort to cite some sort of authority to bolster her position, the Superintendent reiterates a litany of irrelevant cases beginning with *American Iron & Steel Manufacturing Co.* (1914), 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 and its progeny. Every case except one that the Superintendent cited involved the liquidation of a bank during a time when most banking statutes,

including Ohio's, provided for the "superadded liability" of shareholders. (See Appellant's Brief, pp. 13-17). In other words, the statutes specifically provided that shareholders were individually liable for all the debts and obligations of a bank. See, e.g., *Baumgardner v. State ex rel. Fulton* (1934), 48 Ohio App. 5, 22, 16 Ohio Law Abs. 671, 1 O.O. 50, 192 N.E. 349, 357. In fact, Ohio's General Assembly explicitly adopted the proposition supported by the cases the Superintendent cited—that is, paying interest to creditors before making distributions to shareholders—in the context of bank liquidations. But OGICO is not a bank, and until the General Assembly adopts the same statutory priority in the context of insurance liquidation, the Superintendent simply does not have the authority to pay interest, regardless of how many banking cases she cites.

The only case the Superintendent cited that involved the liquidation of an insurance company was *Wenzel v. Holland-America Ins. Co. Trust* (Mo. 2000), 13 S.W.3d 643, in which the court misapplied a provision similar to R.C. § 3903.43(A) allowing the liquidator to "compound, compromise, or in any other manner negotiate the amount for which claims will be recommended to the court" to settle claims in dispute. However, in this case, the Superintendent recommended the payment of \$19,970,587.68 to Class 5 creditors and the payment of \$91,479.89 to Class 6 claimants as "100% distribution" to those claimants. (Supp. 30-31). There was no mention of further compounding, compromising, or negotiating additional payments as interest in the future.

The Superintendent notes that a case cited by the Franklin County Court of Appeals, *Huston v. FDIC* (Tex. 1990), 800 S.W.2d 845, has “lost some weight in this context,” since the Texas state legislature amended the Texas priority statute to allow for the payment of interest after *Huston*. But by dismissing *Huston*, the Superintendent ignores the critical point that the *Huston* Court performed its duties accordingly—that is, the *Huston* Court applied the priority statute as it was written and left it up to the legislature to change the law. Similarly, the only way the Superintendent can pay interest to claimants in future liquidation cases is if she asks the General Assembly and the General Assembly agrees to amend R.C. Chapter 3903 to provide her with such authority. The Superintendent is well aware that this is the process that she must follow. In fact, as recently as this past year, the General Assembly, amended a portion of R.C. Title 39, based upon the endorsement of the Superintendent, to “conform Ohio’s insurance agent regulations with other states’.” Ohio Legislative Service Commission Fiscal Note & Local Impact Statement, Am. Sub. H.B. No. 300 passed by the 128th General Assembly.

The Amicus Curiae Brief by the National Association of Insurance Commissioners (“NAIC”) in support of the Superintendent in this case simply emphasizes the difference between the position of the NAIC and the law of Ohio. While it is clearly the prerogative of the NAIC to urge the enactment of its Model laws to Ohio’s General Assembly, it concedes that the revised 1978 Model did *not* contain a provision for interest on claims (see NAIC Amicus Brief, p. 5) and that it

was the 1978 Model on which the Ohio statute was based. While later Models did provide for the payment of interest, its omission in the one on which Ohio law was based argues *against* and not *for* an interpretation of Ohio law which would authorize the payment of interest and is evidence of a specific legislative intent to deny the Superintendent the right to pay interest. (See NAIC Amicus Brief, pp. 5-6). The argument that NAIC Models should prevail in Ohio whether enacted or not is simply beyond the pale and merely parrots the Superintendent's request that the Court should rewrite the law rather than interpret it, as does the NAIC argument that the Superintendent has the "statutory discretion" to follow the "collective wisdom of the NAIC commissioner and the various state legislatures," rather than Ohio law. (See NAIC Amicus Brief, pp. 7-8). While the Superintendent may be, in some cases, vested with broad discretionary powers, nowhere is the power given her to act in total disregard of Ohio law.

In fact, this Court already rejected all of the lines of reasoning that the Superintendent set forth in her Brief and deferred instead to the "plain meaning" interpretation of the exact statute that is at issue in this case, R.C. § 3903.42. *Covington v. Ohio General Ins. Co.* (2003), 99 Ohio St.3d 117, 789 N.E.2d 213. In *Ohio General*, this Court rejected the Superintendent's urging for the Court to interpret the statute based on non-statutory reasons. As is the case here, the Superintendent requested the Court to defer to the departments' administrative interpretation, the legislative history associated with the 1978 Model Act and NAIC comments, and the decisions of other state courts interpreting their own statutes.

This Court in *Ohio General* rejected all of those lines of reasoning and based its decision, instead, on the text of the statute itself. Just as this Court held in *Ohio General*, just as the Tenth District held below, the plain meaning of R.C. § 3903.42 must be upheld. And the plain meaning simply does not provide for the payment of interest.²

B. Even if another provision of R.C. Chapter 3903 can be construed to permit the Superintendent of Insurance to pay interest, R.C. § 3903.42 still requires her first to pay all claimants, including Class 9 shareholders, in accordance with the priority set forth therein.

The Superintendent has, by her own testimony and pursuant to her own Complaint, paid all claims filed and approved. The one exception is Petrosurance.

In this case, the Superintendent injected the issue of the payment of interest to some—but not all—of the claimants midway through the payment of the priorities set forth in R.C. § 3903.42, because it had at all times been known to her that there were substantial funds on hand to which Petrosurance was entitled as a Class 9 Claimant—and the Superintendent was determined to avoid that at all costs. She regards any payment to Petrosurance as a “windfall,” although it has been waiting for payment of its claim for 20 years—longer than any creditors had to wait. The court of common pleas determined that Petrosurance should be paid whatever funds were left after the payment of interest. (TR 116, p. 10). Even the

² The Court should note that, unlike the facts in this case, there were no Class 9 shareholder claims to pay in *Ohio General* or *Benjamin v. American Druggists' Insurance Co.* (Feb. 15, 2005), Franklin C.P. No. 86-CV-1381, unreported, after the other classes of claimants had been paid in full.

Superintendent admits that Petrosurance is entitled to the “surplus” once all debts are discharged in full (Appellant’s Brief, p. 12), as did the Order requested by the Superintendent.

The Superintendent continually compliments herself for having earned interest on funds during the (unexplained) protracted length of this proceeding (see Appellant’s Brief, pp. 7, 8, 13), even though interest rates were consistently very high during that time, and even though any claimant, creditor or shareholder, would have been glad to forego the accretion of interest in return for the prompt payment of 100% of their claim. Then the Superintendent proceeds to an unjustified attack on Petrosurance because OGICO’s insurance company paid a claim against some of OGICO’s directors. (See Appellant’s Brief, p. 6). Contrary to her assertion when asking this Court to accept jurisdiction, no suit was filed against any of the Directors of Officers—the insurance company settled the claim with the Superintendent without litigation or an admission of any type. More importantly, the claim was *not* against Petrosurance and Petrosurance is entitled, by the express terms of R.C. § 3903.42, to payment of its claim.

R.C. § 3903.42 expressly requires that all claims in each class be paid before the Superintendent proceeds to make payment to the next class lower in priority. In this case, she not only paid all the general creditors but obtained the Court’s Order barring any further claims by them or any new claimants. Then she proceeded to make payment to the next class lower in priority, state and local governments. Now, because she has funds remaining, she wants to treat Class 9

Claimants differently by suggesting that those funds are somehow “surplus.” (See Appellant’s Brief, pp. 7, 8, and 9). In addition to providing for a new payment to fully-paid creditors, she wants to ignore the fact that R.C. § 3903.42 accords shareholders a place in the statutory priority order. The only difference between Class 5 creditors and the Class 9 shareholder is that the creditors have been paid and the shareholder has not.

There is nothing ambiguous about R.C. § 3903.42. Nothing in that statute authorizes the Superintendent simply to stop after payment of Class 6 claimants and declare that the remaining funds are “surplus” subject to redistribution to one higher priority class as “interest.” Nor can this Court read such an alternative into R.C. § 3903.42—the Superintendent’s attempt to turn Class 9 claimants into debtors “by implication” (see Appellant’s Brief, p. 13) is nothing less than ludicrous. 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.* (2006), 112 Ohio St.3d 27, 857 N.E.2d 1203; *State v. Bartholomew* (2008), 119 Ohio St.3d 359, 894 N.E.2d 307. The Court cannot insert language into a statute through the guise of interpretation, and if the statute is not ambiguous, it should simply be applied; it does not need to be interpreted. See *Portage Cty. Bd. of Commrs. v. Akron* (2006), 109 Ohio St.3d 106, 846 N.E.2d 478; *Hall v. Banc One Mgt. Corp.* (2007), 114 Ohio St.3d 484, 873 N.E.2d 290.

In addition to the express provisions of R.C. § 3903.42, which include the rights of shareholders and do not provide for payments of interest, the Courts of

Ohio have recognized the fact that “stock is an asset in itself distinct from the asset that is the issuing company.” *Mutual Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59, 641 N.E.2d 1080. The rights of shareholders in insurance company liquidation cases have been noted by the courts, as in *Benjamin v. Ernst & Young LLP* (2006), 167 Ohio App.3d 350, 855 N.E.2d 128, in which the Court observed that “[t]he statutory liquidator steps into the shoes of the insurer and recoups its assets in order to protect the rights of its creditors, policyholders and *shareholders*.” (Emphasis added.) See, also, R.C. §§ 3903.21(A)(19) and 3903.21(A)(23), both of which recognize *shareholders* as well as creditors as having rights in the liquidation of insurance companies.

Most importantly, R.C. § 3903.44 requires a liquidator to pay distributions “*in a manner that will assure proper recognition of priorities*.” (Emphasis added.) The claim of a shareholder is one of those priorities. Payment of interest is not. The Superintendent’s arbitrary conclusion that funds on hand before payments to shareholders constitute a “surplus” for distribution to persons who have already been paid in full is a direct attack on the express priorities of both R.C. § 3903.42 and R.C. § 3903.44.

Failure by this Court to uphold the priorities set forth in R.C. § 3903.42 would implicate provisions of both the Ohio and United States Constitutions. In addition to Article I, Sec. 19 of the Ohio Constitution, which establishes the inviolability of private property in this state, Article I, Sec. 16 guarantees to Petrosurance its remedy by due course of law and its right to have

justice administered without denial or delay. The Fourteenth Amendment to the Constitution of the United States provides identical guarantees at the federal level, all of which would be violated if the Superintendent's refusal to compensate Petrosurance for the taking of its property should be upheld by this Court.

C. After the Superintendent has paid all approved claims in Classes 1 through 8 of R.C. § 3903.42 and the filing of additional claims has been barred, the funds remaining in the Superintendent's hands must be paid by her to the sole shareholder, a Class 9 claimant.

When the Superintendent filed this suit in 2007, the only relief she sought was the elimination of Petrosurance as a shareholder-claimant. There was no suggestion in her Complaint as to what she intended to do with the \$13,664,189³ of "surplus" now in her hands.

The Superintendent's attempt to bar Petrosurance was based on two theories. First, she argued that its claim was duplicative of a 1991 creditor's claim that never mentioned Petrosurance and had been denied as a creditor's claim in 2002; and second, she argued that the Petrosurance claim was late because of a 1997 Order barring claims based on insurance policies. The court of appeals demolished both of these arguments (and the Superintendent has abandoned them in this Appeal), concluding that they were both "irrelevant to Petrosurance's 2007 claim" (AR 28, ¶¶ 43-46). The court of appeals also discounted the Superintendent's assertion that Petrosurance's claim was somehow "late" (AR 28, ¶ 44), because all

³ According to the Independent Auditor's Report filed with and approved by the Franklin County Court of Common Pleas on January 21, 2010, the sum in the Superintendent's possession in the OGICO Estate as of June 30, 2009 was \$13,664,189. (Supp. 48). However, such amount, which is not all held in cash, is constantly changing.

other claims have been settled and there had been and is now no claim that Petrosurance's claim interferes in any way with the administration of the liquidation, since it is obviously complete. (See R.C. § 3903.35). See especially in this regard, the court of appeals' observation at footnote 4 of its Opinion at p. 26:

There has been no assertion that payment to Petrosurance would prejudice the orderly administration of the liquidation where all allowed claims have been paid, all further Class 4, 5, and 6 claims have been foreclosed or zero-valued by court order, and a surplus remains in the Superintendent's possession.

(AR 28, p. 25 note 4).

The court of common pleas has already ruled that once the interest claim had been disposed of, funds remaining should be paid to Petrosurance, whether as sole shareholder or as a Class 9 Claimant "without regard to the timeliness of its formal claim." (See TR 116, p. 10).

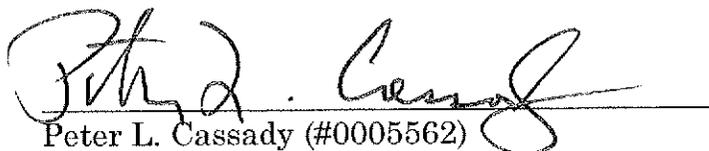
While the court of appeals declined to resolve Petrosurance's entitlement to the "surplus" funds "in the first instance," it did, in fact, determine that the Superintendent's conclusion that it could pay interest to the creditors "is irreconcilable" with the express language of the statute (AR 28, ¶ 30) and erroneous (AR 28, ¶ 46). It further concluded that the Superintendent had "erroneously refused to file [Petrosurance's] Proof of Claim" and erroneously refused to "request a hearing when Petrosurance filed its objections" (AR 28, ¶ 46). In view of the findings of the court of common pleas and the court of appeals, and the undisputed fact that Petrosurance is OGICO's sole shareholder, there are no issues left to resolve.

Considering the undisputed assertions in the Affidavit, the court of common pleas ruling on what was to be done when the interest question was resolved, and the findings of the court of appeals, there are no facts in dispute and Plaintiff's entitlement to the funds now in the Superintendent's hands is unchallenged. It is time for the Superintendent's 20-year campaign to deny Petrosurance access to its own funds to terminate. This Court should order the Superintendent to pay to Petrosurance without further delay all sums in her possession in this Estate.

IV. CONCLUSION.

For the reasons set forth above, this Court should affirm the decision below and order the Superintendent to pay to Petrosurance all sums in its possession in this Estate.

Respectfully submitted,



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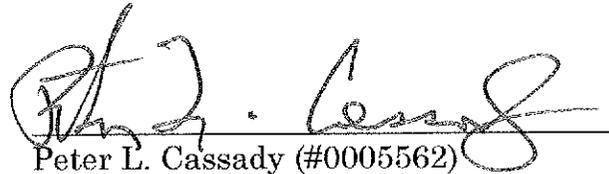
I hereby certify that a copy of the foregoing has been served the 5th day of April 2010, by U.S. Mail, postage paid, on the following:

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1125.24 Paying claims.

(A) All claims against the bank's estate and expenses, proved to the receiver's satisfaction or approved by the court, shall be paid in the following order:

(1) Expenses of liquidation and receivership, including money borrowed under authority of division (A)(6) of section 1125.22 or division (A)(7) of section 1125.12 of the Revised Code and interest on it, and claims for fees and assessments due the superintendent of financial institutions;

(2) Claims given priorities under other provisions of state or federal law;

(3) Wages and salaries of officers and employees earned during the one-month period preceding the date of the bank's closing in an amount, before applicable taxes and other withholdings, that does not exceed one thousand dollars for any one person;

(4) Deposit obligations;

(5) Other general liabilities;

(6) Obligations subordinated to deposits and other general liabilities.

(B) Interest shall be given the same priority as the claim on which it is based, but no interest shall be paid on any claim until the principal of all claims within the same class has been paid or provided for in full.

(C) Any funds remaining after satisfying the requirements of divisions (A) and (B) of this section shall be paid to the shareholders.

(D) Payment on claims shall be made pro rata among claims of the kind specified in each class set forth in division (A) of this section.

(E) Subject to the approval of the court, the receiver may designate a separate class of claims consisting only of every unsecured claim that is less than, or reduced to, an amount the court approves for payment as reasonable and necessary for administrative convenience.

(F) Subject to the approval of the court, the receiver may make periodic and interim liquidating dividends or payments.

Effective Date: 01-01-1997

3903.35 Proof of claims to be filed with liquidator.

(A) Proof of all claims shall be filed with the liquidator in the form required by section 3903.36 of the Revised Code on or before the last day for filing specified in the notice required under section 3903.22 of the Revised Code, except that proof of claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

(B) The liquidator may permit a claimant making a late filing to share in distributions, whether past or future, as if he were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation, under any of the following circumstances:

(1) The existence of the claim was not known to the claimant and he filed his claim as promptly thereafter as reasonably possible after learning of it;

(2) A transfer to a creditor was avoided under sections 3903.26 to 3903.28 of the Revised Code, or was voluntarily surrendered under section 3903.29 of the Revised Code, and the filing satisfies the conditions of section 3903.29 of the Revised Code;

(3) The valuation, under section 3903.41 of the Revised Code, of security held by a secured creditor shows a deficiency, and the claim is filed within thirty days after the valuation.

(C) The liquidator shall permit late filing claims to share in distributions, whether past or future, as if they were not late, if such claims are claims of a guaranty association or foreign guaranty association for reimbursement of covered claims paid or expenses incurred, or both, subsequent to the last day for filing where such payments were made and expenses incurred as provided by law.

(D) The liquidator may consider any claim filed late which is not covered by division (B) of this section, and permit it to receive distributions which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late-filing claimant shall receive, at each distribution, the same percentage of the amount allowed on his claim as is then being paid to claimants of any lower priority. This shall continue until his claim has been paid in full.

Effective Date: 03-07-1983

3903.39 Written notice of denial of claim.

(A) When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant or his attorney by first class mail at the address shown in the proof of claim. Within sixty days from the mailing of the notice, the claimant may file objections with the liquidator. If no such filing is made, the claimant may not further object to the determination.

(B) Whenever objections are filed with the liquidator and the liquidator does not alter his denial of the claim as a result of the objections, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing in accordance with the Civil Rules to the claimant or his attorney and to any other persons directly affected, not less than ten nor more than thirty days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee who shall submit findings of fact along with his recommendation.

Effective Date: 03-07-1983

3903.44 Court payment of distributions.

Under the direction of the court, the liquidator shall pay distributions in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims. Distribution of assets in kind may be made at valuations set by agreement between the liquidator and the creditor and approved by the court.

Effective Date: 03-07-1983